COURT FILE NUMBER	
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, as amended AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF MONETTE FARMS LTD., MONETTE FARMS ONTARIO CORP., NEXGEN SEEDS LTD., MONETTE PRODUCE LTD., MONETTE SEEDS LTD., MONETTE LAND CORP., DMO HOLDINGS LTD., DMO HOLDINGS USA, INC., MONETTE SEEDS USA, LLC, MONETTE FARMS ARIZONA, LLC, MONETTE FARMS USA, INC.,1012595 DE INC., MONETTE PRODUCE, LLC, GOAT'S PEAK WINERY LTD., MONETTE FARMS BC LTD., MONETTE FARMS LAND GP LTD., MONETTE FARMS LAND II GP LTD., AND MONETTE FARMS BC GP LTD.
APPLICANTS	MONETTE FARMS LTD., MONETTE FARMS ONTARIO CORP., NEXGEN SEEDS LTD., MONETTE PRODUCE LTD., MONETTE SEEDS LTD., MONETTE LAND CORP., DMO HOLDINGS LTD., DMO HOLDINGS USA, INC., MONETTE SEEDS USA, LLC, MONETTE FARMS ARIZONA, LLC, MONETTE FARMS USA, INC., 1012595 DE INC., MONETTE PRODUCE, LLC, GOAT'S PEAK WINERY LTD., MONETTE FARMS BC LTD., MONETTE FARMS LAND GP LTD., MONETTE FARMS LAND II GP LTD., AND MONETTE FARMS BC GP LTD.
DOCUMENT	**BOOK OF AUTHORITIES OF THE APPLICANTS**

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ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Cassels Brock & Blackwell LLP
Suite 3700, Bankers Hall West
888 3rd Street SW
Calgary, Alberta, T2P 5C5

Telephone: (403) 351-2920
Facsimile: (403) 648-1151
Email: joliver@cassels.com / dmarechal@cassels.com / mclarksonmaciel@cassels.com

File No.: 063030-01

Attention: Jeffrey Oliver / Danielle Maréchal / Matteo Clarkson-Maciel

LIST OF AUTHORITIES

REGULATIONS / LEGISLATION

Tab **Authority**

1. *Companies' Creditors Arrangement Act,* RSC 1985, c C-36
2. *Range Act*, SBC 2004, c 71
3. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3
4. *Farmers' Creditors Arrangement Act, 1934*, SC 1934, c 53
5. *Alberta Rules of Court*, Alta Reg 124/2010

JURISPRUDENCE

Tab **Authority**

6. *Lydian International Limited (Re)*, 2019 ONSC 7473
7. *Stelco Inc, Re*, 2004 CanLII 24933 (ONSC)
8. *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10
9. *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60
10. *Re 4519922 Canada* 2015 ONSC 124
11. *Canwest Global Communications Corp (Re)*, 2009 CanLII 55114 (ON SC)
12. *Re Angus A2A GP Inc*, 2025 ABKB 51
13. *Angus A2A GP Inc v Alvarez & Marsal Canada Inc*, 2025 ABCA 147
14. *Canwest Publishing Inc*, 2010 ONSC 222
15. *Target Canada Co (Re)*, 2015 ONSC 303
16. *Re Just Energy Corp*, 2021 ONSC 1793
17. *Oblats de Marie Immaculee du Manitoba, Re*, 2002 SKQB 161
18. *Royal Bank v Perfection Foods Ltd*, 1991 CanLII 13003 (PE SCTD)
19. *BZAM Ltd Plan of Arrangement*, 2024 ONSC 1645
20. *Re Chalice Brands Ltd*, 2023 ONSC 3174
21. *Nordstrom Canada Retail, Inc*, 2023 ONSC 1422
22. *Industrial Properties Regina Limited v Copper Sands Land Corp*, 2018 SKCA 36
23. *Canada v Canada North Group Inc*, 2021 SCC 30
24. *Re Canadian Airlines Corp*, [2000] AJ No 1693
25. *Re Nortel Networks Corp,* 2009 CanLII 43427 (ONSC)
26. *AlphaBow Energy Ltd (Re)*, 2025 ABKB 622

27. *MJardin Group, Inc (Re)*, 2022 ONSC 3338
28. *Great Basin Gold Ltd (Re)*, 2012 BCSC 1459
29. *Springer Aerospace Holdings Limited*, 2022 ONSC 6581
30. *Re Northstar Aerospace Inc*, 2013 ONSC 1780
31. *Jaguar Mining Inc (Re)*, 2014 ONSC 494
32. *Timminco Limited (Re)*, 2012 ONSC 506
33. *Re Clover Leaf Holdings Company*, 2019 ONSC 6966
34. *PT Holdco Inc (Re)*, 2016 ONSC 495
35. *Pride Group Holdings Inc et al*, 2024 ONSC 2026
36. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41
37. *Sherman Estate v Donovan*, 2021 SCC 25
38. *Rompsen Investment Corp v Hargate Properties Inc*, 2012 ABQB 412

ORDERS AND ENDORSEMENTS

39. Court File No. 2401-15969: *Re Angus A2A GP Inc*, Initial Order granted November 14, 2024
40. Court File No. 2501-03316: *OKR Governance Co Inc et al*, Initial Order granted March 7, 2025
41. Court File No. CV-23-00693758-00CL: *Original Traders Energy Ltd et al*, Initial Order granted January 30, 2023
42. Court File No. CV-23-00693758-00CL: *Original Traders Energy Ltd et al*, Amended and Restated Initial Order granted February 9, 2023
43. Court File No. 2403 15089: *Freedom Cannabis Inc et al*, Initial Order granted August 8, 2024
44. Court File No. CV-23-00703350-00CL: *Aleafia Health Inc et al*, SISP approval order granted August 22, 2023
45. Court File No. 2501-18462: *Canacol Energy Ltd et al*, Initial Order granted November 18, 2025
46. *Aleafia Health Inc et al*, Endorsement of the Honourable Justice Conway issued August 22, 2023

TEXTS

47. Virginia Torrie, *Reinventing Bankruptcy Law: A History of the Companies' Creditors Arrangement Act* (Toronto: University of Toronto Press, 2020)

R.S.C. 1985, c. C-36, s. 2

s 2.

Currency

2.
2(1)Definitions
In this Act,

"aircraft objects" [Repealed 2012, c. 31, s. 419.]

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

"bond" includes a debenture, debenture stock or other evidences of indebtedness; *("obligation")*

"cash-flow statement", in respect of a company, means the statement referred to in paragraph 10(2)(a) indicating the company's projected cash flow; *("état de l'évolution de l'encaisse")*

"claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*; *("réclamation")*

"collective agreement", in relation to a debtor company, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the debtor company and a bargaining agent; *("convention collective")*

"company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies; *("compagnie")*

Proposed Amendment — 2(1) "company"

"company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, telegraph companies, insurance companies, companies to which the *Trust and Loan Companies Act* applies and prescribed public post-secondary educational institutions; *("compagnie")*

2024, c. 15, s. 274 [To come into force June 20, 2026.]

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"court" means

(a) in Nova Scotia, British Columbia and Prince Edward Island, the Supreme Court,

(a.1) in Ontario, the Superior Court of Justice,

(b) in Quebec, the Superior Court,

(c) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench, and

(c.1) in Newfoundland and Labrador, the Trial Division of the Supreme Court, and

(d) in Yukon and the Northwest Territories, the Supreme Court, and in Nunavut, the Nunavut Court of Justice;

("tribunal")

"debtor company" means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of thecompany have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

("compagnie débitrice")

"director" means, in the case of a company other than an income trust, a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever named called; *("administrateur")*

"eligible financial contract" means an agreement of a prescribed kind; *("contrat financier admissible")*

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

("réclamation relative à des capitaux propres")

"equity interest" means

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(a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

("intérêt relatif à des capitaux propres")

"financial collateral" means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits,

(b) securities, a securities account, a securities entitlement or a right to acquire securities, or

(c) a futures agreement or a futures account;

("garantie financière")

"income trust" means a trust that has assets in Canada if

(a) its units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act, or

(b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act;

("fiducie de revenu")

"initial application" means the first application made under this Act in respect of a company; *("demande initiale")*

"monitor", in respect of a company, means the person appointed under section 11.7 to monitor the business and financial affairs of the company; *("contrôleur")*

"net termination value" means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; *("valeurs nettes dues à la date de résiliation")*

"prescribed" means prescribed by regulation; *("Version anglaise seulement")*

"secured creditor" means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds; *("créancier garanti")*

"shareholder" includes a member of a company — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies; *("actionnaire")*

"Superintendent of Bankruptcy" means the Superintendent of Bankruptcy appointed under subsection 5(1) of the *Bankruptcy and Insolvency Act*; *("surintendant des faillites")*

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"Superintendent of Financial Institutions" means the Superintendent of Financial Institutions appointed under subsection 5(1) of the *Office of the Superintendent of Financial Institutions Act*; *("surintendant des institutions financières")*

"title transfer credit support agreement" means an agreement under which a debtor company has provided title to property for the purpose of securing the payment or performance of an obligation of the debtor company in respect of an eligible financial contract; *("accord de transfert de titres pour obtention de crédit")*

"unsecured creditor" means any creditor of a company who is not a secured creditor, whether resident or domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issue under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds. *("creancier chirographaire")*

2(2)Meaning of "related" and "dealing at arm's length"
For the purpose of this Act, section 4 of the *Bankruptcy and Insolvency Act* applies for the purpose of determining whether a person is related to or dealing at arm's length with a debtor company.

Amendment History
R.S.C. 1985, c. 27 (2nd Supp.), s. 10 (Sched., item 3); 1990, c. 17, s. 4; 1992, c. 27, s. 90(1)(f); 1993, c. 28, s. 78 (Sched. III, item 20) [Repealed 1999, c. 3, s. 12 (Sched., item 4).]; 1993, c. 34, s. 52; 1996, c. 6, s. 167(1)(d); 1997, c. 12, s. 120; 1998, c. 30, s. 14(c); 1999, c. 3, s. 22; 1999, c. 28, s. 154; 2001, c. 9, s. 575; 2002, c. 7, s. 133; 2004, c. 25, s. 193; 2005, c. 3, s. 15; 2005, c. 47, s. 124 [Amended 2007, c. 36, s. 105.]; 2007, c. 29, s. 104; 2007, c. 36, ss. 61(1), (2), (4); 2012, c. 31, s. 419; 2015, c. 3, s. 37; 2018, c. 10, s. 89

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R.S.C. 1985, c. C-36, s. 3

s 3.

Currency

3.

3(1)Application

This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

3(2)Affiliated companies

For the purposes of this Act,

(a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and

(b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

3(3)Company controlled

For the purposes of this Act, a company is controlled by a person or by two or more companies if

(a) securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

3(4)Subsidiary

For the purposes of this Act, a company is a subsidiary of another company if

(a) it is controlled by
(i) that other company,

(ii) that other company and one ore more companies each of which is controlled by that other company, or

(iii) two or more companies each of which is controlled by that other company; or

(b) it is a subsidiary of a company that is a subsidiary of that other company.

Amendment History

1997, c. 12, s. 121; 2005, c. 47, s. 125

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

R.S.C. 1985, c. C-36, s. 9

s 9.

Currency

9.

9(1)Jurisdiction of court to receive applications

Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

9(2)Single judge may exercise powers, subject to appeal

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

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R.S.C. 1985, c. C-36, s. 11.1

s 11.1

Currency

11.1

11.1(1)Meaning of "regulatory body"

In this section, **"regulatory body"** means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

11.1(2)Regulatory bodies — order under section 11.02

Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

11.1(3)Exception

On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

11.1(4)Declaration — enforcement of a payment

If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

Amendment History

1997, c. 12, s. 124; 2001, c. 9, s. 576; 2005, c. 47, s. 128; 2007, c. 29, s. 106; 2007, c. 36, s. 65

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R.S.C. 1985, c. C-36, s. 11.02

s 11.02

Currency

11.02

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 10 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.

11.02(2)Stays, etc. — other than initial application

A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

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

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

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

11.02(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.

11.02(4)Restriction

Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Amendment History

2005, c. 47, s. 128; 2019, c. 29, s. 137

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R.S.C. 1985, c. C-36, s. 11.2

s 11.2

Currency

11.2

11.2(1)Interim financing

On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

11.2(2)Priority — secured creditors

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

11.2(3)Priority — other orders

The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

11.2(4)Factors to be considered

In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

11.2(5)Additional factor — initial application

When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Amendment History

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1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65; 2019, c. 29, s. 138

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R.S.C. 1985, c. C-36, s. 11.03

s 11.03

Currency

11.03

11.03(1)Stays — directors

An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

11.03(2)Exception

Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

11.03(3)Persons deemed to be directors

If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

Amendment History

2005, c. 47, s. 128

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R.S.C. 1985, c. C-36, s. 11.7

s 11.7

Currency

11.7

11.7(1)Court to appoint monitor

When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

11.7(2)Restrictions on who may be monitor

Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

(a) if the trustee is or, at any time during the two preceding years, was

(i) a director, an officer or an employee of the company,

(ii) related to the company or to any director or officer of the company, or

(iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

(b) if the trustee is

(i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or

(ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

11.7(3)Court may replace monitor

On application by a creditor of the company, the court may, if it considers it appropriate in the circumstances, replace the monitor by appointing another trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*, to monitor the business and financial affairs of the company.

11.7(4) [Repealed 2005, c. 47, s. 129.]

11.7(5) [Repealed 2005, c. 47, s. 129.]

Amendment History

1997, c. 12, s. 124; 2005, c. 47, s. 129

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R.S.C. 1985, c. C-36, s. 11.51

s 11.51

Currency

11.51

11.51(1)Security or charge relating to director's indemnification

On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

11.51(2)Priority

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

11.51(3)Restriction — indemnification insurance

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

11.51(4)Negligence, misconduct or fault

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

Amendment History

2005, c. 47, s. 128; 2007, c. 36, s. 66

Currency

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Federal English Regulations Current to Gazette Vol. 159:18 (August 27, 2025)

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

R.S.C. 1985, c. C-36, s. 11.52

s 11.52

Currency

11.52

11.52(1)Court may order security or charge to cover certain costs

On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

11.52(2)Priority

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

Amendment History

2005, c. 47, s. 128; 2007, c. 36, s. 66

Currency

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

R.S.C. 1985, c. C-36, s. 11

s 11. General power of court

Currency

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.

Amendment History

1992, c. 27, s. 90; 1996, c. 6, s. 167(1)(d); 1997, c. 12, s. 124; 2005, c. 47, s. 128

Currency

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Canada Federal Statutes
Companies' Creditors Arrangement Act
Part IV — Cross-Border Insolvencies (ss. 44-61) [Heading added 2005, c. 47, s. 131.]
Miscellaneous Provisions [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 56

s 56. Authorization to act as representative of proceeding under this Act

Currency

56.Authorization to act as representative of proceeding under this Act
The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside Canada.

Amendment History
2005, c. 47, s. 131

Currency
Federal English Statutes reflect amendments current to February 12, 2026
Federal English Regulations Current to Gazette Vol. 159:18 (August 27, 2025)

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B.C. Statutes
Range Act
Part 1 — Disposition of Rights over Crown Range by the Government (ss. 2-21.1)
Division 2 — Content of Licences and Permits

S.B.C. 2004, c. 71, s. 4

s 4. Grazing licence content

Currency

4.Grazing licence content
A grazing licence

(a) must

(i) describe the Crown range over which it is to apply,

(ii) be for a term of not less than 15 years and not more than 25 years, and

(iii) specify a number of animal unit months for which the holder is eligible each year, subject to variations authorized or required under another provision of this Act or of the *Forest and Range Practices Act*,

(a.1) that is entered into with a first nation or its representative to implement or further an agreement between the first nation and the government respecting treaty-related measures, interim measures or economic measures, must state that it is a condition of the licence that the first nation comply with the agreement, and

(b) may include other terms and conditions consistent with this Act, the *Forest and Range Practices Act* and the regulations under them.

Amendment History
2010, c. 12, s. 54; 2014, c. 7, s. 10

Currency
British Columbia Current to S.B.C. 2025, c. 14 and Gazette Vol. 68:8 (June 3, 2025)

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Canada Federal Statutes
Bankruptcy and Insolvency Act
Interpretation

R.S.C. 1985, c. B-3, s. 2

s 2. Definitions

Currency

2.Definitions
In this Act

"affidavit" includes statutory declaration and solemn affirmation; *("affidavit")*

"aircraft objects" [Repealed 2012, c. 31, s. 414.]

"application", with respect to a bankruptcy application filed in a court in the Province of Quebec, means a motion; *(Version anglaise seulement)*

"assignment" means an assignment filed with the official receiver; *("cession")*

"bank" means

(a) every bank and every authorized foreign bank within the meaning of section 2 of the *Bank Act*,

(b) every other member of the Canadian Payments Association established by the *Canadian Payments Act*, and

(c) every local cooperative credit society, as defined in subsection 2(1) of the Act referred to in paragraph (b), that is a member of a central cooperative credit society, as defined in that subsection, that is a member of that Association;

("banque")

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

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

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

"child" [Repealed 2000, c. 12, s. 8(1).]

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

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

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

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

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

Proposed Amendment — 2 "corporation"

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

2024, c. 15, s. 273 [To come into force June 20, 2026.]

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

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

"current assets" means cash, cash equivalents — including negotiable instruments and demand deposits — inventory or accounts receivable, or the proceeds from any dealing with those assets; *("actif à court terme")*

"date of the bankruptcy", in respect of a person, means the date of

(a) the granting of a bankruptcy order against the person,

(b) the filing of an assignment in respect of the person, or

(c) the event that causes an assignment by the person to be deemed;

("date de la faillite")

"date of the initial bankruptcy event", in respect of a person, means the earliest of the day on which any one of the following is made, filed or commenced, as the case may be:

(a) an assignment by or in respect of the person,

(b) a proposal by or in respect of the person,

(c) a notice of intention by the person,

(d) the first application for a bankruptcy order against the person, in any case
(i) referred to in paragraph 50.4(8)(a) or 57(a) or subsection 61(2), or

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(ii) in which a notice of intention to make a proposal has been filed under section 50.4 or a proposal has been filed under section 62 in respect of the person and the person files an assignment before the court has approved the proposal,

(e) the application in respect of which a bankruptcy order is made, in the case of an application other than one referred to in paragraph (d); or

(f) proceedings under the *Companies' Creditors Arrangement Act*;

("ouverture de la faillite")

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

"director" in respect of a corporation other than an income trust, means a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever name called; *("administrateur")*

"eligible financial contract" means an agreement of a prescribed kind; *("contrat financier admissible")*

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

("réclamation relative à des capitaux propres")

"equity interest" means

(a) in the case of a corporation other than an income trust, a share in the corporation — or a warrant or option or another right to acquire a share in the corporation — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

("intérêt relatif à des capitaux propres")

"executing officer" includes a sheriff, a bailiff and any officer charged with the execution of a writ or other process under this Act or any other Act or proceeding with respect to any property of a debtor; *("huissier-exécutant")*

"financial collateral" means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits,

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(b) securities, a securities account, a securities entitlement or a right to acquire securities, or

(c) a futures agreement or a futures account;

("garantie financière")

"General Rules" means the General Rules referred to in section 209; *("Règles générales")*

"income trust" means a trust that has assets in Canada if

(a) its units are listed on a prescribed stock exchange on the date of the initial bankruptcy event, or

(b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the date of the initial bankruptcy event;

("fiducie de revenu")

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

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

("personne insolvable")

"legal counsel" means any person qualified, in accordance with the laws of a province, to give legal advice; *("conseiller juridique")*

"locality of a debtor" means the principal place

(a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

(b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated;

("localité")

"Minister" means the Minister of Industry; *("ministre")*

"net termination value" means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; *("valeurs nettes dues à la date de résiliation")*

"official receiver" means an officer appointed under subsection 12(2); *("séquestre officiel")*

"person" includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person; *("personne")*

"prescribed"

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(a) in the case of the form of a document that is by this Act to be prescribed and the information to be given therein, means prescribed by directive issued by the Superintendent under paragraph 5(4)(e), and

(b) in any other case, means prescribed by the General Rules;

("prescrit")

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

"proposal" means

(a) in any provision of Division I of Part III, a proposal made under that Division, and

(b) in any other provision, a proposal made under Division I of Part III or a consumer proposal made under Division II of Part III

and includes a proposal or consumer proposal, as the case may be, for a composition, for an extension of time or for a scheme or arrangement; *("proposition concordataire"* ou *"proposition")*

"public utility" includes a person or body who supplies fuel, water or electricity, or supplies telecommunications, garbage collection, pollution control or postal services; *("entreprise de service public")*

"resolution" or **"ordinary resolution"** means a resolution carried in the manner provided by section 115; *("résolution"* ou *"résolution ordinaire")*

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes

(a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the *Civil Code of Québec* or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or

(b) any of

(i) the vendor of any property sold to the debtor under a conditional or instalment sale,

(ii) the purchaser of any property from the debtor subject to a right of redemption, or

(iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,

if the exercise of the person's rights is subject to the provisions of Book Six of the *Civil Code of Québec* entitled *Prior Claims and Hypothecs* that deal with the exercise of hypothecary rights;

("créancier garanti")

Editor's Note: S.C. 2001, c. 4, s. 25 replaced the definition of "secured creditor". S.C. 2001, c. 4, s. 177(1) provides as follows:

(1) The definition of "secured creditor" in subsection 2(1) of the Bankruptcy and Insolvency Act*, as enacted by section 25 of this Act [i.e. 2001, c. 4], applies only to bankruptcies or proposals in respect of which proceedings are commenced after the coming into force of that section, but nothing in this subsection shall be construed as changing the status of any person*

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who was a secured creditor in respect of a bankruptcy or a proposal in respect of which proceedings were commenced before the coming into force of that section.

Immediately before the replacement, the definition of ***"secured creditor"*** *read as follows:*

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable.

"settlement" [Repealed 2005, c. 47, s. 2(1).]

"shareholder" includes a member of a corporation — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies; *("actionnaire")*

"sheriff" [Repealed 2004, c. 25, s. 7(3).]

"special resolution" means a resolution decided by a majority in number and three-fourths in value of the creditors with proven claims present, personally or by proxy, at a meeting of creditors and voting on the resolution; *("résolution spéciale")*

"Superintendent" means the Superintendent of Bankruptcy appointed under subsection 5(1); *("surintendant")*

"Superintendent of Financial Institutions" means the Superintendent of Financial Institutions appointed under subsection 5(1) of the *Office of the Superintendent of Financial Institutions Act*; *("surintendant des institutions financières")*

"time of the bankruptcy", in respect of a person, means the time of

(a) the granting of a bankruptcy order against the person,

(b) the filing of an assignment by or in respect of the person, or

(c) the event that causes an assignment by the person to be deemed;

("moment de la faillite")

"title transfer credit support agreement" means an agreement under which an insolvent person or a bankrupt has provided title to property for the purpose of securing the payment or performance of an obligation of the insolvent person or bankrupt in respect of an eligible financial contract; *("accord de transfert de titres pour obtention de crédit")*

"transfer at undervalue" means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor; *("opération sous-évaluée")*

"trustee" or **"licensed trustee"** means a person who is licensed or appointed under this Act. *("syndic"* ou *"syndic autorisé")*

R.S.C. 1985, c. 31 (1st Supp.), s. 69; 1992, c. 27, s. 3; 1995, c. 1, s. 62(1)(a); 1997, c. 12, s. 1; 1999, c. 28, s. 146; 1999, c. 31, s. 17; 2000, c. 12, s. 8; 2001, c. 4, s. 25; 2001, c. 9, s. 572; 2004, c. 25, s. 7(1), (3)-(8), (10); 2005, c. 3, s. 11; 2005, c. 47, s. 2(1), (3)-(5); 2007, c. 29, s. 91; 2007, c. 36, s. 1; 2012, c. 31, s. 414; 2018, c. 10, s. 82

Note:

S.C. 2000, c. 12, s. 8, amended s. 2(1) by repealing the definition of "child", and adding definitions of "common law partner" and "common law partnership". Pursuant to S.C. 2000, c. 12, s. 21, the amendments apply only to bankruptcies, proposals and receiverships commenced after the coming into force of S.C. 2000, c. 12, s. 21 on July 31, 2000. Prior to its repeal, the definition of "child" read as follows:

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"child" includes a child born out of marriage;

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24-25 GEORGE V.

CHAP. 53.

An Act to facilitate Compromises and Arrangements between Farmers and their Creditors.

[*Assented to 3rd July, 1934.*]

WHEREAS in view of the depressed state of agriculture the present indebtedness of many farmers is beyond their capacity to pay; and whereas it is essential in the interest of the Dominion to retain the farmers on the land as efficient producers and for such purpose it is necessary to provide means whereby compromises or rearrangements may be effected of debts of farmers who are unable to pay: Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. This Act may be cited as *The Farmers' Creditors Arrangement Act, 1934.* Short title.

BANKRUPTCY AND INSOLVENCY PROVISIONS.

2. (1) In this Act unless the context otherwise requires or implies, the expression Interpretation.

(a) "assignment" means an assignment made under the *Bankruptcy Act* by a farmer; "Assignment," "Petition," "Composition."

(b) "Board" means a board of review established under this Act; "Board."

(c) "court" means the court having jurisdiction under this Act; "Court."

(d) "creditor" includes a secured creditor; "Creditor."

(e) "district" means a judicial district of a province to which this Act applies; "District."

(f) "farmer" means a person whose principal occupation consists in farming or the tillage of the soil; "Farmer."

(g) "mortgage" includes a hypothec and also a deed of sale with a right of redemption; "Mortgage."

(h) "Official Receiver" means an Official Receiver appointed under this Act; "Official Receiver."

(i) "petition" means a petition in bankruptcy against a farmer; "Petition."

"Proposal." *(j)* "proposal" means a proposal for a composition, extension of time or scheme of arrangement made by a farmer hereunder.

Application of *Bankruptcy Act*. R.S., c. 11. (2) Unless it is otherwise provided or the context otherwise requires, expressions contained in this Act shall have the same meaning as in the *Bankruptcy Act*, and this Act shall be read and construed as one with the *Bankruptcy Act*, but shall have full force and effect notwithstanding anything contained in the *Bankruptcy Act*, and the provisions of the *Bankruptcy Act* and Bankruptcy Rules shall, except as in this Act otherwise provided, apply *mutatis mutandis* in the case of proceedings hereunder including meetings of creditors.

When proposal has been approved. (3) In any case where the affairs of a farmer have been arranged by a proposal approved by the court or confirmed by the Board as hereinafter provided, Part I of the *Bankruptcy Act* shall notwithstanding section seven thereof thereafter apply to such farmer but only failure on the part of such farmer to carry out any of the terms of the proposal shall be deemed to be an act of bankruptcy. Provided that such failure shall not be deemed an act of bankruptcy if, in the opinion of the Court, such act was due to causes beyond the control of such farmer.

Official Receivers. **3.** (1) The Governor in Council may appoint an Official Receiver or Receivers in each county or district or for any number of counties or districts of any province to which this Act applies as he may deem necessary or expedient.

In county, etc., where farmer resides. (2) In the case of an assignment or petition an Official Receiver in the county or district where the farmer resides shall be the Official Receiver for the purposes of this Act and of the *Bankruptcy Act*.

Appointment. (3) The Governor in Council may appoint any person to be an Official Receiver under this Act including the holder of any other office, whether Dominion or provincial, and the holder of any such office shall, notwithstanding anything contained in any other statute or law, be bound to perform the functions and duties of the Official Receiver.

Duties of Official Receiver. (4) The Official Receiver shall, in the case of an assignment or petition by a farmer, perform the functions and duties of the Official Receiver, custodian and trustee under the *Bankruptcy Act* and the meetings of creditors shall be held at his office.

Provisions relating to gazetting not to apply. **4.** The provisions of the *Bankruptcy Act* relating to gazetting shall not apply in the case of an assignment or petition, and the provisions of the said Act requiring Official Receivers to keep the *Canada Gazette* on file shall not apply in the case of Official Receivers appointed under this Act.

Jurisdiction.

5. (1) In the case of an assignment, petition or proposal, in the province of Quebec, the Superior Court of the judicial district where the farmer resides, and in other provinces, the county or district court, shall have exclusive jurisdiction in bankruptcy subject to appeal as provided in section one hundred and seventy-four of the *Bankruptcy Act.*

Powers of judge.

(2) The Superior, county or district court judge shall exercise the powers vested in the registrar by section one hundred and fifty-nine of the *Bankruptcy Act.*

Duties of clerk.

(3) The prothonotary of the Superior Court and the clerk of the county or district court shall perform all the duties of the registrar, except his judicial duties.

COMPOSITIONS.

If farmer unable to meet his liabilities.

6. (1) A farmer who is unable to meet his liabilities as they become due may make a proposal for a composition, extension of time or scheme of arrangement either before or after an assignment has been made.

Duties of Official Receiver.

(2) Such proposal shall be filed with the Official Receiver who shall forthwith convene a meeting of the creditors and perform the duties and functions required by the *Bankruptcy Act* to be performed by a trustee in the case of a proposal for a composition, extension of time or scheme of arrangement.

In case of a debt owing to a secured creditor.

7. A proposal may provide for a compromise or an extension of time or a scheme of arrangement in relation to a debt owing to a secured creditor, or in relation to a debt owing to a person who has acquired movable or immovable property subject to a right of redemption, but in that event the concurrence of the secured creditor or such person, shall be required, except in the case of a proposal formulated and confirmed by the Board of Review as hereinafter provided.

Valuation of security of secured creditor.

8. Whenever a proposal relates to the rights of a secured creditor or of a person who has acquired movable or immovable property subject to a right of redemption, such creditor or person may value his security and shall be entitled to vote only in respect of the balance of his claim after deducting the amount of his valuation; provided, however, that no proposal shall be approved by the court which provides for the payment to such secured creditor or person on account of such security of any amount in excess of his valuation, or for granting to him any new security for an amount in excess of his valuation.

9.

Certain provisions of the *Bankruptcy Act* not to apply.

9. Subsections three and five of section sixteen of the *Bankruptcy Act* shall not apply in the case of a proposal for a composition, extension of time or scheme of arrangement made by any farmer.

Farmer to execute necessary instruments.

10. Whenever a proposal has been approved by the court or whenever a proposal has been formulated and confirmed by the Board, as hereinafter provided, the court may order the farmer to execute any mortgage, conveyance or other instrument necessary to give effect to the proposal.

Stay of proceedings.

11. On the filing with the Official Receiver of a proposal, no creditor whether secured or unsecured, shall have any remedy against the property or person of the debtor, or shall commence or continue any proceedings under the *Bankruptcy Act*, or any action, execution or other proceedings for the recovery of a debt provable in bankruptcy, or the realization of any security unless with leave of the court and on such terms as the court may impose; provided, however, that the stay of proceedings herein provided shall not be effective for more than sixty days from the date of filing of the proposal with the Official Receiver, unless the court extends the time for the purpose of any proceedings in connection with the proposal.

Preservation of property.

(2) On a proposal being filed the property of the debtor shall be deemed to be under the authority of the court pending the final disposition of any proceedings in connection with the proposal and the court may make such order as it deems necessary for the preservation of such property.

PROVINCIAL BOARDS OF REVIEW.

Board of Review.

12. (1) The Governor in Council may, whenever he considers it expedient, establish in any province a Board of Review which shall exercise in such province the jurisdiction hereinafter provided.

Appointment of Commissioners.

(2) A Board shall consist of a Chief Commissioner and two Commissioners who shall be appointed by the Governor in Council and shall hold office during pleasure and shall receive such remuneration as the Governor in Council may provide.

Chief Commissioner to be a judge.

(3) The Chief Commissioner shall be a judge of the court of the province invested with original or appellate jurisdiction in bankruptcy by the *Bankruptcy Act*, and one Commissioner shall be appointed as a representative of creditors and one Commissioner shall be appointed as a representative of debtors.

Proposal.

(4) In any case where the Official Receiver reports that a farmer has made a proposal but that no proposal has been approved by the creditors, the Board shall, on the written

request of a creditor or of the debtor, endeavour to formulate an acceptable proposal to be submitted to the creditors and the debtor, and the Board shall consider representations on the part of those interested.

If proposal approved.

(5) If any such proposal formulated by the Board is approved by the creditors and the debtor, it shall be filed in the court and shall be binding on the debtor and all the creditors.

Board may confirm proposal.

(6) If the creditors or the debtor decline to approve the proposal so formulated, the Board may nevertheless confirm such proposal, either as formulated or as amended by the Board, in which case it shall be approved by the Court and shall be binding upon all the creditors and the debtor as in the case of a proposal duly accepted by the creditors and approved by the court.

Requests dealt with by the full Board.

(7) Every request to formulate a proposal shall be dealt with by the full Board, but a determination of the majority shall be deemed to be the determination of the Board.

How Board to base its proposal.

(8) The Board shall base its proposal upon the present and prospective capability of the debtor to perform the obligations prescribed and the productive value of the farm.

Board may decline to formulate a proposal.

(9) The Board may decline to formulate a proposal in any case where it does not consider that it can do so in fairness and justice to the debtor or the creditors.

Powers under *Inquiries Act.*

(10) For the purposes of the performance of its duties and functions hereunder a Board shall have the powers of a Commissioner appointed under the *Inquiries Act.*

Appointment and remuneration of Registrar and other officers.

13. The Governor in Council may also appoint a registrar and any other necessary officers to assist the Board and such officers shall hold office during pleasure and receive such remuneration as the Governor in Council may provide.

Official Receiver, etc., may appear in person.

14. The Official Receiver, custodian or trustee may appear in person and be heard by the court or the Board in any proceedings hereunder.

RULES AND REGULATIONS.

Governor in Council may make rules and regulations.

15. (1) The Governor in Council may make rules and regulations governing the procedure in the case of an assignment, petition or proposal including the advertising to be done in each case and the procedure in relation to the exercise of jurisdiction of the Board and to give effect to the provisions of this Act, and may establish a tariff of fees to be paid in any such case including the remuneration of the trustee.

Supervision of trustees.

(2) Every trustee acting as such under this Act shall be subject to such supervision by the Superintendent of Bankruptcy as the Governor in Council may determine.

Administration and expenses.

16. (1) The Minister of Finance shall be charged with the administration of this Act, and the expenses necessary for such administration shall be payable out of any unappropriated moneys of the Consolidated Revenue Fund.

Annual report.

(2) The Minister shall at the end of the fiscal year prepare a report of expenditure incurred and of proceedings taken under this Act and shall lay the same before Parliament forthwith, or if Parliament be not then sitting, within fifteen days after the commencement of the next ensuing session.

INTEREST ON FARM LOANS.

Rate of interest.

17. (1) Notwithstanding the provisions of any other statute or law, whenever any rate of interest exceeding seven per centum is stipulated for in any mortgage of farm real estate, if any person liable to pay the mortgage tenders or pays to the person entitled to receive the money, the amount owing on such mortgage and interest to the time of payment, together with three months' further interest in lieu of notice, no interest shall after the expiry of three months period aforesaid be chargeable, payable or recoverable in respect of the said mortgage at any rate in excess of five per centum per annum.

Application of this section.

(2) The provisions of this section shall apply in the case of any mortgage heretofore or hereafter made and whether or not the principal sum is due and owing at the time such tender or payment is made.

Act to come into force upon proclamation.

18. This Act except section seventeen shall not come into force in any province until proclaimed by the Governor in Council to be in force in such province, but section seventeen shall come into force when this Act is assented to.

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Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 6 — Resolving Issues and Preserving Rights
Division 4 — Restriction on Media Reporting and Public Access to Court Proceedings

Alta. Reg. 124/2010, s. 6.28

s 6.28 Application of this Division

Currency

6.28Application of this Division

Unless an enactment otherwise provides or the Court otherwise orders, this Division applies to an application for an order

(a) to ban publication of court proceedings,

(b) to seal or partially seal a court file,

(c) permitting a person to give evidence in a way that prevents that person or another person from being identified,

(d) for a hearing from which the public is excluded, or

(e) for use of a pseudonym.

Currency

Alberta Current to S.A. 2025, c. 15 and Gazette Vol. 121:11 (June 14, 2025)

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2019 ONSC 7473
Ontario Superior Court of Justice [Commercial List]

Lydian International Limited (Re)

2019 CarswellOnt 21645, 2019 ONSC 7473, 314 A.C.W.S. (3d) 12, 75 C.B.R. (6th) 314

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 ARRANGMENT OF LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES CORPORATION AND LYDIAN U.K. CORPORATION LIMITED (Applicants)

Geoffrey B. Morawetz C.J. Ont. S.C.J.

Heard: December 23, 2019
Judgment: December 23, 2019
Docket: CV-19-00633392-00CL

Proceedings: additional reasons at *Lydian International Limited (Re)* (2020), 2020 CarswellOnt 200, 2020 ONSC 34, Geoffrey B. Morawetz C.J. Ont. S.C.J. (Ont. S.C.J. [Commercial List])

Counsel: Elizabeth Pillon, Sanja Sopic, Nicholas Avis, for Applicants
Pamela Huff, for Resource Capital Fund VI L.P.
Alan Merskey, for OSISKO Bermuda Limited
D.J. Miller, for proposed Monitor, Alvarez & Marsal Canada Inc.
David Bish, for ORION Capital Management
Bruce Darlington, for ING Bank N.V./ABS Svensk Exportkrerdit (publ)

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — "Come-back" clause

Applicants were part of project of gold exploration and development business in Armenia — Applicants were experiencing liquidity issues due to blockades of project and other external factors — Applicants contended that they required immediate protection under federal Companies' Creditors Arrangement Act ("CCAA") for breathing room to pursue remedial steps on time-sensitive basis — Applicants brought application for creditor protection and other relief under CCAA — Application granted — Section 11.02(1) of CCAA had been recently amended — Maximum stay period permitted in initial application was reduced from 30 days to 10 days — Previous s. 11.02 of CCAA provided that after initial stay of up to 30 days, "comeback" hearing was scheduled, and parties could request that certain provisions addressed in initial order could be reconsidered — Practice of granting wide-sweeping relief at initial hearing had to be altered in light of recent amendments — Intent of amendments is to limit relief granted on first day — Ensuing 10-day period allows for stabilization of operations and negotiating window, followed by comeback hearing where request for expanded relief can be considered, on proper notice to all affected parties — This is consistent with objectives of amendments, which include requirement for "participants in an insolvency proceeding to act in good faith" and "improving participation of all players" — It may also result in more meaningful comeback hearings — Absent exceptional circumstances, relief to be granted in initial hearing "shall be limited to relief that is reasonably necessary for

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the continued operations of the debtor company in the ordinary course of business during that period" — Period being no more than 10 days, and whenever possible, status quo should be maintained during that period — It was appropriate to grant order under s. 11.02 of CCAA in respect of applicants — Applicants were "debtor companies" under CCAA, were insolvent and had liabilities in excess of $5 million — Under circumstances, it was appropriate to grant order that extended stay to non-applicant parties — Applicants also granted charge on their assets in maximum amount of US $350,000 and charge over property in favour of their former and current directors in limited amount of $200,000 Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s 11.001; Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s 11.02.

Table of Authorities

Cases considered by *Geoffrey B. Morawetz C.J. Ont. S.C.J.*:

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

Canwest Publishing Inc. / Publications Canwest Inc., Re (2010), 2010 ONSC 222, 2010 CarswellOnt 212, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) — considered

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

Clover Leaf Holdings Company, Re (2019), 2019 ONSC 6966, 2019 CarswellOnt 20001 (Ont. S.C.J. [Commercial List]) — considered

Jaguar Mining Inc., Re (2013), 2014 ONSC 494, 2013 CarswellOnt 18630, 12 C.B.R. (6th) 290 (Ont. S.C.J. [Commercial List]) — considered

Sino-Forest Corp., Re (2012), 2012 ONSC 2063, 2012 CarswellOnt 4117 (Ont. S.C.J. [Commercial List]) — referred to

Target Canada Co., Re (2015), 2015 ONSC 303, 2015 CarswellOnt 620, 22 C.B.R. (6th) 323 (Ont. S.C.J.) — referred to

Statutes considered:

Business Corporations Act, R.S.A. 2000, c. B-9

Generally — referred to

Business Corporations Act, S.B.C. 2002, c. 57

Generally — referred to

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

Generally — referred to

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

Generally — referred to

s. 2(1) "company" — considered

s. 11.001 [en. 2019, c. 29, s. 136] — considered

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

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — considered

s. 11.7 [en. 1997, c. 12, s. 124] — considered

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

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

APPLICATION for creditor protection and other relief under *Companies' Creditors Arrangement Act*.

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***Geoffrey B. Morawetz C.J. Ont. S.C.J.*:**

Introduction

1 Lydian International Limited ("Lydian International"), Lydian Canada Ventures Corporation ("Lydian Canada") and Lydian UK Corporation Limited ("Lydian UK", and collectively, the "Applicants") apply for creditor protection and other relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). The Applicants seek an initial order, substantially in the form attached to the application record. No party attending on the motion opposed the requested relief.

2 The Applicants are part of a gold exploration and development business in south central Armenia (the "Amulsar Project"). The Amulsar Project is directly owned and operated by Lydian Armenia CJSC ("Lydian Armenia"), a wholly-owned subsidiary of the Applicants.

3 As set out in the affidavit of Edward A. Sellers sworn December 22, 2019 (the "Sellers Affidavit"), the Applicants have been experiencing and continue to experience liquidity issues due to blockades of the Amulsar Project and other external factors. The Sellers Affidavit details such activities and Mr. Sellers deposes that these activities have prevented Lydian Armenia and its employees, contractors and suppliers from accessing, constructing and ultimately operating the Amulsar Project.

4 Mr. Sellers states that the lack of progress at the Amulsar Project has prevented the Lydian Group (as that term is defined below) from generating any positive cash flow and has also triggered defaults on certain of the Lydian Group's obligations to its lenders which, if enforced, the Lydian Group would be unable to satisfy.

5 The Lydian Group has operated under forbearance agreements in respect of these defaults since October 2018, but the most recent forbearance agreement expired on December 20, 2019.

6 The Applicants contend that they now require immediate protection under the CCAA for the breathing room they require to pursue remedial steps on a time sensitive basis.

7 The Applicants intend to continue discussions with their lenders and other stakeholders, including the Government of Armenia ("GOA"). The Applicants also intend to continue evaluating potential financing and/or sale options, all with a view to achieving a viable path forward.

The Applicants

8 Lydian International is a corporation continued under the laws of the Bailiwick of Jersey, Channel Islands, from the Province of Alberta pursuant to the *Companies (Jersey) Law 1991*. Lydian International was originally incorporated under the *Business Corporations Act*, R.S.A. 2000, c. B-9 (Alberta) on February 14, 2006 as "Dawson Creek Capital Corp.", and subsequently became Lydian International on December 12, 2007.

9 Lydian International's registered office is located in Jersey. On June 12, 2019, Lydian International shareholders approved its continuance under the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, but this continuance has yet to be implemented.

10 Lydian International has two types of securities listed on the Toronto Stock exchange: (1) ordinary shares and (2) warrants that expired in 2017.

11 Lydian Canada is a direct, wholly owned subsidiary of Lydian International. Lydian Canada is incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57 (British Columbia) and has a registered head office in Toronto. Its registered and records office is located in British Columbia.

12 Lydian UK is a corporation incorporated in the United Kingdom and is a direct, wholly-owned subsidiary of Lydian Canada with a head office located in the United Kingdom. Lydian UK has no material assets in the UK.

13 Lydian International and Lydian UK have assets in Canada in the form of deposits with the Bank of Nova Scotia in Toronto.

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14 The Applicants are part of a corporate group (the "Lydian Group") with a number of other subsidiaries ultimately owned by Lydian International. Other than the Applicants, certain of the Lydian Group's subsidiaries are Lydian U.S. Corporation ("Lydian US"), Lydian International Holdings Limited ("Lydian Holdings"), Lydian Resources Armenia Limited ("Lydian Resources") and Lydian Armenia, a corporation incorporated under the laws of the Republic of Armenia. Together, Lydian U.S., Lydian Holdings, Lydian Resources and Lydian Armenia are the "Non-Applicant" parties.

15 The Applicants submit that due to the complete integration of the business and operations of the Lydian Group, an extension of the stay of proceedings over the Non-Applicant parties is appropriate.

16 The Applicants contend that the Lydian Group is highly integrated and its business and affairs are directed primarily out of Canada. Substantially all of its strategic business affairs, including key decision-making, are conducted in Toronto and Vancouver.

17 Further, all the Applicants and Non-Applicant Parties are borrowers or guarantors of the Lydian Group's secured indebtedness. The Lydian Group's loan agreements are governed primarily by the laws of Ontario.

18 Finally, the Lydian Group's forbearance and restructuring efforts have been directed out of Toronto.

19 The Lydian Group is focused on constructing the Amulsar Project, its wholly-owned development stage gold mine in Armenia. The Amulsar Project was funded by a combination of equity and debt capital and stream financing. The debt and stream financing arrangements are secured over substantially all the assets of Lydian Armenia and Lydian International in the shares of various groups of the Lydian Group.

20 The Applicants contend that time is of the essence given the Applicants' minimal cash position and negative cash flow.

Issues

21 The issues for consideration are whether:

(a) the Applicants meet the criteria for protection under the CCAA;

(b) the CCAA stay should be extended to the Non-Applicant Parties;

(c) the proposed monitor, Alvarez & Marsal Canada Inc. ("A&M") should be appointed as monitor;

(d) Ontario is the appropriate venue for this proceeding;

(e) this court should issue a letter of request of the Royal Court of Jersey;

(f) this Court should exercise its discretion to grant the Administration Charge and the D & O Charge (as defined below); and

(g) it is appropriate to grant a stay extension immediately following the issuance of the Initial Order.

Law and Analysis

22 Pursuant to section 11.02(1) of the CCAA, a court may make an order staying all proceedings in respect of a debtor company for a period of not more than 10 days, provided that the court is satisfied that circumstances exist to make the order appropriate.

23 Section 11.02(1) of the CCAA was recently amended and the maximum stay period permitted in an initial application was reduced from 30 days to 10 days. Section 11.001 which came into force at the same time as the amendment to s. 11.02(1), limits initial orders to "ordinary course" relief.

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24 Section 11.001 provides:

> 11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

25 The News Release issued by Innovation, Science and Economic Development Canada specifically states that these amendments "limit the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players."

26 In my view, the intent of s. 11.001 is clear. Absent exceptional circumstances, the relief to be granted in the initial hearing "shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period". The period being no more than 10 days, and whenever possible, the *status quo* should be maintained during that period.

27 Following the granting of the initial order, a number of developments can occur, including:

(a) notification to all stakeholders of the CCAA application;

(b) stabilization of the operation of debtor companies;

(c) ongoing negotiations with key stakeholders who were consulted prior to the CCAA filing;

(d) commencement of negotiations with stakeholders who were not consulted prior to the CCAA filing;

(e) negotiations of DIP facilities and DIP Charges;

(f) negotiations of Administration Charges;

(g) negotiation of Key Employee Incentives Programs;

(h) negotiation of Key Employee Retention Programs;

(i) consultation with regulators;

(j) consultation with tax authorities;

(k) consideration as to whether representative counsel is required; and

(l) consultation and negotiation with key suppliers.

28 This list is not intended to be exhaustive. It is merely illustrative of the many issues that can arise in a CCAA proceeding.

29 Prior to the recent amendments, it was not uncommon for an initial order to include provisions that would affect some or all of the aforementioned issues and parties. The previous s. 11.02 provided that the initial stay period could be for a period of up to 30 days. After the initial stay, a "comeback" hearing was scheduled and, in theory, parties could request that certain provisions addressed in the initial order could be reconsidered.

30 The practice of granting wide-sweeping relief at the initial hearing must be altered in light of the recent amendments. The intent of the amendments is to limit the relief granted on the first day. The ensuing 10-day period allows for a stabilization of operations and a negotiating window, followed by a comeback hearing where the request for expanded relief can be considered, on proper notice to all affected parties.

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31 In my view, this is consistent with the objectives of the amendments which include the requirement for "participants in an insolvency proceeding to act in good faith" and "improving participation of all players". It may also result in more meaningful comeback hearings.

32 It is against this backdrop that the requested relief at the initial hearing should be scrutinized so as to ensure that it is restricted to what is reasonably necessary for the continued operations of the debtor company during the initial stay period.

33 For the reasons that follow, I conclude that it is appropriate to grant a s. 11.02 order in respect of the Applicants.

34 I am satisfied that Lydian Canada meets the CCAA definition of "company" and is eligible for CCAA protection.

35 I have also considered whether the foreign incorporated companies are "companies" pursuant to the CCAA. Such entities must satisfy the disjunctive test of being an "incorporated company" either "having assets or doing business in Canada".

36 In *Cinram International Inc., Re*, 2012 ONSC 3767, 91 C.B.R. (5th) 46 (Ont. S.C.J. [Commercial List]), I stated that the threshold for having assets in Canada is low and that holding funds in a Canadian bank account brings a foreign corporation within the definition of "company" under the CCAA.

37 In this case, both Lydian International and Lydian UK meet the definition of "company" because both corporations have assets in and do business in Canada.

38 In my view the Applicants are each "debtor companies" under the CCAA. The Applicants are insolvent and have liabilities in excess of $5 million. I am satisfied that the Applicants are eligible for CCAA protection.

39 The Applicants seek to extend the stay to Lydian Armenia, Lydian Holdings, Lydian Resources Armenia Limited and Lydian US. I am satisfied that, in the circumstances, it is appropriate to grant an order that extends the stay to the Non-Applicant Parties. The stay is intended to stabilize operations in the Lydian Group. This finding is consistent with CCAA jurisprudence: see e.g., *Sino-Forest Corp., Re*, 2012 ONSC 2063 (Ont. S.C.J. [Commercial List]), at paras. 5, 18, and 31; *Canwest Global Communications Corp., Re* 2009 59 C.B.R. (5th) 72(Ont. S.C.J. [Commercial List]); and *Target Canada Co., Re*, 2015 ONSC 303, 22 C.B.R. (6th) 323 (Ont. S.C.J.), at paras. 49-50.

40 I am also satisfied that is appropriate to appoint A & M as monitor pursuant to the provisions of s. 11.7 of the CCAA.

41 With respect to whether Ontario is the appropriate venue for this proceeding, Lydian Canada's registered head office is located in Toronto and its registered and records offices are located in Vancouver. In my view, Ontario has jurisdiction over Lydian Canada. The registered head offices for Lydian International and Lydian UK are in Jersey and the UK respectively, however, both entities have assets in Ontario, those being funds on deposit with the Bank of Nova Scotia in Toronto. Further, it seems to me that both Lydian International and Lydian UK have a strong nexus to Ontario and accordingly I am satisfied that Ontario is the appropriate jurisdiction to hear this application.

42 I am also satisfied that, in these circumstances, it is appropriate for this court to issue to the Royal Court of Jersey a letter of request as referenced in the application record.

Administration Charge

43 The Applicants seek a charge on their assets in the maximum amount of US $350,000 to secure the fees and disbursements incurred in connection with services rendered by counsel to the Applicants, A & M and A & M's counsel, in respect of the CCAA proceedings (the "Administration Charge").

44 Section 11.52 of the CCAA provides the ability for the court to grant the Administration Charge.

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45 The recently enacted s. 11.001 of the CCAA limits the requested relief on this motion, including the Administration Charge, to what is reasonably necessary for the continued operation of the Applicants during the Initial Stay Period. The Sellers Affidavit outlines the complex issues facing the Applicants.

46 In *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 222, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]), Pepall J. (as she then was) identified six non-exhaustive factors that the court may consider in addition to s. 11.52 of the CCAA when determining whether to grant an administration charge. These factors include:

(a) the size and complexity of business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.

47 It seems to me that the proposed restructuring will require extensive input from the professional advisors and there is an immediate need for such advice. The requested relief is supported by A & M.

48 I am satisfied that the Administration Charge in the limited amount of US $350,000 is appropriate in the circumstances and is reasonably necessary for the continued operation of the business at this time.

D & O Charge

49 The Applicants also seek a charge over the property in favour of their former and current directors in the limited amount of $200,000 (the "D & O Charge").

50 The Applicants maintain Directors' and Officers' liability insurance (the "D & O Insurance") which provides a total of $10 million in coverage.

51 The D & O Insurance is set to expire on December 31, 2019.

52 Section 11.51 of the CCAA provides the court with the express statutory jurisdiction to grant the D & O charge in an amount the court considers appropriate, provided notice is given to the secured creditors who are likely to be affected.

53 In *Jaguar Mining Inc., Re*, 2014 ONSC 494, 12 C.B.R. (6th) 290 (Ont. S.C.J. [Commercial List]), I set out a number of factors to be considered in determining whether to grant a directors' and officers' charge:

(a) whether notice has been given to the secured creditors likely to be affected by the charge;

(b) whether the amount is appropriate;

(c) whether the Applicant could obtain adequate indemnification insurance for the director at a reasonable cost; and

(d) whether the charge applies in respect of any obligation incurred by a director or officer as a result of the directors' or officers' gross negligence or willful misconduct.

54 Having reviewed the Sellers Affidavit, it seems to me that the granting of the D & O charge is necessary in the circumstances. In arriving at this conclusion, I have also taken into account that the D & O Insurance will lapse shortly; having directors involved in the process is desirable; that the secured creditors likely to be affected do not object; and that A & M

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has advised that it is supportive of the D & O Charge. Further, the requested amount is one that I consider to be reasonably necessary for the continued operation of the Applicants.

Extension of the Stay of Proceedings

55 The Applicants have requested that, if the initial order is granted, I should immediately entertain and grant an order extending the Stay Period until and including January 17, 2020 which will provide the Applicants and all stakeholders with enough time to adequately prepare for a comeback hearing.

56 The Applicants submit that I am authorized to grant a stay extension immediately after granting the initial order because section 11.02(2) of the CCAA does not provide a minimum waiting time before an applicant can seek a stay extension. The Applicants reference recent decisions where courts have scheduled hearings within two or three days after the granting of an initial order. Reference is made to *Clover Leaf Holdings Company, Re*, 2019 ONSC 6966 (Ont. S.C.J. [Commercial List]) and *Re Wayland group Corp. et al.* (2 December 2019), Toronto CV-19-00632079-00CL. In *Clover Leaf*, the stay extension for 36 days and additional relief including authorization for DIP financing was granted three days after the initial order and in *Wayland*, the stay extension was granted two days after the initial order.

57 I acknowledge that, in this case, it may be challenging for the Applicants to return to court at or near the end of the 10-day initial stay period due to the year-end holidays. I also acknowledge that the offices of many of the parties involved in these proceedings may not be open during the holidays.

58 However, the statutory maximum 10-day stay as referenced in s. 11.02(1) expires on January 2, 2020 and the courts are open on that day.

59 As noted above, absent exceptional circumstances, I do not believe that it is desirable to entertain motions for supplementary relief in the period immediately following the granting of an initial order.

60 It could very well be that circumstances existed in both *Clover Leaf* and *Wayland* that justified the stay extension and the ancillary relief being granted shortly after the initial order.

61 However, in this case, I have not been persuaded on the evidence that it is necessary for the stay extension to be addressed prior to January 2, 2020 and I decline to do so.

Disposition

62 The initial order is granted with a Stay Period in effect until January 2, 2020. In view of the holiday schedules of many parties, the following procedures are put in place. The Applicants can file a motion returnable on January 2, 2020, requesting that the stay be extended to January 23, 2020. Any party that wishes to oppose the extension of the stay to January 23, 2020 is required to notify the Applicant, A & M and the Commercial List Office of their intention to do so no later than 2:00 p.m. on December 30, 2019. In the event that the requested stay extension is unopposed, there will be no need for counsel to attend on the return of the motion. I will consider the motion based on the materials filed.

63 If any objections are received by 2:00 p.m. on December 30, 2019, the hearing on January 2, 2020 will address the opposed extension request. Any further relief will be considered at the Comeback Motion on January 23, 2020.

Application granted.

End of Document

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2004 CarswellOnt 1211
Ontario Superior Court of Justice [Commercial List]

Stelco Inc., Re

2004 CarswellOnt 1211, [2004] O.J. No. 1257, [2004] O.T.C. 284, 129 A.C.W.S. (3d) 1065, 48 C.B.R. (4th) 299

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

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Farley J.

Heard: March 5, 2004
Judgment: March 22, 2004
Docket: 04-CL-5306

Counsel: Michael E. Barrack, James D. Gage, Geoff R. Hall for Applicants
David Jacobs, Michael McCreary for Locals, 1005, 5328, 8782 of the United Steel Workers of America
Ken Rosenberg, Lily Harmer, Rob Centa for United Steelworkers of America
Bob Thornton, Kyla Mahar for Ernst & Young Inc., Monitor of the Applicants
Kevin J. Zych for Informal Committee of Stelco Bondholders
David R. Byers for CIT
Kevin McElcheran for GE
Murray Gold, Andrew Hatnay for Retired Salaried Beneficiaries
Lewis Gottheil for CAW Canada and its Local 523
Virginie Gauthier for Fleet
H. Whiteley for CIBC
Gail Rubenstein for FSCO
Kenneth D. Kraft for EDS Canada Inc.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.7 Miscellaneous
Headnote
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Application of Act
Steel company S Inc. applied for protection under Companies' Creditors Arrangement Act ("CCAA") on January 29, 2004 — Union locals moved to rescind initial order and dismiss initial application of S Inc. and its subsidiaries on ground S Inc. was not "debtor company" as defined in s. 2 of CCAA because S Inc. was not insolvent — Motion dismissed — Given time and steps involved in reorganization, condition of insolvency perforce required expanded meaning under CCAA — Union affiant stated that S Inc. will run out of funding by November 2004 — Given that November was ten months away from date of filing, S Inc. had liquidity problem — S Inc. realistically cannot expect any increase in its credit line with its lenders or access to further

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outside funding — S Inc. had negative equity of $647 million — On balance of probabilities, S Inc. was insolvent and therefore was "debtor company" as at date of filing and entitled to apply for CCAA protection.

Table of Authorities

Cases considered by *Farley J.*:

A Debtor (No. 64 of 1992), Re (1993), [1993] 1 W.L.R. 264 (Eng. Ch. Div.) — considered

Anvil Range Mining Corp., Re (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — considered

Bank of Montreal v. I.M. Krisp Foods Ltd. (1996), [1997] 1 W.W.R. 209, 140 D.L.R. (4th) 33, 148 Sask. R. 135, 134 W.A.C. 135, 6 C.P.C. (4th) 90, 1996 CarswellSask 581 (Sask. C.A.) — considered

Barsi v. Farcas (1923), [1924] 1 W.W.R. 707, 2 C.B.R. 299, 18 Sask. L.R. 158, [1924] 1 D.L.R. 1154, 1923 CarswellSask 227 (Sask. C.A.) — referred to

Bell ExpressVu Ltd. Partnership v. Rex (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered

Challmie, Re (1976), 22 C.B.R. (N.S.) 78, 1976 CarswellBC 63 (B.C. S.C.) — considered

Clarkson v. Sterling (1887), 14 O.R. 460 (Ont. C.P.) — considered

Consolidated Seed Exports Ltd., Re (1986), 69 B.C.L.R. 273, 62 C.B.R. (N.S.) 156, 1986 CarswellBC 481 (B.C. S.C.) — considered

Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]) — considered

Davidson v. Douglas (1868), 15 Gr. 347, 1868 CarswellOnt 167 (Ont. Ch.) — considered

Diemaster Tool Inc. v. Skvortsoff (Trustee of) (1991), 3 C.B.R. (3d) 133, 1991 CarswellOnt 168 (Ont. Gen. Div.) — referred to

Enterprise Capital Management Inc. v. Semi-Tech Corp. (1999), 1999 CarswellOnt 2213, 10 C.B.R. (4th) 133 (Ont. S.C.J. [Commercial List]) — considered

Gagnier, Re (1950), 30 C.B.R. 74, 1950 CarswellOnt 101 (Ont. S.C.) — considered

Gardner v. Newton (1916), 10 W.W.R. 51, 26 Man. R. 251, 29 D.L.R. 276, 1916 CarswellMan 83 (Man. K.B.) — considered

Inducon Development Corp., Re (1991), 8 C.B.R. (3d) 306, 1991 CarswellOnt 219 (Ont. Gen. Div.) — considered

Kenwood Hills Development Inc., Re (1995), 30 C.B.R. (3d) 44, 1995 CarswellOnt 38 (Ont. Bktcy.) — considered

King Petroleum Ltd., Re (1978), 29 C.B.R. (N.S.) 76, 1978 CarswellOnt 197 (Ont. S.C.) — considered

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

Maybank Foods Inc. (Trustee of) v. Provisioners Maritimes Ltd. (1989), 92 N.S.R. (2d) 283, 75 C.B.R. (N.S.) 317, 45 B.L.R. 14, 237 A.P.R. 283, 1989 CarswellNS 27 (N.S. T.D.) — considered

Montreal Trust Co. of Canada v. Timber Lodge Ltd. (1992), 15 C.B.R. (3d) 14, (sub nom. *Timber Lodge Ltd. v. Montreal Trust Co. of Canada (No. 1))* 101 Nfld. & P.E.I.R. 73, (sub nom. *Timber Lodge Ltd. v. Montreal Trust Co. of Canada (No. 1))* 321 A.P.R. 73, 1992 CarswellPEI 13 (P.E.I. C.A.) — referred to

MTM Electric Co., Re (1982), 42 C.B.R. (N.S.) 29, 1982 CarswellOnt 170 (Ont. Bktcy.) — considered

New Quebec Raglan Mines Ltd. v. Blok-Andersen (1993), 9 B.L.R. (2d) 93, 1993 CarswellOnt 173 (Ont. Gen. Div. [Commercial List]) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1990 CarswellOnt 139 (Ont. C.A.) — considered

Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp. (2001), 2001 CarswellOnt 2954, 16 B.L.R. (3d) 74, 28 C.B.R. (4th) 294 (Ont. S.C.J. [Commercial List]) — considered

Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp. (2003), 2003 CarswellOnt 5210, 46 C.B.R. (4th) 313, (sub nom. *Olympia & York Developments Ltd. (Bankrupt) v. Olympia & York Realty Corp.)* 180 O.A.C. 158 (Ont. C.A.) — considered

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

Pacific Mobile Corp., Re (1979), 32 C.B.R. (N.S.) 209, 1979 CarswellQue 76 (C.S. Que.) — referred to

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PWA Corp. v. Gemini Group Automated Distribution Systems Inc. (1993), 103 D.L.R. (4th) 609, 49 C.P.R. (3d) 456, 64 O.A.C. 274, 15 O.R. (3d) 730, 10 B.L.R. (2d) 109, 1993 CarswellOnt 149 (Ont. C.A.) — considered

PWA Corp. v. Gemini Group Automated Distribution Systems Inc. (1993), 49 C.P.R. (3d) ix, 10 B.L.R. (2d) 244 (note), 104 D.L.R. (4th) vii, 68 O.A.C. 21 (note), 164 N.R. 78 (note), 16 O.R. (3d) xvi (S.C.C.) — referred to

R. v. Proulx (2000), [2000] 4 W.W.R. 21, 2000 SCC 5, 2000 CarswellMan 32, 2000 CarswellMan 33, 140 C.C.C. (3d) 449, 30 C.R. (5th) 1, 182 D.L.R. (4th) 1, 249 N.R. 201, 49 M.V.R. (3d) 163, [2000] 1 S.C.R. 61, 142 Man. R. (2d) 161, 212 W.A.C. 161 (S.C.C.) — referred to

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621, 1991 CarswellOnt 220 (Ont. Gen. Div.) — considered

Standard Trustco Ltd. (Trustee of) v. Standard Trust Co. (1993), 13 O.R. (3d) 7, 21 C.B.R. (3d) 25, 1993 CarswellOnt 219 (Ont. Gen. Div.) — considered

TDM Software Systems Inc., Re (1986), 60 C.B.R. (N.S.) 92, 1986 CarswellOnt 203 (Ont. S.C.) — referred to

Viteway Natural Foods Ltd., Re (1986), 63 C.B.R. (N.S.) 157, 1986 CarswellBC 499 (B.C. S.C.) — referred to

Webb v. Stenton (1883), 11 Q.B.D. 518 (Eng. C.A.) — referred to

633746 Ontario Inc. (Trustee of) v. Salvati (1990), 79 C.B.R. (N.S.) 72, 73 O.R. (2d) 774, 1990 CarswellOnt 181 (Ont. S.C.) — considered

Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3

Generally — referred to

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

Generally — referred to

s. 2(1) "insolvent person" — referred to

s. 2(1) "insolvent person" (a) — considered

s. 2(1) "insolvent person" (b) — considered

s. 2(1) "insolvent person" (c) — considered

s. 43(7) — referred to

s. 121(1) — referred to

s. 121(2) — referred to

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

Generally — referred to

s. 2 "debtor company" — referred to

s. 2 "debtor company" (a) — considered

s. 2 "debtor company" (b) — considered

s. 2 "debtor company" (c) — considered

s. 2 "debtor company" (d) — considered

s. 12 — referred to

s. 12(1) "claim" — referred to

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Generally — referred to

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Words and phrases considered:

debtor company

It seems to me that the [*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36] test of insolvency . . . which I have determined is a proper interpretation is that the [*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3] definition of [s. 2(1)] (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring.

MOTION by union that steel company was not "debtor company" as defined in *Companies' Creditors Arrangement Act*.

***Farley J.*:**

1 As argued this motion by Locals 1005, 5328 and 8782 United Steel Workers of America (collectively "Union") to rescind the initial order and dismiss the application of Stelco Inc. ("Stelco") and various of its subsidiaries (collectively "Sub Applicants") for access to the protection and process of the *Companies' Creditors Arrangement Act* ("CCAA") was that this access should be denied on the basis that Stelco was not a "debtor company" as defined in s. 2 of the CCAA because it was not insolvent.

2 Allow me to observe that there was a great deal of debate in the materials and submissions as to the reason(s) that Stelco found itself in with respect to what Michael Locker (indicating he was "an expert in the area of corporate restructuring and a leading steel industry analyst") swore to at paragraph 12 of his affidavit was the "current crisis":

> 12. Contending with weak operating results and resulting tight cash flow, management has deliberately chosen not to fund its employee benefits. By contrast, Dofasco and certain other steel companies have consistently funded both their employee benefit obligations as well as debt service. If Stelco's management had chosen to fund pension obligations, presumably with borrowed money, *the current crisis* and related restructuring plans would focus on debt restructuring as opposed to the reduction of employee benefits and related liabilities. [Emphasis added.]

3 For the purpose of determining whether Stelco is insolvent and therefore could be considered to be a debtor company, it matters not what the cause or who caused the financial difficulty that Stelco is in as admitted by Locker on behalf of the Union. The management of a corporation could be completely incompetent, inadvertently or advertently; the corporation could be in the grip of ruthless, hard hearted and hard nosed outside financiers; the corporation could be the innocent victim of uncaring policy of a level of government; the employees (unionized or non-unionized) could be completely incompetent, inadvertently or advertently; the relationship of labour and management could be absolutely poisonous; the corporation could be the victim of unforeseen events affecting its viability such a as a fire destroying an essential area of its plant and equipment or of rampaging dumping. One or more or all of these factors (without being exhaustive), whether or not of varying degree and whether or not in combination of some may well have been the cause of a corporation's difficulty. The point here is that Stelco's difficulty exists; the only question is whether Stelco is insolvent within the meaning of that in the "debtor company" definition of the CCAA. However, I would point out, as I did in closing, that no matter how this motion turns out, Stelco does have a problem which has to be addressed - addressed within the CCAA process if Stelco is insolvent or addressed outside that process if Stelco is determined not to be insolvent. The status quo will lead to ruination of Stelco (and its Sub Applicants) and as a result will very badly affect its stakeholder, including pensioners, employees (unionized and non-unionized), management, creditors, suppliers, customers, local and other governments and the local communities. In such situations, time is a precious commodity; it cannot be wasted; no matter how much some would like to take time outs, the clock cannot be stopped. The watchwords of the Commercial List are equally applicable in such circumstances. They are communication, cooperation and common sense. I appreciate that these cases frequently invoke emotions running high and wild; that is understandable on a human basis but it is the considered, rational approach which will solve the problem.

4 The time to determine whether a corporation is insolvent for the purpose of it being a "debtor company" and thus able to make an application to proceed under the CCAA is the date of filing, in this case January 29, 2004.

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5 The Monitor did not file a report as to this question of insolvency as it properly advised that it wished to take a neutral role. I understand however, that it did provide some assistance in the preparation of Exhibit C to Hap Steven's affidavit.

6 If I determine in this motion that Stelco is not insolvent, then the initial order would be set aside. See *Montreal Trust Co. of Canada v. Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 14 (P.E.I. C.A.). The onus is on Stelco as I indicated in my January 29, 2004 endorsement.

7 S. 2 of the CCAA defines "debtor company" as:

> "debtor company" means any company that:
>
> (a) is bankrupt or insolvent;
>
> (b) has committed an act of bankruptcy within the meaning of *Bankruptcy and Insolvency Act* ["BIA"] or deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;
>
> (c) has made an authorized assignment against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or
>
> (d) is in the course of being wound-up under the *Winding-Up and Restructuring Act* because the company is insolvent.

8 Counsel for the Existing Stelco Lenders and the DIP Lenders posited that Stelco would be able to qualify under (b) in light of the fact that as of January 29, 2004 whether or not it was entitled to receive the CCAA protection under (a) as being insolvent, it had ceased to pay its pre-filing debts. I would merely observe as I did at the time of the hearing that I do not find this argument attractive in the least. The most that could be said for that is that such game playing would be ill advised and in my view would not be rewarded by the exercise of judicial discretion to allow such an applicant the benefit of a CCAA stay and other advantages of the procedure for if it were capriciously done where there is not reasonable need, then such ought not to be granted. However, I would point out that if a corporation did capriciously do so, then one might well expect a creditor-initiated application so as to take control of the process (including likely the ouster of management including directors who authorized such unnecessary stoppage); in such a case, while the corporation would not likely be successful in a corporation application, it is likely that a creditor application would find favour of judicial discretion.

9 This judicial discretion would be exercised in the same way generally as is the case where s. 43(7) of the BIA comes into play whereby a bankruptcy receiving order which otherwise meets the test may be refused. See *Kenwood Hills Development Inc., Re* (1995), 30 C.B.R. (3d) 44 (Ont. Bktcy.) where at p. 45 I observed:

> The discretion must be exercised judicially based on credible evidence; it should be used according to common sense and justice and in a manner which does not result in an injustice: See *Re Churchill Forest Industries (Manitoba) Ltd.* (1971), 16 C.B.R. (NS) 158 (Man. Q.B.).

10 Anderson J. in *MTM Electric Co., Re* (1982), 42 C.B.R. (N.S.) 29 (Ont. Bktcy.) at p. 30 declined to grant a bankruptcy receiving order for the eminently good sense reason that it would be counterproductive: "Having regard for the value of the enterprise and having regard to the evidence before me, I think it far from clear that a receiving order would confer a benefit on anyone." This common sense approach to the judicial exercise of discretion may be contrasted by the rather more puzzling approach in *TDM Software Systems Inc., Re* (1986), 60 C.B.R. (N.S.) 92 (Ont. S.C.).

11 The Union, supported by the International United Steel Workers of America ("International"), indicated that if certain of the obligations of Stelco were taken into account in the determination of insolvency, then a very good number of large Canadian corporations would be able to make an application under the CCAA. I am of the view that this concern can be addressed as follows. The test of insolvency is to be determined on its own merits, not on the basis that an otherwise technically insolvent corporation should not be allowed to apply. However, if a technically insolvent corporation were to apply and there was no

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material advantage to the corporation and its stakeholders (in other words, a pressing need to restructure), then one would expect that the court's discretion would be judicially exercised against granting CCAA protection and ancillary relief. In the case of Stelco, it is recognized, as discussed above, that it is in crisis and in need of restructuring - which restructuring, if it is insolvent, would be best accomplished within a CCAA proceeding. Further, I am of the view that the track record of CCAA proceedings in this country demonstrates a healthy respect for the fundamental concerns of interested parties and stakeholders. I have consistently observed that much more can be achieved by negotiations outside the courtroom where there is a reasonable exchange of information, views and the exploration of possible solutions and negotiations held on a without prejudice basis than likely can be achieved by resorting to the legal combative atmosphere of the courtroom. A mutual problem requires a mutual solution. The basic interest of the CCAA is to rehabilitate insolvent corporations for the benefit of all stakeholders. To do this, the cause(s) of the insolvency must be fixed on a long term viable basis so that the corporation may be turned around. It is not achieved by positional bargaining in a tug of war between two parties, each trying for a larger slice of a defined size pie; it may be achieved by taking steps involving shorter term equitable sacrifices and implementing sensible approaches to improve productivity to ensure that the pie grows sufficiently for the long term to accommodate the reasonable needs of the parties.

12 It appears that it is a given that the Sub Applicants are in fact insolvent. The question then is whether Stelco is insolvent.

13 There was a question as to whether Stelco should be restricted to the material in its application as presented to the Court on January 29, 2004. I would observe that CCAA proceedings are not in the nature of the traditional adversarial lawsuit usually found in our courtrooms. It seems to me that it would be doing a disservice to the interest of the CCAA to artificially keep the Court in the dark on such a question. Presumably an otherwise deserving "debtor company" would not be allowed access to a continuing CCAA proceeding that it would be entitled to merely because some potential evidence were excluded for traditional adversarial technical reasons. I would point out that in such a case, there would be no prohibition against such a corporation reapplying (with the additional material) subsequently. In such a case, what would be the advantage for anyone of a "pause" before being able to proceed under the rehabilitative process under the CCAA. On a practical basis, I would note that all too often corporations will wait too long before applying, at least this was a significant problem in the early 1990s. In *Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), I observed:

> Secondly, CCAA is designed to be remedial; it is not, however, designed to be preventative. CCAA should not be the *last* gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throe.

14 It seems to me that the phrase "death throe" could be reasonably replaced with "death spiral". In *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]), I went on to expand on this at p. 228:

> I would also observe that all too frequently debtors wait until virtually the last moment, the last moment, or in some cases, beyond the last moment before even beginning to think about reorganizational (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if "success" may have been available with earlier spade work.

15 I have not been able to find in the CCAA reported cases any instance where there has been an objection to a corporation availing itself of the facilities of the CCAA on the basis of whether the corporation was insolvent. Indeed, as indicated above, the major concern here has been that an applicant leaves it so late that the timetable of necessary steps may get impossibly compressed. That is not to say that there have not been objections by parties opposing the application on various other grounds. Prior to the 1992 amendments, there had to be debentures (plural) issued pursuant to a trust deed; I recall that in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, 1 O.R. (3d) 289 (Ont. C.A.), the initial application was rejected in the morning because there had only been one debenture issued but another one was issued prior to the return to court that afternoon. This case stands for the general proposition that the CCAA should be given a large and liberal interpretation. I should note that there was in *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (Ont. S.C.J. [Commercial List]) a determination that in a creditor application, the corporation was found not to be insolvent, but see below as to BIA test (c) my views as to the correctness of this decision.

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16 In *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) I observed at p. 32:

> One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.

17 In *Anvil Range Mining Corp., Re* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), the court stated to the same effect:

> The second submission is that the plan is contrary to the purposes of the CCAA. Courts have recognized that the purpose of the CCAA is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators.

18 Encompassed in this is the concept of saving employment if a restructuring will result in a viable enterprise. See *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.). This concept has been a continuing thread in CCAA cases in this jurisdiction stretching back for at least the past 15 years, if not before.

19 I would also note that the jurisprudence and practical application of the bankruptcy and insolvency regime in place in Canada has been constantly evolving. The early jails of what became Canada were populated to the extent of almost half their capacity by bankrupts. Rehabilitation and a fresh start for the honest but unfortunate debtor came afterwards. Most recently, the *Bankruptcy Act* was revised to the BIA in 1992 to better facilitate the rehabilitative aspect of making a proposal to creditors. At the same time, the CCAA was amended to eliminate the threshold criterion of there having to be debentures issued under a trust deed (this concept was embodied in the CCAA upon its enactment in 1933 with a view that it would only be large companies with public issues of debt securities which could apply). The size restriction was continued as there was now a threshold criterion of at least $5 million of claims against the applicant. While this restriction may appear discriminatory, it does have the practical advantage of taking into account that the costs (administrative costs including professional fees to the applicant, and indeed to the other parties who retain professionals) is a significant amount, even when viewed from the perspective of $5 million. These costs would be prohibitive in a smaller situation. Parliament was mindful of the time horizons involved in proposals under BIA where the maximum length of a proceeding including a stay is six months (including all possible extensions) whereas under CCAA, the length is in the discretion of the court judicially exercised in accordance with the facts and the circumstances of the case. Certainly sooner is better than later. However, it is fair to observe that virtually all CCAA cases which proceed go on for over six months and those with complexity frequently exceed a year.

20 Restructurings are not now limited in practical terms to corporations merely compromising their debts with their creditors in a balance sheet exercise. Rather there has been quite an emphasis recently on operational restructuring as well so that the emerging company will have the benefit of a long term viable fix, all for the benefit of stakeholders. See *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at p. 314 where Borins J. states:

> The proposed plan exemplifies the policy and objectives of the Act as it proposes a regime for the court-supervised re-organization for the Applicant company intended to avoid the devastating social and economic effects of a creditor-initiated termination of its ongoing business operations and enabling the company to carry on its business in a manner in which it is intended to cause the least possible harm to the company, its creditors, its employees and former employees and the communities in which its carries on and carried on its business operations.

21 The CCAA does not define "insolvent" or "insolvency". Houlden & Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act* (Toronto, Carswell; 2003) at p. 1107 (N5) states:

> In interpreting "debtor company", reference must be had to the definition of "insolvent person" in s. 2(1) of the *Bankruptcy and Insolvency Act* . . .
>
> To be able to use the Act, a company must be bankrupt or insolvent: *Reference re Companies' Creditors Arrangement Act (Canada)*, 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75. The company must, in its application, admit its insolvency.

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22 It appears to have become fairly common practice for applicants and others when reference is made to insolvency in the context of the CCAA to refer to the definition of "insolvent person" in the BIA. That definition is as follows:

> s. 2(1) . . .
>
> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

23 Stelco acknowledges that it does not meet the test of (b); however, it does assert that it meets the test of both (a) and (c). In addition, however, Stelco also indicates that since the CCAA does not have a reference over to the BIA in relation to the (a) definition of "debtor company" as being a company that is "(a) bankrupt or insolvent", then this term of "insolvent" should be given the meaning that the overall context of the CCAA requires. See the modern rule of statutory interpretation which directs the court to take a contextual and purposive approach to the language of the provision at issue as illustrated by *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at p. 580:

> Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

24 I note in particular that the (b), (c) and (d) aspects of the definition of "debtor company" all refer to other statutes, including the BIA; (a) does not. S. 12 of the CCAA defines "claims" with reference over to the BIA (and otherwise refers to the BIA and the *Winding-Up and Restructuring Act*). It seems to me that there is merit in considering that the test for insolvency under the CCAA may differ somewhat from that under the BIA, so as to meet the special circumstances of the CCAA and those corporations which would apply under it. In that respect, I am mindful of the above discussion regarding the time that is usually and necessarily (in the circumstances) taken in a CCAA reorganization restructuring which is engaged in coming up with a plan of compromise and arrangement. The BIA definition would appear to have been historically focussed on the question of bankruptcy - and not reorganization of a corporation under a proposal since before 1992, secured creditors could not be forced to compromise their claims, so that in practice there were no reorganizations under the former *Bankruptcy Act* unless all secured creditors voluntarily agreed to have their secured claims compromised. The BIA definition then was essentially useful for being a pre-condition to the "end" situation of a bankruptcy petition or voluntary receiving order where the upshot would be a realization on the bankrupt's assets (not likely involving the business carried on - and certainly not by the bankrupt). Insolvency under the BIA is also important as to the Paulian action events (eg., fraudulent preferences, settlements) as to the conduct of the debtor *prior* to the bankruptcy; similarly as to the question of provincial preference legislation. Reorganization under a plan or proposal, on the contrary, is with a general objective of the applicant continuing to exist, albeit that the CCAA may also be used to have an orderly disposition of the assets and undertaking in whole or in part.

25 It seems to me that given the time and steps involved in a reorganization, and the condition of insolvency perforce requires an expanded meaning under the CCAA. Query whether the definition under the BIA is now sufficient in that light for the allowance of sufficient time to carry through with a realistically viable proposal within the maximum of six months allowed under the BIA? I think it sufficient to note that there would not be much sense in providing for a rehabilitation program of restructuring/reorganization under either statute if the entry test was that the applicant could not apply until a rather late stage of its financial difficulties with the rather automatic result that in situations of complexity of any material degree, the applicant

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would not have the financial resources sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on "rescues" as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

26 Allow me now to examine whether Stelco has been successful in meeting the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in regard to the interpretation of "debtor company" in the context and within the purpose of that legislation. To a similar effect, see *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609 (Ont. C.A.), leave to appeal to S.C.C. dismissed [(1993), 49 C.P.R. (3d) ix (S.C.C.)] wherein it was determined that the trial judge was correct in holding that a party was not insolvent and that the statutory definition of insolvency pursuant to the BIA definition was irrelevant to determine that issue, since the agreement in question effectively provided its own definition by implication. It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. That is, there should be a reasonable cushion, which cushion may be adjusted and indeed become in effect an encroachment depending upon reasonable access to DIP between financing. In the present case, Stelco accepts the view of the Union's affiant, Michael Mackey of Deloitte and Touche that it will otherwise run out of funding by November 2004.

27 On that basis, allow me to determine whether Stelco is insolvent on the basis of (i) what I would refer to as the CCAA test as described immediately above, (ii) BIA test (a) or (iii) BIA test (c). In doing so, I will have to take into account the fact that Stephen, albeit a very experienced and skilled person in the field of restructurings under the CCAA, unfortunately did not appreciate that the material which was given to him in Exhibit E to his affidavit was modified by the caveats in the source material that in effect indicated that based on appraisals, the fair value of the real assets acquired was in excess of the purchase price for two of the U.S. comparators. Therefore the evidence as to these comparators is significantly weakened. In addition at Q. 175-177 in his cross examination, Stephen acknowledged that it was reasonable to assume that a purchaser would "take over some liabilities, some pension liabilities and OPEB liabilities, for workers who remain with the plant." The extent of that assumption was not explored; however, I do note that there was acknowledgement on the part of the Union that such an assumption would also have a reciprocal negative effect on the purchase price.

28 The BIA tests are disjunctive so that anyone meeting any of these tests is determined to be insolvent: see *Optical Recording Laboratories Inc., Re* (1990), 75 D.L.R. (4th) 747 (Ont. C.A.) at p. 756; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at p. 161. Thus, if I determine that Stelco is insolvent on *any one* of these tests, then it would be a "debtor company" entitled to apply for protection under the CCAA.

29 In my view, the Union's position that Stelco is not insolvent under BIA (a) because it has not entirely used up its cash and cash facilities (including its credit line), that is, it is not yet as of January 29, 2004 run out of liquidity conflates inappropriately the (a) test with the (b) test. The Union's view would render the (a) test necessarily as being redundant. See *R. v. Proulx*, [2000] 1 S.C.R. 61 (S.C.C.) at p. 85 for the principle that no legislative provision ought to be interpreted in a manner which would "render it mere surplusage." Indeed the plain meaning of the phrase "unable to meet his obligations as they generally become due" requires a construction of test (a) which permits the court to take a purposive assessment of a debtor's ability to meet his future obligations. See *King Petroleum Ltd., Re* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.) where Steele J. stated at p. 80:

> With respect to cl. (a), it was argued that at the time the disputed payments were made the company was able to meet its obligations as they generally became due because no major debts were in fact due at that time. This was premised on the fact that the moneys owed to Imperial Oil were not due until 10 days after the receipt of the statements and that the statements had not then been received. I am of the opinion that this is not a proper interpretation of cl. (a). *Clause (a) speaks in the present and future tenses and not in the past*. I am of the opinion that the company was an "insolvent person" within the meaning of cl. (a) because by the very payment-out of the money in question it placed itself in a position that it was unable to meet its obligations as they would generally become due. In other words, it had placed itself in a position that it would not be able to pay the obligations that it knew it had incurred and which it knew would become due in the immediate future. [Emphasis added.]

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30 *King Petroleum Ltd.* was a case involving the question in a bankruptcy scenario of whether there was a fraudulent preference during a period when the corporation was insolvent. Under those circumstances, the "immediate future" does not have the same expansive meaning that one would attribute to a time period in a restructuring forward looking situation.

31 Stephen at paragraphs 40-49 addressed the restructuring question in general and its applicability to the Stelco situation. At paragraph 41, he outlined the significant stages as follows:

> The process of restructuring under the CCAA entails a number of different stages, the most significant of which are as follows:
>
> (a) identification of the debtor's stakeholders and their interests;
>
> (b) arranging for a process of meaningful communication;
>
> (c) dealing with immediate relationship issues arising from a CCAA filing;
>
> (d) sharing information about the issues giving rise to the debtor's need to restructure;
>
> (e) developing restructuring alternatives; and
>
> (f) building a consensus around a plan of restructuring.

32 I note that January 29, 2004 is just 9-10 months away from November 2004. I accept as correct his conclusion based on his experience (and this is in accord with my own objective experience in large and complicated CCAA proceedings) that Stelco would have the liquidity problem within the time horizon indicated. In that regard, I also think it fair to observe that Stelco realistically cannot expect any increase in its credit line with its lenders or access further outside funding. To bridge the gap it must rely upon the stay to give it the uplift as to prefiling liabilities (which the Union misinterpreted as a general turnaround in its cash position without taking into account this uplift). As well, the Union was of the view that recent price increases would relieve Stelco's liquidity problems; however, the answers to undertaking in this respect indicated:

> With respect to the Business Plan, the average spot market sales price per ton was $514, and the average contract business sales price per ton was $599. The Forecast reflects an average spot market sales price per ton of $575, and average contract business sales price per ton of $611. The average spot price used in the forecast considers further announced price increases, recognizing, among other things, the timing and the extent such increases are expected to become effective. The benefit of the increase in sales prices from the Business Plan is essentially offset by the substantial increase in production costs, and in particular in raw material costs, primarily scrap and coke, as well as higher working capital levels and a higher loan balance outstanding on the CIT credit facility as of January 2004.

I accept that this is generally a cancel out or wash in all material respects.

33 I note that $145 million of cash resources had been used from January 1, 2003 to the date of filing. Use of the credit facility of $350 million had increased from $241 million on November 30, 2003 to $293 million on the date of filing. There must be a reasonable reserve of liquidity to take into account day to day, week to week or month to month variances and also provide for unforeseen circumstances such as the breakdown of a piece of vital equipment which would significantly affect production until remedied. Trade credit had been contracting as a result of appreciation by suppliers of Stelco's financial difficulties. The DIP financing of $75 million is only available if Stelco is under CCAA protection. I also note that a shut down as a result of running out of liquidity would be complicated in the case of Stelco and that even if conditions turned around more than reasonably expected, start-up costs would be heavy and quite importantly, there would be a significant erosion of the customer base (reference should be had to the Slater Hamilton plant in this regard). One does not liquidate assets which one would not sell in the ordinary course of business to thereby artificially salvage some liquidity for the purpose of the test: see *Pacific Mobile Corp., Re* (1979), 32 C.B.R. (N.S.) 209 (C.S. Que.) at p. 220. As a rough test, I note that Stelco (albeit on a consolidated basis

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with all subsidiaries) running significantly behind plan in 2003 from its budget of a profit of $80 million now to a projected loss of $192 million and cash has gone from a positive $209 million to a negative $114 million.

34 Locker made the observation at paragraph 8 of his affidavit that:

> 8. Stelco has performed poorly for the past few years primarily due to an inadequate business strategy, poor utilization of assets, inefficient operations and generally weak management leadership and decision-making. This point is best supported by the fact that Stelco's local competitor, Dofasco, has generated outstanding results in the same period.

Table 1 to his affidavit would demonstrate that Dofasco has had superior profitability and cashflow performance than its "neighbour" Stelco. He went on to observe at paragraphs 36-37:

> 36. Stelco can achieve significant cost reductions through means other than cutting wages, pensions and benefits for employees and retirees. Stelco could bring its cost levels down to those of restructured U.S. mills, with the potential for lowering them below those of many U.S. mills.
>
> 37. Stelco could achieve substantial savings through productivity improvements within the mechanisms of the current collective agreements. More importantly, a major portion of this cost reduction could be achieved through constructive negotiations with the USWA in an out-of-court restructuring that does not require intervention of the courts through the vehicle of CCAA protection.

I accept his constructive comments that there is room for cost reductions and that there are substantial savings to be achieved through productivity improvements. However, I do not see anything detrimental to these discussions and negotiations by having them conducted within the umbrella of a CCAA proceeding. See my comments above regarding the CCAA in practice.

35 But I would observe and I am mystified by Locker's observations at paragraph 12 (quoted above), that Stelco should have borrowed to fund pension obligations to avoid its current financial crisis. This presumes that the borrowed funds would not constitute an obligation to be paid back as to principal and interest, but rather that it would assume the character of a cost-free "gift".

36 I note that Mackey, without the "laundry list" he indicates at paragraph 17 of his second affidavit, is unable to determine at paragraph 19 (for himself) whether Stelco was insolvent. Mackey was unable to avail himself of all available information in light of the Union's refusal to enter into a confidentiality agreement. He does not closely adhere to the BIA tests as they are defined. In the face of positive evidence about an applicant's financial position by an experienced person with expertise, it is not sufficient to displace this evidence by filing evidence which goes no further than raising questions: see *Anvil Range Mining Corp.*, *supra* at p. 162.

37 The Union referred me to one of my decisions *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1993), 13 O.R. (3d) 7 (Ont. Gen. Div.) where I stated as to the MacGirr affidavit:

> The Trustee's cause of action is premised on MacGirr's opinion that STC was insolvent as at August 3, 1990 and therefore the STC common shares and promissory note received by Trustco in return for the Injection had no value at the time the Injection was made. Further, MacGirr ascribed no value to the opportunity which the Injection gave to Trustco to restore STC and salvage its thought to be existing $74 million investment. In stating his opinion MacGirr defined solvency as:
>
> (a) the ability to meet liabilities as they fall due; and
>
> (b) that assets exceed liabilities.
>
> On cross-examination MacGirr testified that in his opinion on either test STC was insolvent as at August 3, 1990 since as to (a) STC was experiencing then a negative cash flow and as to (b) the STC financial statements incorrectly reflected values. As far as (a) is concerned, I would comment that while I concur with MacGirr that at some time in the long run a

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> company that is experiencing a negative cash flow will eventually not be able to meet liabilities as they fall due but that is not the test (which is a "present exercise"). On that current basis STC was meeting its liabilities on a timely basis.

38 As will be seen from that expanded quote, MacGirr gave his own definitions of insolvency which are not the same as the s. 2 BIA tests (a), (b) and (c) but only a very loose paraphrase of (a) and (c) and an omission of (b). Nor was I referred to the *King Petroleum Ltd.* or *Proulx* cases *supra*. Further, it is obvious from the context that "*sometime in the long run . . . eventually*" is not a finite time in the foreseeable future.

39 I have not given any benefit to the $313 - $363 million of improvements referred to in the affidavit of William Vaughan at paragraph 115 as those appear to be capital expenditures which will have to be accommodated within a plan of arrangement or after emergence.

40 It seems to me that if the BIA (a) test is restrictively dealt with (as per my question to Union counsel as to how far in the future should one look on a prospective basis being answered "24 hours") then Stelco would not be insolvent under that test. However, I am of the view that that would be unduly restrictive and a proper contextual and purposive interpretation to be given when it is being used for a restructuring purpose even under BIA would be to see whether there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the say and ancillary protection and procedure by court authorization pursuant to an order. I think this is the more appropriate interpretation of BIA (a) test in the context of a reorganization or "rescue" as opposed to a threshold to bankruptcy consideration or a fraudulent preferences proceeding. On that basis, I would find Stelco insolvent from the date of filing. Even if one were not to give the latter interpretation to the BIA (a) test, clearly for the above reasons and analysis, if one looks at the meaning of "insolvent" within the context of a CCAA reorganization or rescue solely, then of necessity, the time horizon must be such that the liquidity crisis would occur in the sense of running out of "cash" but for the grant of the CCAA order. On that basis Stelco is certainly insolvent given its limited cash resources unused, its need for a cushion, its rate of cash burn recently experienced and anticipated.

41 What about the BIA (c) test which may be roughly referred to as an assets compared with obligations test. See *New Quebec Raglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Ont. Gen. Div. [Commercial List]) as to fair value and fair market valuation. The Union observed that there was no intention by Stelco to wind itself up or proceed with a sale of some or all of its assets and undertaking and therefore some of the liabilities which Stelco and Stephen took into account would not crystallize. However, as I discussed at the time of the hearing, the (c) test is what one might reasonably call or describe as an "artificial" or notional/hypothetical test. It presumes certain things which are in fact not necessarily contemplated to take place or to be involved. In that respect, I appreciate that it may be difficult to get one's mind around that concept and down the right avenue of that (c) test. See my views at trial in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2001] O.J. No. 3394 (Ont. S.C.J. [Commercial List]) at paragraphs 13, 21 and 33; affirmed [2003] O.J. No. 5242 (Ont. C.A.). At paragraph 33, I observed in closing:

> 33 . . . They (and their expert witnesses) all had to contend with dealing with rambling and complicated facts and, in Section 100 BIA, a section which is difficult to administer when fmv [fair market value] in a notational or hypothetical market involves ignoring what would often be regarded as self evidence truths but at the same time appreciating that this notational or hypothetical market requires that the objects being sold have to have realistic true to life attributes recognized.

42 The Court of Appeal stated at paragraphs 24-25 as follows:

> 24. Nor are the appellants correct to argue that the trial judge also assumed an imprudent vendor in arriving at his conclusion about the fair market value of the OYSF note would have to know that in order to realize value from the note any purchaser would immediately put OYSF and thus OYDL itself into bankruptcy to pre-empt a subsequent triggering event in favour of EIB. While this was so, and the trial judge clearly understood it, the error in this submission is that it seeks to inject into the analysis factors subjected to the circumstances of OYDL as vendor and not intrinsic to the value of the OYSF note. The calculation of fair market value does not permit this but rather must assume an unconstrained vendor.

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> 25. The Applicants further argue that the trial judge eroded in determining the fair market value of the OYSF note by reference to a transaction which was entirely speculative because it was never considered by OYDL nor would have it been since it would have resulted in OYDL's own bankruptcy. I disagree. The transaction hypothesized by the trial judge was one between a notational, willing, prudent and informed vendor and purchaser based on factors relevant to the OYSF note itself rather than the particular circumstances of OYDL as the seller of the note. This is an entirely appropriate way to determine the fair market value of the OYSF note.

43 Test (c) deems a person to be insolvent if "the aggregate of [its] property is not, at a fair valuation, sufficient, or of disposed at a fairly conducted sale under legal process would not be sufficient to enable payment of all [its] obligations, due and accruing due." The origins of this legislative test appear to be the decision of Spragge V-C in *Davidson v. Douglas* (1868), 15 Gr. 347 (Ont. Ch.) at p. 351 where he stated with respect to the solvency or insolvency of a debtor, the proper course is:

> to see and examine whether all his property, real and personal, be sufficient if presently realized for the payment of his debts, and in this view we must estimate his land, as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it would bring in the market at a forced sale, or a sale where the seller cannot await his opportunities, but must sell.

44 In *Clarkson v. Sterling* (1887), 14 O.R. 460 (Ont. C.P.) at p. 463, Rose J. indicted that the sale must be fair and reasonable, but that the determination of fairness and reasonableness would depend on the facts of each case.

45 The Union essentially relied on garnishment cases. Because of the provisions relating as to which debts may or may not be garnished, these authorities are of somewhat limited value when dealing with the test (c) question. However I would refer to one of the Union's cases *Bank of Montreal v. I.M. Krisp Foods Ltd.*, [1996] S.J. No. 655 (Sask. C.A.) where it is stated at paragraph 11:

> 11. Few phrases have been as problematic to define as "debt due or accruing due". The Shorter Oxford English Dictionary, 3rd ed. defines "accruing" as "arising in due course", but an examination of English and Canadian authority reveals that not all debts "arising in due course" are permitted to be garnisheed. (See Professor Dunlop's extensive research for his British Columbia Law Reform Commission's Report on Attachment of Debts Act, 1978 at 17 to 29 and is text Creditor-Debtor Law in Canada, 2nd ed. at 374 to 385.)

46 In *Barsi v. Farcas* (1923), [1924] 1 D.L.R. 1154 (Sask. C.A.), Lamont J.A. was cited for his statement at p. 522 of *Webb v. Stenton* (1883), 11 Q.B.D. 518 (Eng. C.A.) that: "an accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation."

47 Saunders J. noted in *633746 Ontario Inc. (Trustee of) v. Salvati* (1990), 79 C.B.R. (N.S.) 72 (Ont. S.C.) at p. 81 that a sale out of the ordinary course of business would have an adverse effect on that actually realized.

48 There was no suggestion by any of the parties that any of the assets and undertaking would have any enhanced value from that shown on the financial statements prepared according to GAAP.

49 In *King Petroleum Ltd.*, *supra* at p. 81 Steele J. observed:

> To consider the question of insolvency under cl. (c) I must look to the aggregate property of the company and come to a conclusion as to whether or not it would be sufficient to enable payment of all obligations due and accruing due. There are two tests to be applied: First, its fair value and, secondly, its value if disposed of at a fairly conducted sale under legal process. The balance sheet is a starting point, but the evidence relating to the fair value of the assets and what they might realize if disposed of at a fairly conducted sale under legal process must be reviewed in interpreting it. In this case, I find no difficulty in accepting the obligations shown as liabilities because they are known. I have more difficulty with respect to the assets.

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50 To my view the preferable interpretation to be given to "sufficient to enable payment of all his obligations, due and accruing due" is to be determined in the context of this test as a whole. What is being put up to satisfy those obligations is the debtor's assets and undertaking *in total*; in other words, the debtor in essence is taken as having sold everything. There would be no residual assets and undertaking to pay off any obligations which would not be encompassed by the phrase "all of his obligations, due and accruing due". Surely, there cannot be "orphan" obligations which are left hanging unsatisfied. It seems to me that the intention of "due and accruing due" was to cover off all obligations of whatever nature or kind and leave nothing in limbo.

51 S. 121(1) and (2) of the BIA, which are incorporated by reference in s. 12 of the CCAA, provide in respect to provable claims:

> S. 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such claim shall be made in accordance with s. 135.

52 *Houlden and Morawetz 2004 Annotated supra* at p. 537 (G28(3)) indicates:

> The word "liability" is a very broad one. It includes all obligations to which the bankrupt is subject on the day on which he becomes bankrupt except for contingent and unliquidated claims which are dealt with in s. 121(2).

However contingent and unliquidated claims would be encompassed by the term "obligations".

53 In *Gardner v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.), Mathers C.J.K.B. observed at p. 281 that "contingent claim, that is, a claim which may or may not ripen into a debt, according as some future event does or does not happen." See *A Debtor (No. 64 of 1992), Re*, [1993] 1 W.L.R. 264 (Eng. Ch. Div.) at p. 268 for the definition of a "liquidated sum" which is an amount which can be readily ascertained and hence by corollary an "unliquidated claim" would be one which is not easily ascertained, but will have to be valued. In *Gagnier, Re* (1950), 30 C.B.R. 74 (Ont. S.C.), there appears to be a conflation of not only the (a) test with the (c) test, but also the invocation of the judicial discretion not to grant the receiving order pursuant to a bankruptcy petition, notwithstanding that "[the judge was] unable to find the debtor is bankrupt". The debtor was able to survive the (a) test as he had the practice (accepted by all his suppliers) of providing them with post dated cheques. The (c) test was not a problem since the judge found that his assets should be valued at considerably more than his obligations. However, this case does illustrate that the application of the tests present some difficulties. These difficulties are magnified when one is dealing with something more significantly complex and a great deal larger than a haberdashery store - in the case before us, a giant corporation in which, amongst other things, is engaged in a very competitive history including competition from foreign sources which have recently restructured into more cost efficient structures, having shed certain of their obligations. As well, that is without taking into account that a sale would entail significant transaction costs. Even of greater significance would be the severance and termination payments to employees not continued by the new purchaser. Lastly, it was recognized by everyone at the hearing that Stelco's plants, especially the Hamilton-Hilton works, have extremely high environmental liabilities lurking in the woodwork. Stephen observed that these obligations would be substantial, although not quantified.

54 It is true that there are no appraisals of the plant and equipment nor of the assets and undertaking of Stelco. Given the circumstances of this case and the complexities of the market, one may realistically question whether or not the appraisals would be all that helpful or accurate.

55 I would further observe that in the notional or hypothetical exercise of a sale, then all the obligations which would be triggered by such sale would have to be taken into account.

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56 All liabilities, contingent or unliquidated would have to be taken into account. See *King Petroleum Ltd.*, *supra* p. 81; *Salvati*, *supra* pp. 80-1; *Maybank Foods Inc. (Trustee of) v. Provisioners Maritimes Ltd.* (1989), 45 B.L.R. 14 (N.S. T.D.) at p. 29; *Challmie, Re* (1976), 22 C.B.R. (N.S.) 78 (B.C. S.C.), at pp. 81-2. In *Challmie* the debtor ought to have known that his guarantee was very much exposed given the perilous state of his company whose liabilities he had guaranteed. It is interesting to note what was stated in *Maybank Foods Inc. (Trustee of)*, even if it is rather patently obvious. Tidman J. said in respect of the branch of the company at p. 29:

> Mr. MacAdam argues also that the $4.8 million employees' severance obligation was not a liability on January 20, 1986. The *Bankruptcy Act* includes as obligations both those due and accruing due. Although the employees' severance obligation was not due and payable on January 20, 1986 it was an obligation "accruing due". The Toronto facility had experienced severe financial difficulties for some time; in fact, it was the major, if not the sole cause, of Maybank's financial difficulties. I believe it is reasonable to conclude that a reasonably astute perspective buyer of the company has a going concern would have considered that obligation on January 20, 1986 and that it would have substantially reduced the price offered by that perspective buyer. Therefore that obligation must be considered as an obligation of the company on January 20, 1986.

57 With the greatest of respect for my colleague, I disagree with the conclusion of Ground J. in *Enterprise Capital Management Inc.*, *supra* as to the approach to be taken to "due and accruing due" when he observed at pp. 139-140:

> It therefore becomes necessary to determine whether the principle amount of the Notes constitutes an obligation "due or accruing due" as of the date of this application.
>
> There is a paucity of helpful authority on the meaning of "accruing due" for purposes of a definition of insolvency. Historically, in 1933, in *P. Lyall & Sons Construction Co. v. Baker*, [1933] O.R. 286 (Ont. C.A.), the Ontario Court of Appeal, in determining a question of set-off under the *Dominion Winding-Up Act* had to determine whether the amount claimed as set-off was a debt due or accruing due to the company in liquidation for purposes of that Act. Marsten J. at pp. 292-293 quoted from Moss J.A. in *Mail Printing Co. v. Clarkson* (1898), 25 O.R. 1 (Ont. C.A.) at p. 8:
>
> > A debt is defined to be a sum of money which is certainly, and at all event, payable without regard to the fact whether it be payable now or at a future time. And an accruing debt is a debt not yet actually payable, but a debt which is represented by an existing obligation: Per Lindley L.J. in *Webb v. Stenton* (1883), 11 Q.D.D. at p. 529.
>
> Whatever relevance such definition may have had for purposes of dealing with claims by and against companies in liquidation under the old winding-up legislation, it is apparent to me that it should not be applied to definitions of insolvency. To include every debt payable at some future date in "accruing due" for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for the purposes of the BIA and therefore the CCAA. For the same reason, I do not accept the statement quoted in the Enterprise factum from the decision of the Bankruptcy Court for the Southern District of New York in *Centennial Textiles Inc., Re*, 220 B.R. 165 (U.S.N.Y.D.C. 1998) that "if the present saleable value of assets are less than the amount required to pay existing debt as they mature, the debtor is insolvent". In my view, the obligations, which are to be measured against the fair valuation of a company's property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied as, for example, a sinking fund payment due within the current year. Black's Law Dictionary defines "accrued liability" as "an obligation or debt which is properly chargeable in a given accounting period, but which is not yet paid or payable". The principal amount of the Notes is neither due nor accruing due in this sense.

58 There appears to be some confusion in this analysis as to "debts" and "obligations", the latter being much broader than debts. Please see above as to my views concerning the floodgates argument under the BIA and CCAA being addressed by judicially exercised discretion even if "otherwise warranted" applications were made. I pause to note that an insolvency test under general corporate litigation need not be and likely is not identical, or indeed similar to that under these insolvency statutes. As well, it is curious to note that the cut off date is the end of the current fiscal period which could have radically different

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results if there were a calendar fiscal year and the application was variously made in the first week of January, mid-summer or the last day of December. Lastly, see above and below as to my views concerning the proper interpretation of this question of "accruing due".

59 It seems to me that the phrase "accruing due" has been interpreted by the courts as broadly identifying obligations that will "become due". See *Viteway Natural Foods Ltd.* below at pp. 163-4 - at least at some point in the future. Again, I would refer to my conclusion above that *every obligation* of the corporation in the hypothetical or notional sale must be treated as "accruing due" to avoid orphan obligations. In that context, it matters not that a wind-up pension liability may be discharged over 15 years; in a test (c) situation, it is crystallized on the date of the test. See *Optical Recording Laboratories Inc. supra* at pp. 756-7; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at pp. 164-63-4; *Consolidated Seed Exports Ltd., Re* (1986), 62 C.B.R. (N.S.) 156 (B.C. S.C.) at p. 163. In *Consolidated Seed Exports Ltd.*, Spencer J. at pp. 162-3 stated:

> In my opinion, a futures broker is not in that special position. The third definition of "insolvency" may apply to a futures trader at any time even though he has open long positions in the market. Even though Consolidated's long positions were not required to be closed on 10th December, the chance that they might show a profit by March 1981 or even on the following day and thus wipe out Consolidated's cash deficit cannot save it from a condition of insolvency on that day. The circumstances fit precisely within the third definition; if all Consolidated's assets had been sold on that day at a fair value, the proceeds would not have covered its obligations due and accruing due, including its obligations to pay in March 1981 for its long positions in rapeseed. The market prices from day to day establish a fair valuation. . . .
>
> The contract to buy grain at a fixed price at a future time imposes a present obligation upon a trader taking a long position in the futures market to take delivery in exchange for payment at that future time. It is true that in the practice of the market, that obligation is nearly always washed out by buying an offsetting short contract, but until that is done the obligation stands. The trader does not know who will eventually be on the opposite side of his transaction if it is not offset but all transactions are treated as if the clearing house is on the other side. It is a present obligation due at a future time. It is therefore an obligation accruing due within the meaning of the third definition of "insolvency".

60 The possibility of an expectancy of future profits or a change in the market is not sufficient; *Consolidated Seed Exports Ltd.* at p. 162 emphasizes that the test is to be done on that day, the day of filing in the case of an application for reorganization.

61 I see no objection to using Exhibit C to Stephen's affidavit as an aid to review the balance sheet approach to test (c). While Stephen may not have known who prepared Exhibit C, he addressed each of its components in the text of his affidavit and as such he could have mechanically prepared the exhibit himself. He was comfortable with and agreed with each of its components. Stelco's factum at paragraphs 70-1 submits as follows:

> 70. In Exhibit C to his Affidavit, Mr. Stephen addresses a variety of adjustments to the Shareholder's Equity of Stelco necessary to reflect the values of assets and liabilities as would be required to determine whether Stelco met the test of insolvency under Clause C. In cross examination of both Mr. Vaughan and Mr. Stephen only one of these adjustments was challenged - the "Possible Reductions in Capital Assets."
>
> 71. The basis of the challenge was that the comparative sales analysis was flawed. In the submission of Stelco, none of these challenges has any merit. Even if the entire adjustment relating to the value in capital assets is ignored, the remaining adjustments leave Stelco with assets worth over $600 million less than the value of its obligations due and accruing due. This fundamental fact is not challenged.

62 Stelco went on at paragraphs 74-5 of its factum to submit:

> 74. The values relied upon by Mr. Stephen if anything, understate the extent of Stelco's insolvency. As Mr. Stephen has stated, and no one has challenged by affidavit evidence or on cross examination, in a fairly conducted sale under legal process, the value of Stelco's working capital and other assets would be further impaired by: (i) increased environmental liabilities not reflected on the financial statements, (ii) increased pension deficiencies that would be

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generated on a wind up of the pension plans, (iii) severance and termination claims and (iv) substantial liquidation costs that would be incurred in connection with such a sale.

75. No one on behalf of the USWA has presented any evidence that the capital assets of Stelco are in excess of book value on a stand alone basis. Certainly no one has suggested that these assets would be in excess of book value if the related environmental legacy costs and collective agreements could not be separated from the assets.

63 Before turning to that exercise, I would also observe that test (c) is also disjunctive. There is an insolvency condition if the total obligation of the debtor exceed either (i) a fair valuation of its assets or (ii) the proceeds of a sale fairly conducted under legal process of its assets.

64 As discussed above and confirmed by Stephen, if there were a sale under legal process, then it would be unlikely, especially in this circumstance that values would be enhanced; in all probability they would be depressed from book value. Stephen took the balance sheet GAAP calculated figure of equity at November 30, 2003 as $804.2 million. From that, he deducted the loss for December 2003 - January 2004 of $17 million to arrive at an equity position of $787.2 million as at the date of filing.

65 From that, he deducted, reasonably in my view, those "booked" assets that would have no value in a test (c) sale namely: (a) $294 million of future income tax recourse which would need taxable income in the future to realize; (b) $57 million for a write-off of the Platemill which is presently hot idled (while Locker observed that it would not be prohibitive in cost to restart production, I note that neither Stephen nor Vaughn were cross examined as to the decision not to do so); and (c) the captialized deferred debt issue expense of $3.2 million which is being written off over time and therefore, truly is a "nothing". This totals $354.2 million so that the excess of value over liabilities before reflecting obligations not included in the financials directly, but which are, substantiated as to category in the notes would be $433 million.

66 On a windup basis, there would be a pension deficiency of $1252 million; however, Stephen conservatively in my view looked at the Mercer actuary calculations on the basis of a going concern finding deficiency of $656 million. If the $1252 million windup figure had been taken, then the picture would have been even bleaker than it is as Stephen has calculated it for test (c) purposes. In addition, there are deferred pension costs of $198.7 million which under GAAP accounting calculations is allowed so as to defer recognition of past bad investment experience, but this has no realizable value. Then there is the question of Employee Future Benefits. These have been calculated as at December 31, 2003 by the Mercer actuary as $909.3 million but only $684 million has been accrued and booked on the financial statements so that there has to be an increased provision of $225.3 million. These off balance sheet adjustments total $1080 million.

67 Taking that last adjustment into account would result in a *negative* equity of ($433 million minus $1080 million) or *negative* $647 million. On that basis without taking into account possible reductions in capital assets as dealt with in the somewhat flawed Exhibit E nor environmental and other costs discussed above, Stelco is insolvent according to the test (c). With respect to Exhibit E, I have not relied on it in any way, but it is entirely likely that a properly calculated Exhibit E would provide comparators (also being sold in the U.S. under legal process in a fairly conducted process) which tend to require a further downward adjustment. Based on test (c), Stelco is significantly, not marginally, under water.

68 In reaching my conclusion as to the negative equity (and I find that Stephen approached that exercise fairly and constructively), please note my comments above regarding the possible assumption of pension obligations by the purchaser being offset by a reduction of the purchase price. The 35% adjustment advocated as to pension and employee benefits in this regard is speculation by the Union. Secondly, the Union emphasized cash flow as being important in evaluation, but it must be remembered that Stelco has been negative cash flow for some time which would make that analysis unreliable and to the detriment of the Union's position. The Union treated the $773 million estimated contribution to the shortfall in the pension deficiency by the Pension Benefits Guarantee Fund as eliminating that as a Stelco obligation. That is not the case however as that Fund would be subrogated to the claims of the employees in that respect with a result that Stelco would remain liable for that $773 million. Lastly, the Union indicated that there should be a $155 million adjustment as to the negative equity in Sub Applicants when calculating Stelco's equity. While Stephen at Q. 181-2 acknowledged that there was no adjustment for

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that, I agree with him that there ought not to be since Stelco was being examined (and the calculations were based) on an unconsolidated basis, not on a consolidated basis.

69 In the end result, I have concluded on the balance of probabilities that Stelco is insolvent and therefore it is a "debtor company" as at the date of filing and entitled to apply for the CCAA initial order. My conclusion is that (i) BIA test (c) strongly shows Stelco is insolvent; (ii) BIA test (a) demonstrates, to a less certain but sufficient basis, an insolvency and (iii) the "new" CCAA test again strongly supports the conclusion of insolvency. I am further of the opinion that I properly exercised my discretion in granting Stelco and the Sub Applicants the initial order on January 29, 2004 and I would confirm that as of the present date with effect on the date of filing. The Union's motion is therefore dismissed.

70 I appreciate that all the employees (union and non-union alike) and the Union and the International have a justifiable pride in their work and their workplace - and a human concern about what the future holds for them. The pensioners are in the same position. Their respective positions can only be improved by engaging in discussion, an exchange of views and information reasonably advanced and conscientiously listened to and digested, leading to mutual problem solving, ideas and negotiations. Negative attitudes can only lead to the detriment to all stakeholders. Unfortunately there has been some finger pointing on various sides; that should be put behind everyone so that participants in this process can concentrate on the future and not inappropriately dwell on the past. I understand that there have been some discussions and interchange over the past two weeks since the hearing and that is a positive start.

Motion dismissed.

APPENDIX

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KeyCite treatment
Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): One Bloor West Toronto Group (The One) Inc. (Re) | 2026 ONSC 1854, 2026 CarswellOnt 4462 | (Ont. S.C.J. [Commercial List], Mar 20, 2026)

2020 SCC 10, 2020 CSC 10
Supreme Court of Canada

9354-9186 Québec inc. v. Callidus Capital Corp.

2020 CarswellQue 3772, 2020 CarswellQue 3773, 2020 SCC 10, 2020 CSC 10, [2020] 1 S.C.R. 521, 1 B.L.R. (6th) 1, 317 A.C.W.S. (3d) 532, 444 D.L.R. (4th) 373, 78 C.B.R. (6th) 1

9354-9186 Québec inc. and 9354-9178 Québec inc. (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., 9354-9186 Québec inc., 9354-9178 Québec inc., Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

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

Heard: January 23, 2020
Judgment: May 8, 2020
Docket: 38594

Proceedings: reasons in full to *9354-9186 Québec inc. v. Callidus Capital Corp.* (2020), 2020 CarswellQue 237, 2020 CarswellQue 236, Abella J., Côté J., Karakatsanis J., Kasirer J., Moldaver J., Rowe J., Wagner C.J.C. (S.C.C.); reversing *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), 2019 QCCA 171, EYB 2019-306890, 2019 CarswellQue 94, Dumas J.C.A. (ad hoc), Dutil J.C.A., Schrager J.C.A. (C.A. Que.)

Counsel: Jean-Philippe Groleau, Christian Lachance, Gabriel Lavery Lepage, Hannah Toledano, for Appellants / Interveners, 9354-9186 Québec inc. and 9354-9178 Québec inc.
Neil A. Peden, for Appellants / Interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited)
Geneviève Cloutier, Clifton P. Prophet, for Respondent, Callidus Capital Corporation
Jocelyn Perreault, Noah Zucker, François Alexandre Toupin, for Respondents, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier
Joseph Reynaud, Nathalie Nouvet, for Intervener, Ernst & Young Inc.
Sylvain Rigaud, Arad Mojtahedi, Saam Pousht-Mashhad, for Interveners, Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals

Subject: Civil Practice and Procedure; Insolvency

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Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.c Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous
Debtor sought protection under Companies' Creditors Arrangement Act (CCAA) — Debtor brought application seeking authorization of funding agreement and requested placement of super-priority charge in favour of lender — After its first plan of arrangement was rejected, secured creditor submitted second plan and sought authorization to vote on it — Supervising judge dismissed secured creditor's application, holding that secured creditor was acting with improper purpose — After reviewing terms of proposed financing, supervising judge found it met criteria set out by courts — Finally, supervising judge imposed super-priority charge on debtor's assets in favour of lender — Secured creditor appealed supervising judge's order — Court of Appeal allowed appeal, finding that exercise of judge's discretion was not founded in law nor on proper treatment of facts — Debtor and lender, supported by monitor, appealed to Supreme Court of Canada — Appeal allowed — By seeking authorization to vote on second version of its own plan, secured creditor was attempting to circumvent creditor democracy CCAA protects — By doing so, secured creditor acted contrary to expectation that parties act with due diligence in insolvency proceeding and was properly barred from voting on second plan — Supervising judge considered proposed financing to be fair and reasonable and correctly determined that it was not plan of arrangement — Therefore, supervising judge's order should be reinstated.
Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Divers
Débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — Débitrice a déposé une requête visant à obtenir l'autorisation de conclure un accord de financement et a demandé l'autorisation de grever son actif d'une charge super-prioritaire en faveur du prêteur — Après que son premier plan d'arrangement ait été rejeté, la créancière garantie a soumis un deuxième plan et a demandé l'autorisation de voter sur ce plan — Juge surveillant a rejeté la demande de la créancière garantie, estimant que la créancière garantie agissait dans un but illégitime — Après en avoir examiné les modalités, le juge surveillant a conclu que le financement proposé respectait le critère établi par les tribunaux — Enfin, le juge surveillant a ordonné que les actifs de la débitrice soient grevés d'une charge super-prioritaire en faveur du prêteur — Créancière garantie a interjeté appel de l'ordonnance du juge surveillant — Cour d'appel a accueilli l'appel, estimant que l'exercice par le juge de son pouvoir discrétionnaire n'était pas fondé en droit, non plus qu'il ne reposât sur un traitement approprié des faits — Débitrice et le prêteur, appuyés par le contrôleur, ont formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — En cherchant à obtenir l'autorisation de voter sur la deuxième version de son propre plan, la créancière garantie tentait de contourner la démocratie entre les créanciers que défend la LACC — Ce faisant, la créancière garantie agissait manifestement à l'encontre de l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité et a été à juste titre empêchée de voter sur le nouveau plan — Juge surveillant a estimé que le financement proposé était juste et raisonnable et a eu raison de conclure que le financement ne constituait pas un plan d'arrangement — Par conséquent, l'ordonnance du juge surveillant devrait être rétablie.
The debtor manufactured, distributed, installed, and serviced electronic casino gaming machines. The debtor sought financing from a secured creditor, the debt being secured in part by a share pledge agreement. Over the following years, the debtor lost significant amounts of money, and the secured creditor continued to extend credit. Eventually, the debtor sought protection under the Companies' Creditors Arrangement Act (CCAA). In its petition, the debtor alleged that its liquidity issues were the result of the secured creditor taking de facto control of the corporation and dictating a number of purposefully detrimental business decisions in order to deplete the corporation's equity value with a view to owning the debtor's business and, ultimately, selling it. The debtor's petition succeeded, and an initial order was issued. The debtor then entered into an asset purchase agreement with the secured creditor whereby the secured creditor would obtain all of the debtor's assets in exchange for extinguishing almost the entirety of its secured claim against the debtor. The agreement would also permit the debtor to retain claims for damages against the creditor arising from its alleged involvement in the debtor's financial difficulties. The asset purchase agreement was approved by the supervising judge. The debtor brought an application seeking authorization of a proposed third-party litigation funding agreement (LFA) and the placement of a super-priority charge in favour of the lender. The secured creditor submitted a plan of arrangement along with an application seeking the authorization to vote with the unsecured creditors.

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The supervising judge dismissed the secured creditor's application, holding that the secured creditor should not be allowed to vote on its own plan because it was acting with an improper purpose. He noted that the secured creditor's first plan had been rejected and this attempt to vote on the new plan was an attempt to override the result of the first vote. Under the circumstances, given that the secured creditor's conduct was contrary to the requirements of appropriateness, good faith, and due diligence, allowing the secured creditor to vote would be both unfair and unreasonable. Since the new plan had no reasonable prospect of success, the supervising judge declined to submit it to a creditors' vote. The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third-party litigation funding set out by the courts. Finally, the supervising judge imposed the litigation financing charge on the debtor's assets in favour of the lender. The secured creditor appealed the supervising judge's order.

The Court of Appeal allowed the appeal, finding that the exercise of the judge's discretion was not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention was justified. In particular, the Court of Appeal identified two errors. First, the Court of Appeal was of the view that the supervising judge erred in finding that the secured creditor had an improper purpose in seeking to vote on its plan. The Court of Appeal relied heavily on the notion that creditors have a right to vote in their own self-interest. Second, the Court of Appeal concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to the debtor's commercial operations. In light of this perceived error, the Court of Appeal substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. The debtor and the lender, supported by the monitor, appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Wagner C.J.C., Moldaver J. (Abella, Karakatsanis, Côté, Rowe, Kasirer JJ. concurring): Section 11 of the CCAA empowers a judge to make any order that the judge considers appropriate in the circumstances. A high degree of deference is owed to discretionary decisions made by judges supervising CCAA proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably. This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the CCAA proceedings they oversee.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the CCAA that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. One such constraint arises from s. 11 of the CCAA, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. For example, a creditor acts for an improper purpose where the creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the objectives of the CCAA. Supervising judges are best placed to determine whether the power to bar a creditor from voting should be exercised. Here, the supervising judge made no error in exercising his discretion to bar the secured creditor from voting on its plan. The supervising judge was intimately familiar with the debtor's CCAA proceedings and noted that, by seeking an authorization to vote on a second version of its own plan, the first one having been rejected, the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the CCAA protects. By doing so, the secured creditor acted contrary to the expectation that parties act with due diligence in an insolvency proceeding. Hence, the secured creditor was properly barred from voting on the second plan.

Interim financing is a flexible tool that may take on a range of forms, and third-party litigation funding may be one such form. Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best placed to answer. Here, there was no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context. While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the CCAA individually before reaching his conclusion, this was not itself an error. It was apparent that the supervising judge was focused on the fairness at stake to all parties, the specific objectives of the CCAA, and the particular circumstances of this case when he approved the LFA as interim financing. The supervising judge correctly determined that the LFA was not a plan of arrangement because it did not propose any compromise of the creditors' rights. The super-priority charge he granted to the lender did not convert the LFA into a plan of arrangement by subordinating creditors' rights. Therefore, he did not err in the exercise of his discretion, no intervention was justified and the supervising judge's order should be reinstated.

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La débitrice fabriquait, distribuait, installait et entretenait des appareils de jeux électroniques pour casino. La débitrice a demandé du financement à la créancière garantie que la débitrice a garanti partiellement en signant une entente par laquelle elle mettait en gage ses actions. Au cours des années suivantes, la débitrice a perdu d'importantes sommes d'argent et la créancière garantie a continué de lui consentir du crédit. Finalement, la débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC). Dans sa requête, la débitrice a fait valoir que ses problèmes de liquidité découlaient du fait que la créancière garantie exerçait un contrôle de facto à l'égard de son entreprise et lui dictait un certain nombre de décisions d'affaires dans l'intention de lui nuire et de réduire la valeur de ses actions dans le but de devenir propriétaire de l'entreprise de la débitrice et ultimement de la vendre. La requête de la débitrice a été accordée et une ordonnance initiale a été émise. La débitrice a alors signé une convention d'achat d'actifs avec la créancière garantie en vertu de laquelle la créancière garantie obtiendrait l'ensemble des actifs de la débitrice en échange de l'extinction de la presque totalité de la créance garantie qu'elle détenait à l'encontre de la débitrice. Cette convention prévoyait également que la débitrice se réservait le droit de réclamer des dommages-intérêts à la créancière garantie en raison de l'implication alléguée de celle-ci dans ses difficultés financières. Le juge surveillant a approuvé la convention d'achat d'actifs. La débitrice a déposé une requête visant à obtenir l'autorisation de conclure un accord de financement du litige par un tiers (AFL) et l'autorisation de grever son actif d'une charge super-prioritaire en faveur du prêteur. La créancière garantie a soumis un plan d'arrangement et une requête visant à obtenir l'autorisation de voter avec les créanciers chirographaires.

Le juge surveillant a rejeté la demande de la créancière garantie, estimant que la créancière garantie ne devrait pas être autorisée à voter sur son propre plan puisqu'elle agissait dans un but illégitime. Il a fait remarquer que le premier plan de la créancière garantie avait été rejeté et que cette tentative de voter sur le nouveau plan était une tentative de contourner le résultat du premier vote. Dans les circonstances, étant donné que la conduite de la créancière garantie était contraire à l'opportunité, à la bonne foi et à la diligence requises, lui permettre de voter serait à la fois injuste et déraisonnable. Comme le nouveau plan n'avait aucune possibilité raisonnable de recevoir l'aval des créanciers, le juge surveillant a refusé de le soumettre au vote des créanciers. Le juge surveillant a décidé qu'il n'était pas nécessaire de soumettre l'AFL au vote des créanciers parce qu'il ne s'agissait pas d'un plan d'arrangement. Après en avoir examiné les modalités, le juge surveillant a conclu que l'AFL respectait le critère d'approbation applicable en matière de financement d'un litige par un tiers établi par les tribunaux. Enfin, le juge surveillant a ordonné que les actifs de la débitrice soient grevés de la charge liée au financement du litige en faveur du prêteur. La créancière garantie a interjeté appel de l'ordonnance du juge surveillant.

La Cour d'appel a accueilli l'appel, estimant que l'exercice par le juge de son pouvoir discrétionnaire n'était pas fondé en droit, non plus qu'il ne reposât sur un traitement approprié des faits, de sorte que, peu importe la norme de contrôle appliquée, il était justifié d'intervenir en appel. En particulier, la Cour d'appel a relevé deux erreurs. D'une part, la Cour d'appel a conclu que le juge surveillant a commis une erreur en concluant que la créancière garantie a agi dans un but illégitime en demandant l'autorisation de voter sur son plan. La Cour d'appel s'appuyait grandement sur l'idée que les créanciers ont le droit de voter en fonction de leur propre intérêt. D'autre part, la Cour d'appel a conclu que le juge surveillant a eu tort d'approuver l'AFL en tant qu'accord de financement provisoire parce qu'à son avis, il n'était pas lié aux opérations commerciales de la débitrice. À la lumière de ce qu'elle percevait comme une erreur, la Cour d'appel a substitué son opinion selon laquelle l'AFL était un plan d'arrangement et que pour cette raison, il aurait dû être soumis au vote des créanciers. La débitrice et le prêteur, appuyés par le contrôleur, ont formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

Wagner, J.C.C., Moldaver, J. (Abella, Karakatsanis, Côté, Rowe, Kasirer, JJ., souscrivant à leur opinion) : L'article 11 de la LACC confère au juge le pouvoir de rendre toute ordonnance qu'il estime indiquée dans les circonstances. Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la LACC commandent un degré élevé de déférence. Ainsi, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable. Cette norme déférente de contrôle tient compte du fait que le juge surveillant possède une connaissance intime des procédures intentées sous le régime de la LACC dont il assure la supervision.

En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la LACC qui peuvent limiter son droit de voter, ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Une telle limite découle de l'art. 11 de la LACC, qui confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter lorsqu'il agit dans un but illégitime. Par exemple,

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un créancier agit dans un but illégitime lorsque le créancier cherche à exercer ses droits de vote de manière à contrecarrer, à miner les objectifs de la LACC ou à aller à l'encontre de ceux-ci. Le juge surveillant est mieux placé que quiconque pour déterminer s'il doit exercer le pouvoir d'empêcher le créancier de voter. En l'espèce, le juge surveillant n'a commis aucune erreur en exerçant son pouvoir discrétionnaire pour empêcher la créancière garantie de voter sur son plan. Le juge surveillant connaissait très bien les procédures fondées sur la LACC relatives à la débitrice et a fait remarquer que, en cherchant à obtenir l'autorisation de voter sur la deuxième version de son propre plan, la première ayant été rejetée, la créancière garantie tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la LACC. Ce faisant, la créancière garantie agissait manifestement à l'encontre de l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité. Ainsi, la créancière garantie a été à juste titre empêchée de voter sur le nouveau plan.

Le financement temporaire est un outil souple qui peut revêtir différentes formes, et le financement d'un litige par un tiers peut constituer l'une de ces formes. Au bout du compte, la question de savoir s'il y a lieu d'approuver le financement temporaire projeté est une question à laquelle le juge surveillant est le mieux placé pour répondre. En l'espèce, il n'y avait aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'AFL à titre de financement temporaire. Se fondant sur les principes applicables à l'approbation d'accords semblables dans le contexte des recours collectifs, le juge surveillant a estimé que l'AFL était juste et raisonnable. Bien que le juge surveillant n'ait pas examiné à fond chacun des facteurs énoncés à l'art. 11.2(4) de la LACC de façon individuelle avant de tirer sa conclusion, cela ne constituait pas une erreur en soi. Il était manifeste que le juge surveillant a mis l'accent sur l'équité envers toutes les parties, les objectifs précis de la LACC et les circonstances particulières de la présente affaire lorsqu'il a approuvé l'AFL à titre de financement temporaire. Le juge surveillant a eu raison de conclure que l'AFL ne constituait pas un plan d'arrangement puisqu'il ne proposait aucune transaction visant les droits des créanciers. La charge super-prioritaire qu'il a accordée au prêteur ne convertissait pas l'AFL en plan d'arrangement en subordonnant les droits des créanciers. Par conséquent, il n'a pas commis d'erreur dans l'exercice de sa discrétion, aucune intervention n'était justifiée et l'ordonnance du juge surveillant devrait être rétablie.

Table of Authorities

Cases considered by *Wagner C.J.C., Moldaver J.*:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, *(*sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, *(*sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, *(*sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513 (Ont. C.A.) — referred to

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board) (2006), 2006 SCC 4, 2006 CarswellAlta 139, 2006 CarswellAlta 140, 344 N.R. 293, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140 (S.C.C.) — referred to

Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.) (2018), 2018 QCCS 1040, 2018 CarswellQue 1923 (C.S. Que.) — referred to

BA Energy Inc., Re (2010), 2010 ABQB 507, 2010 CarswellAlta 1598, 70 C.B.R. (5th) 24 (Alta. Q.B.) — referred to

Blackburn Developments Ltd., Re (2011), 2011 BCSC 1671, 2011 CarswellBC 3291, 27 B.C.L.R. (5th) 199 (B.C. S.C.) — referred to

Boutiques San Francisco inc., Re (2003), 2003 CarswellQue 13882 (C.S. Que.) — referred to

Bridging Finance Inc. v. Béton Brunet 2001 inc. (2017), 2017 CarswellQue 328, 2017 QCCA 138, 44 C.B.R. (6th) 175 (C.A. Que.) — referred to

Canada Trustco Mortgage Co. v. R. (2005), 2005 SCC 54, 2005 CarswellNat 3212, 2005 CarswellNat 3213, *(*sub nom. *Canada Trustco Mortgage Co. v. Canada)* 2005 D.T.C. 5523 (Eng.), *(*sub nom. *Hypothèques Trustco Canada v. Canada)* 2005 D.T.C. 5547 (Fr.), [2005] 5 C.T.C. 215, *(*sub nom. *Minister of National Revenue v. Canada Trustco Mortgage Co.)* 340 N.R. 1, 259 D.L.R. (4th) 193, [2005] 2 S.C.R. 601 (S.C.C.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — referred to

Caterpillar Financial Services Ltd. v. 360networks Corp. (2007), 2007 BCCA 14, 2007 CarswellBC 29, 28 E.T.R. (3d) 186, 27 C.B.R. (5th) 115, 61 B.C.L.R. (4th) 334, 10 P.P.S.A.C. (3d) 311, 235 B.C.A.C. 95, 388 W.A.C. 95, 279 D.L.R. (4th) 701 (B.C. C.A.) — referred to

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Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 258 B.C.A.C. 187, 434 W.A.C. 187 (B.C. C.A.) — referred to

Crystallex International Corp., Re (2012), 2012 ONSC 2125, 2012 CarswellOnt 4577, 91 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — considered

Crystallex International Corp., Re (2012), 2012 ONCA 404, 2012 CarswellOnt 7329, 91 C.B.R. (5th) 207, 293 O.A.C. 102, 4 B.L.R. (5th) 1 (Ont. C.A.) — considered

Dugal v. Manulife Financial Corp. (2011), 2011 ONSC 1785, 2011 CarswellOnt 1889, 105 O.R. (3d) 364, 18 C.P.C. (7th) 105 (Ont. S.C.J.) — referred to

Edgewater Casino Inc., Re (2009), 2009 BCCA 40, 2009 CarswellBC 213, 51 C.B.R. (5th) 1, 265 B.C.A.C. 274, 446 W.A.C. 274, (sub nom. *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.)* 308 D.L.R. (4th) 339 (B.C. C.A.) — followed

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

Fracmaster Ltd., Re (1999), 1999 CarswellAlta 461, 245 A.R. 102, 11 C.B.R. (4th) 204, 1999 ABQB 379 (Alta. Q.B.) — referred to

Grant Forest Products Inc. v. Toronto-Dominion Bank (2015), 2015 ONCA 570, 2015 CarswellOnt 11970, 26 C.B.R. (6th) 218, 20 C.C.P.B. (2nd) 161, 387 D.L.R. (4th) 426, 9 E.T.R. (4th) 205, 2015 C.E.B. & P.G.R. 8139 (headnote only), 337 O.A.C. 237, 26 C.C.E.L. (4th) 176, 4 P.P.S.A.C. (4th) 358 (Ont. C.A.) — referred to

HSBC Bank Canada v. Bear Mountain Master Partnership (2010), 2010 BCSC 1563, 2010 CarswellBC 2962, 72 C.B.R. (4th) 276 (B.C. S.C. [In Chambers]) — referred to

Hayes v. Saint John (City) (2016), 2016 NBBR 125, 2016 NBQB 125, 2016 CarswellNB 253, 2016 CarswellNB 254 (N.B. Q.B.) — referred to

Houle v. St. Jude Medical Inc. (2017), 2017 ONSC 5129, 2017 CarswellOnt 13215, 9 C.P.C. (8th) 321 (Ont. S.C.J.) — referred to

Houle v. St. Jude Medical Inc. (2018), 2018 ONSC 6352, 2018 CarswellOnt 17713, 429 D.L.R. (4th) 739, 29 C.P.C. (8th) 409 (Ont. Div. Ct.) — referred to

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

Kitchener Frame Ltd., Re (2012), 2012 ONSC 234, 2012 CarswellOnt 1347, 86 C.B.R. (5th) 274 (Ont. S.C.J. [Commercial List]) — referred to

Langtry v. Dumoulin (1885), 7 O.R. 644 (Ont. Div. Ct.) — referred to

Laserworks Computer Services Inc., Re (1998), 1998 CarswellNS 38, (sub nom. *Laserworks Computer Services Inc. (Bankrupt), Re)* 165 N.S.R. (2d) 297, (sub nom. *Laserworks Computer Services Inc. (Bankrupt), Re)* 495 A.P.R. 297, 6 C.B.R. (4th) 69, 37 B.L.R. (2d) 226, 1998 NSCA 42, 165 N.S.R. (2d) 296 (N.S. C.A.) — considered

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

Marcotte c. Banque de Montréal (2015), 2015 QCCS 1915, 2015 CarswellQue 4055 (C.S. Que.) — referred to

McIntyre Estate v. Ontario (Attorney General) (2002), 2002 CarswellOnt 2880, 23 C.P.C. (5th) 59, 218 D.L.R. (4th) 193, 61 O.R. (3d) 257, 164 O.A.C. 37 (Ont. C.A.) — referred to

Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp. (2013), 2013 ONSC 4974, 2013 CarswellOnt 11197, 117 O.R. (3d) 150, 55 C.P.C. (7th) 437, 6 C.C.P.B. (2nd) 82 (Ont. S.C.J.) — referred to

New Skeena Forest Products Inc., Re (2005), 2005 BCCA 192, 2005 CarswellBC 705, 7 M.P.L.R. (4th) 153, 9 C.B.R. (5th) 278, 39 B.C.L.R. (4th) 338, [2005] 8 W.W.R. 224, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 210 B.C.A.C. 247, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 348 W.A.C. 247 (B.C. C.A.) — referred to

Nortel Networks Corp., Re (2015), 2015 ONCA 681, 2015 CarswellOnt 15461, 391 D.L.R. (4th) 283, 127 O.R. (3d) 641, 340 O.A.C. 234, 32 C.B.R. (6th) 21 (Ont. C.A.) — referred to

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North American Tungsten Corp. v. Global Tungsten and Powders Corp. (2015), 2015 BCCA 390, 2015 CarswellBC 2629, 76 C.P.C. (7th) 1, 377 B.C.A.C. 6, 648 W.A.C. 6, 32 C.B.R. (6th) 175 (B.C. C.A.) — referred to

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

Pole Lite ltée c. Banque Nationale du Canada (2006), 2006 CarswellQue 3438, 2006 QCCA 557, [2006] R.J.Q. 1009 (C.A. Que.) — referred to

Royal Bank v. Fracmaster Ltd. (1999), 1999 CarswellAlta 539, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 209 W.A.C. 93, 11 C.B.R. (4th) 230, 1999 ABCA 178 (Alta. C.A.) — referred to

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 625, 6 C.B.R. (4th) 314, 96 O.T.C. 272 (Ont. Gen. Div. [Commercial List]) — referred to

Schenk v. Valeant Pharmaceuticals International Inc. (2015), 2015 ONSC 3215, 2015 CarswellOnt 8651, 74 C.P.C. (7th) 332 (Ont. S.C.J.) — referred to

Stanway v. Wyeth Canada Inc. (2013), 2013 BCSC 1585, 2013 CarswellBC 2630, 41 C.P.C. (7th) 209, [2014] 3 W.W.R. 808, 56 B.C.L.R. (5th) 192 (B.C. S.C.) — referred to

Stelco Inc., Re (2005), 2005 CarswellOnt 1188, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 196 O.A.C. 142, 253 D.L.R. (4th) 109, 75 O.R. (3d) 5 (Ont. C.A.) — referred to

Target Canada Co., Re (2015), 2015 ONSC 303, 2015 CarswellOnt 620, 22 C.B.R. (6th) 323 (Ont. S.C.J.) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — followed

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc. (2019), 2019 ONCA 508, 2019 CarswellOnt 9683, 70 C.B.R. (6th) 181, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 11 P.P.S.A.C. (4th) 11 (Ont. C.A.) — referred to

1078385 Ontario Ltd., Re (2004), 2004 CarswellOnt 8034, 16 C.B.R. (5th) 152, (sub nom. *1078385 Ontario Ltd. (Receivership), Re)* 206 O.A.C. 17 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 4.2 [en. 2019, c. 29, s. 133] — referred to

s. 43(7) — referred to

s. 50(1) — referred to

s. 54(3) — considered

s. 108(3) — referred to

s. 187(9) — considered

Champerty, Act respecting, R.S.O. 1897, c. 327

Generally — referred to

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

Generally — referred to

s. 2(1) "debtor company" — referred to

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s. 3(1) — referred to

s. 4 — referred to

s. 5 — referred to

s. 6 — referred to

s. 6(1) — considered

s. 11 — considered

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

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

s. 11.2(2) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4)(a) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(b) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(c) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(d) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(e) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(f) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(g) [en. 2007, c. 36, s. 65] — considered

s. 11.2(5) [en. 2005, c. 47, s. 128] — considered

s. 11.7 [en. 1997, c. 12, s. 124] — referred to

s. 11.8 [en. 1997, c. 12, s. 124] — referred to

s. 18.6 [en. 1997, c. 12, s. 125] — considered

s. 22(1) — referred to

s. 22(2) — referred to

s. 22(3) — considered

s. 23(1)(d) — referred to

s. 23(1)(i) — referred to

ss. 23-25 — referred to

s. 36 — considered

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

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Generally — referred to

s. 6(1) — referred to

APPEAL by debtor from judgment reported at *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), EYB 2019-306890, 2019 CarswellQue 94, 2019 QCCA 171 (C.A. Que.), finding that debtor's scheme amounted to plan of arrangement and that funding request should be submitted to creditors for approval.

POURVOI formé par la débitrice à l'encontre d'une décision publiée à *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), EYB 2019-306890, 2019 CarswellQue 94, 2019 QCCA 171 (C.A. Que.), ayant conclu que la proposition de la débitrice constituait un plan d'arrangement et que la demande de financement devrait être soumise aux créanciers pour approbation.

Wagner C.J.C., Moldaver J. **(Abella, Karakatsanis, Côté, Rowe and Kasirer JJ. concurring):**

I. Overview

1 These appeals arise in the context of an ongoing proceeding instituted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), in which substantially all of the assets of the debtor companies have been liquidated. The proceeding was commenced well over four years ago. Since then, a single supervising judge has been responsible for its oversight. In this capacity, he has made numerous discretionary decisions.

2 Two of the supervising judge's decisions are in issue before us. Each raises a question requiring this Court to clarify the nature and scope of judicial discretion in *CCAA* proceedings. The first is whether a supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. The second is whether a supervising judge can approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*.

3 For the reasons that follow, we would answer both questions in the affirmative, as did the supervising judge. To the extent the Court of Appeal disagreed and went on to interfere with the supervising judge's discretionary decisions, we conclude that it was not justified in doing so. In our respectful view, the Court of Appeal failed to treat the supervising judge's decisions with the appropriate degree of deference. In the result, as we ordered at the conclusion of the hearing, these appeals are allowed and the supervising judge's order reinstated.

II. Facts

4 In 1994, Mr. Gérald Duhamel founded Bluberi Gaming Technologies Inc., which is now one of the appellants, 9354-9186 Québec inc. The corporation manufactured, distributed, installed, and serviced electronic casino gaming machines. It also provided management systems for gambling operations. Its sole shareholder has at all material times been Bluberi Group Inc., which is now another of the appellants, 9354-9178 Québec inc. Through a family trust, Mr. Duhamel controls Bluberi Group Inc. and, as a result, Bluberi Gaming (collectively, "Bluberi").

5 In 2012, Bluberi sought financing from the respondent, Callidus Capital Corporation ("Callidus"), which describes itself as an "asset-based or distressed lender" (R.F., at para. 26). Callidus extended a credit facility of approximately $24 million to Bluberi. This debt was secured in part by a share pledge agreement.

6 Over the next three years, Bluberi lost significant amounts of money, and Callidus continued to extend credit. By 2015, Bluberi owed approximately $86 million to Callidus — close to half of which Bluberi asserts is comprised of interest and fees.

A. Bluberi's Institution of CCAA Proceedings and Initial Sale of Assets

7 On November 11, 2015, Bluberi filed a petition for the issuance of an initial order under the *CCAA*. In its petition, Bluberi alleged that its liquidity issues were the result of Callidus taking *de facto* control of the corporation and dictating a number

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of purposefully detrimental business decisions. Bluberi alleged that Callidus engaged in this conduct in order to deplete the corporation's equity value with a view to owning Bluberi and, ultimately, selling it.

8 Over Callidus's objection, Bluberi's petition succeeded. The supervising judge, Michaud J., issued an initial order under the *CCAA*. Among other things, the initial order confirmed that Bluberi was a "debtor company" within the meaning of s. 2(1) of the Act; stayed any proceedings against Bluberi or any director or officer of Bluberi; and appointed Ernst & Young Inc. as monitor ("Monitor").

9 Working with the Monitor, Bluberi determined that a sale of its assets was necessary. On January 28, 2016, it proposed a sale solicitation process, which the supervising judge approved. That process led to Bluberi entering into an asset purchase agreement with Callidus. The agreement contemplated that Callidus would obtain all of Bluberi's assets in exchange for extinguishing almost the entirety of its secured claim against Bluberi, which had ballooned to approximately $135.7 million. Callidus would maintain an undischarged secured claim of $3 million against Bluberi. The agreement would also permit Bluberi to retain claims for damages against Callidus arising from its alleged involvement in Bluberi's financial difficulties ("Retained Claims"). [1] Throughout these proceedings, Bluberi has asserted that the Retained Claims should amount to over $200 million in damages.

10 The supervising judge approved the asset purchase agreement, and the sale of Bluberi's assets to Callidus closed in February 2017. As a result, Callidus effectively acquired Bluberi's business, and has continued to operate it as a going concern.

11 Since the sale, the Retained Claims have been Bluberi's sole remaining asset and thus the sole security for Callidus's $3 million claim.

B. The Initial Competing Plans of Arrangement

12 On September 11, 2017, Bluberi filed an application seeking the approval of a $2 million interim financing credit facility to fund the litigation of the Retained Claims and other related relief. The lender was a joint venture numbered company incorporated as 9364-9739 Québec inc. This interim financing application was set to be heard on September 19, 2017.

13 However, one day before the hearing, Callidus proposed a plan of arrangement ("First Plan") and applied for an order convening a creditors' meeting to vote on that plan. The First Plan proposed that Callidus would fund a $2.5 million (later increased to $2.63 million) distribution to Bluberi's creditors, except itself, in exchange for a release from the Retained Claims. This would have fully satisfied the claims of Bluberi's former employees and those creditors with claims worth less than $3000; creditors with larger claims were to receive, on average, 31 percent of their respective claims.

14 The supervising judge adjourned the hearing of both applications to October 5, 2017. In the meantime, Bluberi filed its own plan of arrangement. Among other things, the plan proposed that half of any proceeds resulting from the Retained Claims, after payment of expenses and Bluberi's creditors' claims, would be distributed to the unsecured creditors, as long as the net proceeds exceeded $20 million.

15 On October 5, 2017, the supervising judge ordered that the parties' plans of arrangement could be put to a creditors' vote. He ordered that both parties share the fees and expenses related to the presentation of the plans of arrangement at a creditors' meeting, and that a party's failure to deposit those funds with the Monitor would bar the presentation of that party's plan of arrangement. Bluberi elected not to deposit the necessary funds, and, as a result, only Callidus's First Plan was put to the creditors.

C. Creditors' Vote on Callidus's First Plan

16 On December 15, 2017, Callidus submitted its First Plan to a creditors' vote. The plan failed to receive sufficient support. Section 6(1) of the *CCAA* provides that, to be approved, a plan must receive a "double majority" vote in each class of creditors — that is, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims. All of Bluberi's creditors, besides Callidus, formed a single voting class of unsecured creditors. Of the 100 voting unsecured creditors, 92 creditors (representing $3,450,882 of debt) voted in favour, and 8 voted against (representing $2,375,913 of debt). The First Plan failed because the creditors voting in favour only held 59.22 percent of the total value being voted, which did

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not meet the s. 6(1) threshold. Most notably, SMT Hautes Technologies ("SMT"), which held 36.7 percent of Bluberi's debt, voted against the plan.

17 Callidus did not vote on the First Plan — despite the Monitor explicitly stating that Callidus could have "vote[d] ... the portion of its claim, assessed by Callidus, to be an unsecured claim" (Joint R.R., vol. III, at p.188).

D. Bluberi's Interim Financing Application and Callidus's New Plan

18 On February 6, 2018, Bluberi filed one of the applications underlying these appeals, seeking authorization of a proposed third party litigation funding agreement ("LFA") with a publicly traded litigation funder, IMF Bentham Limited or its Canadian subsidiary, Bentham IMF Capital Limited (collectively, "Bentham"). Bluberi's application also sought the placement of a $20 million super-priority charge in favour of Bentham on Bluberi's assets ("Litigation Financing Charge").

19 The LFA contemplated that Bentham would fund Bluberi's litigation of the Retained Claims in exchange for receiving a portion of any settlement or award after trial. However, were Bluberi's litigation to fail, Bentham would lose all of its invested funds. The LFA also provided that Bentham could terminate the litigation of the Retained Claims if, acting reasonably, it were no longer satisfied of the merits or commercial viability of the litigation.

20 Callidus and certain unsecured creditors who voted in favour of its plan (who are now respondents and style themselves the "Creditors' Group") contested Bluberi's application on the ground that the LFA was a plan of arrangement and, as such, had to be submitted to a creditors' vote. [2]

21 On February 12, 2018, Callidus filed the other application underlying these appeals, seeking to put another plan of arrangement to a creditors' vote ("New Plan"). The New Plan was essentially identical to the First Plan, except that Callidus increased the proposed distribution by $250,000 (from $2.63 million to $2.88 million). Further, Callidus filed an amended proof of claim, which purported to value the security attached to its $3 million claim at *nil*. Callidus was of the view that this valuation was proper because Bluberi had no assets other than the Retained Claims. On this basis, Callidus asserted that it stood in the position of an unsecured creditor, and sought the supervising judge's permission to vote on the New Plan with the other unsecured creditors. Given the size of its claim, if Callidus were permitted to vote on the New Plan, the plan would necessarily pass a creditors' vote. Bluberi opposed Callidus's application.

22 The supervising judge heard Bluberi's interim financing application and Callidus's application regarding its New Plan together. Notably, the Monitor supported Bluberi's position.

III. Decisions Below

A. Quebec Superior Court (2018 QCCS 1040 (C.S. Que.)) (Michaud J.)

23 The supervising judge dismissed Callidus's application, declining to submit the New Plan to a creditors' vote. He granted Bluberi's application, authorizing Bluberi to enter into a litigation funding agreement with Bentham on the terms set forth in the LFA and imposing the Litigation Financing Charge on Bluberi's assets.

24 With respect to Callidus's application, the supervising judge determined Callidus should not be permitted to vote on the New Plan because it was acting with an "improper purpose" (para. 48). He acknowledged that creditors are generally entitled to vote in their own self-interest. However, given that the First Plan — which was almost identical to the New Plan — had been defeated by a creditors' vote, the supervising judge concluded that Callidus's attempt to vote on the New Plan was an attempt to override the result of the first vote. In particular, he wrote:

> Taking into consideration the creditors' interest, the Court accepted, in the fall of 2017, that Callidus' Plan be submitted to their vote with the understanding that, as a secured creditor, Callidus would not cast a vote. However, under the present circumstances, it would serve an improper purpose if Callidus was allowed to vote on its own plan, especially when its vote would very likely result in the New Plan meeting the two thirds threshold for approval under the CCAA.

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> As pointed out by SMT, the main unsecured creditor, Callidus' attempt to vote aims only at cancelling SMT's vote which prevented Callidus' Plan from being approved at the creditors' meeting.
>
> It is one thing to let the creditors vote on a plan submitted by a secured creditor, it is another to allow this secured creditor to vote on its own plan in order to exert control over the vote for the sole purpose of obtaining releases. [paras. 45-47]

25 The supervising judge concluded that, in these circumstances, allowing Callidus to vote would be both "unfair and unreasonable" (para. 47). He also observed that Callidus's conduct throughout the *CCAA* proceedings "lacked transparency" (at para. 41) and that Callidus was "solely motivated by the [pending] litigation" (para. 44). In sum, he found that Callidus's conduct was contrary to the "requirements of appropriateness, good faith, and due diligence", and ordered that Callidus would not be permitted to vote on the New Plan (para. 48, citing *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter Century Services], at para. 70).

26 Because Callidus was not permitted to vote on the New Plan and SMT had unequivocally stated its intention to vote against it, the supervising judge concluded that the plan had no reasonable prospect of success. He therefore declined to submit it to a creditors' vote.

27 With respect to Bluberi's application, the supervising judge considered three issues relevant to these appeals: (1) whether the LFA should be submitted to a creditors' vote; (2) if not, whether the LFA ought to be approved by the court; and (3) if so, whether the $20 million Litigation Financing Charge should be imposed on Bluberi's assets.

28 The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. He considered a plan of arrangement to involve "an arrangement or compromise between a debtor and its creditors" (para. 71, citing *Crystallex International Corp., Re*, 2012 ONCA 404, 293 O.A.C. 102 (Ont. C.A.), at para. 92 ("*Crystallex*")). In his view, the LFA lacked this essential feature. He also concluded that the LFA did not need to be accompanied by a plan, as Bluberi had stated its intention to file a plan in the future.

29 After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third party litigation funding set out in *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2013 ONSC 4974, 117 O.R. (3d) 150 (Ont. S.C.J.), at para. 41, and *Hayes v. Saint John (City)*, 2016 NBQB 125 (N.B. Q.B.), at para. 4 (CanLII). In particular, he considered Bentham's percentage of return to be reasonable in light of its level of investment and risk. Further, the supervising judge rejected Callidus and the Creditors' Group's argument that the LFA gave too much discretion to Bentham. He found that the LFA did not allow Bentham to exert undue influence on the litigation of the Retained Claims, noting similarly broad clauses had been approved in the *CCAA* context (para. 82, citing *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332 (Ont. S.C.J.), at para. 23).

30 Finally, the supervising judge imposed the Litigation Financing Charge on Bluberi's assets. While significant, the supervising judge considered the amount to be reasonable given: the amount of damages that would be claimed from Callidus; Bentham's financial commitment to the litigation; and the fact that Bentham was not charging any interim fees or interest (i.e., it would only profit in the event of successful litigation or settlement). Put simply, Bentham was taking substantial risks, and it was reasonable that it obtain certain guarantees in exchange.

31 Callidus, again supported by the Creditors' Group, appealed the supervising judge's order, impleading Bentham in the process.

B. Quebec Court of Appeal (2019 QCCA 171 (C.A. Que.)) (Dutil and Schrager JJ.A. and Dumas J. (ad hoc))

32 The Court of Appeal allowed the appeal, finding that "[t]he exercise of the judge's discretion [was] not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention [was] justified" (para. 48 CanLII)). In particular, the court identified two errors of relevance to these appeals.

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33 First, the court was of the view that the supervising judge erred in finding that Callidus had an improper purpose in seeking to vote on its New Plan. In its view, Callidus should have been permitted to vote. The court relied heavily on the notion that creditors have a right to vote in their own self-interest. It held that any judicial discretion to preclude voting due to improper purpose should be reserved for the "clearest of cases" (para. 62, referring to *Blackburn Developments Ltd., Re*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199 (B.C. S.C.), at para. 45). The court was of the view that Callidus's transparent attempt to obtain a release from Bluberi's claims against it did not amount to an improper purpose. The court also considered Callidus's conduct prior to and during the *CCAA* proceedings to be incapable of justifying a finding of improper purpose.

34 Second, the court concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to Bluberi's commercial operations. The court concluded that the supervising judge had both "misconstrued in law the notion of interim financing and misapplied that notion to the factual circumstances of the case" (para. 78).

35 In light of this perceived error, the court substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. It held that "[a]n arrangement or proposal can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them" (para. 85). The court considered the LFA to be a plan of arrangement because it affected the creditors' share in any eventual litigation proceeds, would cause them to wait for the outcome of any litigation, and could potentially leave them with nothing at all. Moreover, the court held that Bluberi's scheme "as a whole", being the prosecution of the Retained Claims and the LFA, should be submitted as a plan to the creditors for their approval (para. 89).

36 Bluberi and Bentham (collectively, "appellants"), again supported by the Monitor, now appeal to this Court.

IV. Issues

37 These appeals raise two issues:

(1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?

(2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the *CCAA*?

V. Analysis

A. Preliminary Considerations

38 Addressing the above issues requires situating them within the contemporary Canadian insolvency landscape and, more specifically, the *CCAA* regime. Accordingly, before turning to those issues, we review (1) the evolving nature of *CCAA* proceedings; (2) the role of the supervising judge in those proceedings; and (3) the proper scope of appellate review of a supervising judge's exercise of discretion.

(1) The Evolving Nature of CCAA Proceedings

39 The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).

40 Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving

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and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* 2nd ed. (2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

41 Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

42 That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014, 139 O.R. (3d) 1 (Ont. C.A.), at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416 (Ont. C.A.), at para. 70).

43 Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Target Canada Co., Re*, 2015 ONSC 303, 22 C.B.R. (6th) 323 (Ont. S.C.J.), at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

44 *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93 (Alta. C.A.), at paras. 15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204 (Alta. Q.B.), at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

45 However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business. [3] Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed,

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in *Indalex*, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

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

(2) The Role of a Supervising Judge in CCAA Proceedings

47 One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

48 The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing 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. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco Inc., Re* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

49 The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

50 The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

> **Good faith**
>
> **18.6 (1)** Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **Good faith — powers of court**
>
> **(2)** If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.
>
> (See also *BIA*, s. 4.2; *Budget Implementation Act, 2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

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51 The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6 (B.C. C.A.), at paras. 21-23; *BA Energy Inc., Re*, 2010 ABQB 507, 70 C.B.R. (5th) 24 (Alta. Q.B.); *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (4th) 276 (B.C. S.C. [In Chambers]), at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701 (B.C. C.A.), at paras. 51-52, in which the courts seized on a party's failure to act diligently).

52 We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the *CCAA* (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as "the eyes and the ears of the court" throughout the proceedings (*Essar*, at para. 109). The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing (see *CCAA*, s. 23(1)(d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp-566 and 569).

(3) Appellate Review of Exercises of Discretion by a Supervising Judge

53 A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426 (Ont. C.A.), at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175 (C.A. Que.), at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338 (B.C. C.A.), at para. 20).

54 This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Edgewater Casino Inc., Re*, 2009 BCCA 40, 308 D.L.R. (4th) 339 (B.C. C.A.) ("*Re Edgewater Casino Inc.*), at para. 20, are apt:

> ... one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. ... *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

55 With the foregoing in mind, we turn to the issues on appeal.

B. Callidus Should Not Be Permitted to Vote on Its New Plan

56 A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights (e.g., s. 22(3)), or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. We conclude that one such constraint arises from s. 11 of the *CCAA*, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. Supervising judges are best-placed to determine whether this discretion should be exercised in a particular case. In our view, the supervising judge here made no error in exercising his discretion to bar Callidus from voting on the New Plan.

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(1) Parameters of Creditors' Right to Vote on Plans of Arrangement

57 Creditor approval of any plan of arrangement or compromise is a key feature of the *CCAA*, as is the supervising judge's oversight of that process. Where a plan is proposed, an application may be made to the supervising judge to order a creditors' meeting to vote on the proposed plan (*CCAA*, ss. 4 and 5). The supervising judge has the discretion to determine whether to order the meeting. For the purposes of voting at a creditors' meeting, the debtor company may divide the creditors into classes, subject to court approval (*CCAA*, s. 22(1)). Creditors may be included in the same class if "their interests or rights are sufficiently similar to give them a commonality of interest" (*CCAA*, s. 22(2); see also L. W. Houlden, G. B. Morawetz and J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf)), vol. 4, at §149). If the requisite "double majority" in each class of creditors — again, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims — vote in favour of the plan, the supervising judge may sanction the plan (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 296 D.L.R. (4th) 135 (Ont. C.A.), at para. 34; see *CCAA*, s. 6). The supervising judge will conduct what is commonly referred to as a "fairness hearing" to determine, among other things, whether the plan is fair and reasonable (Wood, at pp. 490-92; see also Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 529; Houlden, Morawetz and Sarra at §45). Once sanctioned by the supervising judge, the plan is binding on each class of creditors that participated in the vote (*CCAA*, s. 6(1)).

58 Creditors with a provable claim against the debtor whose interests are affected by a proposed plan are usually entitled to vote on plans of arrangement (Wood, at p. 470). Indeed, there is no express provision in the *CCAA* barring such a creditor from voting on a plan of arrangement, including a plan it sponsors.

59 Notwithstanding the foregoing, the appellants submit that a purposive interpretation of s. 22(3) of the *CCAA* reveals that, as a general matter, a creditor should be precluded from voting on its own plan. Section 22(3) provides:

> **Related creditors**
>
> **(3)** A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

The appellants note that s. 22(3) was meant to harmonize the *CCAA* scheme with s. 54(3) of the *BIA*, which provides that "[a] creditor who is related to the debtor may vote against but not for the acceptance of the proposal." The appellants point out that, under s. 50(1) of the *BIA*, only debtors can sponsor plans; as a result, the reference to "debtor" in s. 54(3) captures *all* plan sponsors. They submit that if s. 54(3) captures all plan sponsors, s. 22(3) of the *CCAA* must do the same. On this basis, the appellants ask us to extend the voting restriction in s. 22(3) to apply not only to creditors who are "related to the company", as the provision states, but to any creditor who sponsors a plan. They submit that this interpretation gives effect to the underlying intention of both provisions, which they say is to ensure that a creditor who has a conflict of interest cannot "dilute" or overtake the votes of other creditors.

60 We would not accept this strained interpretation of s. 22(3). Section 22(3) makes no mention of conflicts of interest between creditors and plan sponsors generally. The wording of s. 22(3) only places voting restrictions on creditors who are "related to the [debtor] company". These words are "precise and unequivocal" and, as such, must "play a dominant role in the interpretive process" (*Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.), at para. 10). In our view, the appellants' analogy to the *BIA* is not sufficient to overcome the plain wording of this provision.

61 While the appellants are correct that s. 22(3) was enacted to harmonize the treatment of related parties in the *CCAA* and *BIA*, its history demonstrates that it is not a general conflict of interest provision. Prior to the amendments incorporating s. 22(3) into the *CCAA*, the *CCAA* clearly allowed creditors to put forward a plan of arrangement (see Houlden, Morawetz and Sarra, at §33, *Red Cross*; *1078385 Ontario Ltd., Re* (2004), 206 O.A.C. 17 (Ont. C.A.)). In contrast, under the *BIA*, only debtors could make proposals. Parliament is presumed to have been aware of this obvious difference between the two statutes (see *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.), at para. 59; see also *Third Eye Capital Corporation*, at para. 57). Despite this difference, Parliament imported, with necessary modification, the wording

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of the *BIA* related creditor provision into the *CCAA*. Going beyond this language entails accepting that Parliament failed to choose the right words to give effect to its intention, which we do not.

62 Indeed, Parliament did not mindlessly reproduce s. 54(3) of the *BIA* in s. 22(3) of the *CCAA*. Rather, it made two modifications to the language of s. 54(3) to bring it into conformity with the language of the *CCAA*. First, it changed "proposal" (a defined term in the *BIA*) to "compromise or arrangement" (a term used throughout the *CCAA*). Second, it changed "debtor" to "company", recognizing that companies are the only kind of debtor that exists in the *CCAA* context.

63 Our view is further supported by Industry Canada's explanation of the rationale for s. 22(3) as being to "reduce the ability of *debtor companies* to organize a restructuring plan that confers additional benefits to *related parties*" (Office of the Superintendent of Bankruptcy Canada, *Bill C-12: Clause by Clause Analysis*, cl. 71, s. 22 (emphasis added); see also Standing Senate Committee on Banking, Trade and Commerce, at p. 151).

64 Finally, we note that the *CCAA* contains other mechanisms that attenuate the concern that a creditor with conflicting legal interests with respect to a plan it proposes may distort the creditors' vote. Although we reject the appellants' interpretation of s. 22(3), that section still bars creditors who are related to the debtor company from voting in favour of *any* plan. Additionally, creditors who do not share a sufficient commonality of interest may be forced to vote in separate classes (s. 22(1) and (2)), and, as we will explain, a supervising judge may bar a creditor from voting where the creditor is acting for an improper purpose.

(2) Discretion to Bar a Creditor From Voting in Furtherance of an Improper Purpose

65 There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, *CCAA* supervising judges are often called upon "to sanction measures for which there is no explicit authority in the *CCAA*" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed a "hierarchical" approach to determining whether jurisdiction exists to sanction a proposed measure: "courts [must] 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" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the *CCAA* will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

66 Applying this approach, we conclude that jurisdiction exists under s. 11 of the *CCAA* to bar a creditor from voting on a plan of arrangement or compromise where the creditor is acting for an improper purpose.

67 Courts have long recognized that s. 11 of the *CCAA* signals legislative endorsement of the "broad reading of *CCAA* authority developed by the jurisprudence" (*Century Services*, at para. 68). Section 11 states:

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

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be "appropriate in the circumstances".

68 Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the *CCAA* context (para. 36).

69 Oversight of the plan negotiation, voting, and approval process falls squarely within the supervising judge's purview. As indicated, there are no specific provisions in the *CCAA* which govern when a creditor who is otherwise eligible to vote on a plan may nonetheless be barred from voting. Nor is there any provision in the *CCAA* which suggests that a creditor has an

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absolute right to vote on a plan that cannot be displaced by a proper exercise of judicial discretion. However, given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, creditors should only be barred from voting where the circumstances demand such an outcome. In other words, it is necessarily a discretionary, circumstance-specific inquiry.

70 Thus, it is apparent that s. 11 serves as the source of the supervising judge's jurisdiction to issue a discretionary order barring a creditor from voting on a plan of arrangement. The exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an "improper purpose" — the supervising judge has the discretion to bar that creditor from voting.

71 The discretion to bar a creditor from voting in furtherance of an improper purpose under the *CCAA* parallels the similar discretion that exists under the *BIA*, which was recognized in *Laserworks Computer Services Inc., Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296 (N.S. C.A.). In *Laserworks Computer Services Inc.*, the Nova Scotia Court of Appeal concluded that the discretion to bar a creditor from voting in this way stemmed from the court's power, inherent in the scheme of the *BIA*, to supervise "[e]ach step in the bankruptcy process" (at para. 41), as reflected in ss. 43(7), 108(3), and 187(9) of the Act. The court explained that s. 187(9) specifically grants the power to remedy a "substantial injustice", which arises "when the *BIA* is used for an improper purpose" (para. 54). The court held that "[a]n improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament" (para. 54).

72 While not determinative, the existence of this discretion under the *BIA* lends support to the existence of similar discretion under the *CCAA* for two reasons.

73 First, this conclusion would be consistent with this Court's recognition that the *CCAA* "offers a more flexible mechanism with *greater* judicial discretion" than the *BIA* (*Century Services*, at para. 14 (emphasis added)).

74 Second, this Court has recognized the benefits of harmonizing the two statutes to the extent possible. For example, in *Indalex*, the Court observed that "in order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those received under the *BIA* (para. 51; see also *Century Services*, at para. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283 (Ont. C.A.), at paras. 34-46). Thus, where the statutes are capable of bearing a harmonious interpretation, that interpretation ought to be preferred "to avoid the ills that can arise from [insolvency] 'statute-shopping'" (*Kitchener Frame Ltd., Re*, 2012 ONSC 234, 86 C.B.R. (5th) 274, at para. 78; see also para. 73). In our view, the articulation of "improper purpose" set out in *Laserworks Computer Services Inc.* — that is, any purpose collateral to the purpose of insolvency legislation — is entirely harmonious with the nature and scope of judicial discretion afforded by the *CCAA*. Indeed, as we have explained, this discretion is to be exercised in accordance with the *CCAA*'s objectives as an insolvency statute.

75 We also observe that the recognition of this discretion under the *CCAA* advances the basic fairness that "permeates Canadian insolvency law and practice" (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation .... If the *CCAA* is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute.
>
> ("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30)

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In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.

76 Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the *CCAA*. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.

(3) The Supervising Judge Did Not Err in Prohibiting Callidus From Voting

77 In our view, the supervising judge's decision to bar Callidus from voting on the New Plan discloses no error justifying appellate intervention. As we have explained, discretionary decisions like this one must be approached from the appropriate posture of deference. It bears mentioning that, when he made this decision, the supervising judge was intimately familiar with Bluberi's *CCAA* proceedings. He had presided over them for over 2 years, received 15 reports from the Monitor, and issued approximately 25 orders.

78 The supervising judge considered the whole of the circumstances and concluded that Callidus's vote would serve an improper purpose (paras. 45 and 48). We agree with his determination. He was aware that, prior to the vote on the First Plan, Callidus had chosen not to value *any* of its claim as unsecured and later declined to vote at all — despite the Monitor explicitly inviting it do so[4] . The supervising judge was also aware that Callidus's First Plan had failed to receive the other creditors' approval at the creditors' meeting of December 15, 2017, and that Callidus had chosen not to take the opportunity to amend or increase the value of its plan at that time, which it was entitled to do (see *CCAA*, ss. 6 and 7; Monitor, I.F., at para. 17). Between the failure of the First Plan and the proposal of the New Plan — which was identical to the First Plan, save for a modest increase of $250,000 — none of the factual circumstances relating to Bluberi's financial or business affairs had materially changed. However, Callidus sought to value the *entirety* of its security at *nil* and, on that basis, sought leave to vote on the New Plan as an unsecured creditor. If Callidus were permitted to vote in this way, the New Plan would certainly have met the s. 6(1) threshold for approval. In these circumstances, the inescapable inference was that Callidus was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. Put simply, Callidus was seeking to take a "second kick at the can" and manipulate the vote on the New Plan. The supervising judge made no error in exercising his discretion to prevent Callidus from doing so.

79 Indeed, as the Monitor observes, "[o]nce a plan of arrangement or proposal has been submitted to the creditors of a debtor for voting purposes, to order a second creditors' meeting to vote on a substantially similar plan would not advance the policy objectives of the CCAA, nor would it serve and enhance the public's confidence in the process or otherwise serve the ends of justice" (I.F., at para. 18). This is particularly the case given that the cost of having another meeting to vote on the New Plan would have been upwards of $200,000 (see supervising judge's reasons, at para. 72).

80 We add that Callidus's course of action was plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding — which, in our view, includes acting with due diligence in valuing their claims and security. At all material times, Bluberi's Retained Claims have been the sole asset securing Callidus's claim. Callidus has pointed to nothing in the record that indicates that the value of the Retained Claims has changed. Had Callidus been of the view that the Retained Claims had no value, one would have expected Callidus to have valued its security accordingly prior to the vote on the First Plan, if not earlier. Parenthetically, we note that, irrespective of the timing, an attempt at such a valuation may well have failed. This would have prevented Callidus from voting as an unsecured creditor, even in the absence of Callidus's improper purpose.

81 As we have indicated, discretionary decisions attract a highly deferential standard of review. Deference demands that review of a discretionary decision begin with a proper characterization of the basis for the decision. Respectfully, the Court of Appeal failed in this regard. The Court of Appeal seized on the supervising judge's somewhat critical comments relating to Callidus's goal of being released from the Retained Claims and its conduct throughout the proceedings as being incapable of grounding a finding of improper purpose. However, as we have explained, these considerations did not drive the supervising judge's conclusion. His conclusion was squarely based on Callidus' attempt to manipulate the creditors' vote to ensure that its

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New Plan would succeed where its First Plan had failed (see supervising judge's reasons, at paras. 45-48). We see nothing in the Court of Appeal's reasons that grapples with this decisive impropriety, which goes far beyond a creditor merely acting in its own self-interest.

82 In sum, we see nothing in the supervising judge's reasons on this point that would justify appellate intervention. Callidus was properly barred from voting on the New Plan.

83 Before moving on, we note that the Court of Appeal addressed two further issues: whether Callidus is "related" to Bluberi within the meaning of s. 22(3) of the *CCAA*; and whether, if permitted to vote, Callidus should be ordered to vote in a separate class from Bluberi's other creditors (see *CCAA*, s. 22(1) and (2)). Given our conclusion that the supervising judge did not err in barring Callidus from voting on the New Plan on the basis that Callidus was acting for an improper purpose, it is unnecessary to address either of these issues. However, nothing in our reasons should be read as endorsing the Court of Appeal's analysis of them.

C. Bluberi's LFA Should Be Approved as Interim Financing

84 In our view, the supervising judge made no error in approving the LFA as interim financing pursuant to s. 11.2 of the *CCAA*. Interim financing is a flexible tool that may take on a range of forms. As we will explain, third party litigation funding may be one such form. Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 and the remedial objectives of the *CCAA* more generally.

(1) Interim Financing and Section 11.2 of the CCAA

85 Interim financing, despite being expressly provided for in s. 11.2 of the *CCAA*, is not defined in the Act. Professor Sarra has described it as "refer[ring] primarily to the working capital that the debtor corporation requires in order to keep operating during restructuring proceedings, as well as to the financing to pay the costs of the workout process" (*Rescue! The Companies' Creditors Arrangement Act*, at p. 197). Interim financing used in this way — sometimes referred to as "debtor-in-possession" financing — protects the going-concern value of the debtor company while it develops a workable solution to its insolvency issues (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]), at paras. 7, 9 and 24; *Boutiques San Francisco inc., Re* [2003 CarswellQue 13882 (C.S. Que.)], 2003 CanLII 36955, at para. 32). That said, interim financing is not limited to providing debtor companies with immediate operating capital. Consistent with the remedial objectives of the *CCAA*, interim financing at its core enables the preservation and realization of the value of a debtor's assets.

86 Since 2009, s. 11.2(1) of the *CCAA* has codified a supervising judge's discretion to approve interim financing, and to grant a corresponding security or charge in favour of the lender in the amount the judge considers appropriate:

> **Interim financing**
>
> **11.2 (1)** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

87 The breadth of a supervising judge's discretion to approve interim financing is apparent from the wording of s. 11.2(1). Aside from the protections regarding notice and pre-filing security, s. 11.2(1) does not mandate any standard form or terms.[5] It simply provides that the financing must be in an amount that is "appropriate" and "required by the company, having regard to its cash-flow statement".

88 The supervising judge may also grant the lender a "super-priority charge" that will rank in priority over the claims of any secured creditors, pursuant to s. 11.2(2):

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Priority — secured creditors

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

89 Such charges, also known as "priming liens", reduce lenders' risks, thereby incentivizing them to assist insolvent companies (Innovation, Science and Economic Development Canada, *Archived — Bill C-55: clause by clause analysis*, last updated December 29, 2016 (online), cl. 128, s. 11.2; Wood, at p. 387). As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by taking a security interest in the borrower's assets. However, debtor companies under *CCAA* protection will often have pledged all or substantially all of their assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank behind those other creditors (McElcheran, at pp. 298-99). Although super-priority charges do subordinate secured creditors' security positions to the interim financing lender's — a result that was controversial at common law — Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) (see M. B. Rotsztain and A. Dostal, "Debtor-In-Possession Financing", in S. Ben-Ishai and A. Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond* (2007), 227, at pp. 228-229 and 240-50). Indeed, this balance was expressly considered by the Standing Senate Committee on Banking, Trade and Commerce that recommended codifying interim financing in the *CCAA* (pp. 100-4).

90 Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best-placed to answer. The *CCAA* sets out a number of factors that help guide the exercise of this discretion. The inclusion of these factors in s. 11.2 was informed by the Standing Senate Committee on Banking, Trade and Commerce's view that they would help meet the "fundamental principles" that have guided the development of Canadian insolvency law, including "fairness, predictability and efficiency" (p. 103; see also Innovation, Science and Economic Development Canada, cl. 128, s. 11.2). In deciding whether to grant interim financing, the supervising judge is to consider the following non-exhaustive list of factors:

Factors to be considered

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

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

(*CCAA*, s. 11.2(4))

91 Prior to the coming into force of the above provisions in 2009, courts had been using the general discretion conferred by s. 11 to authorize interim financing and associated super-priority charges (*Century Services*, at para. 62). Section 11.2 largely codifies the approaches those courts have taken (Wood, at p. 388; McElcheran, at p. 301). As a result, where appropriate, guidance may be drawn from the pre-codification interim financing jurisprudence.

92 As with other measures available under the *CCAA*, interim financing is a flexible tool that may take different forms or attract different considerations in each case. Below, we explain that third party litigation funding may, in appropriate cases, be one such form.

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(2) Supervising Judges May Approve Third Party Litigation Funding as Interim Financing

93 Third party litigation funding generally involves "a third party, otherwise unconnected to the litigation, agree[ing] to pay some or all of a party's litigation costs, in exchange for a portion of that party's recovery in damages or costs" (R. K. Agarwal and D. Fenton, "Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context" (2017), 59 *Can. Bus. L. J.* 65, at p. 65). Third party litigation funding can take various forms. A common model involves the litigation funder agreeing to pay a plaintiff's disbursements and indemnify the plaintiff in the event of an adverse cost award in exchange for a share of the proceeds of any successful litigation or settlement (see *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364 (Ont. S.C.J.); *Musicians' Pension Fund of Canada (Trustee of)*).

94 Outside of the *CCAA* context, the approval of third party litigation funding agreements has been somewhat controversial. Part of that controversy arises from the potential of these agreements to offend the common law doctrines of champerty and maintenance. [6] The tort of maintenance prohibits "officious intermeddling with a lawsuit which in no way belongs to one" (L. N. Klar et al., *Remedies in Tort* (loose-leaf), vol. 1, by L. Berry, ed., at p. 14-11, citing *Langtry v. Dumoulin* (1885), 7 O.R. 644 (Ont. Div. Ct.), at p. 661). Champerty is a species of maintenance that involves an agreement to share in the proceeds or otherwise profit from a successful suit (*McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (Ont. C.A.), at para. 26).

95 Building on jurisprudence holding that *contingency fee* arrangements are not champertous where they are not motivated by an improper purpose (e.g., *McIntyre Estate*), lower courts have increasingly come to recognize that *litigation funding* agreements are also not *per se* champertous. This development has been focussed within class action proceedings, where it arose as a response to barriers like adverse cost awards, which were stymieing litigants' access to justice (see *Dugal*, at para. 33; *Marcotte c. Banque de Montréal*, 2015 QCCS 1915 (C.S. Que.), at paras. 43-44 (CanLII); *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321 (Ont. S.C.J.), at para. 52, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739 (Ont. Div. Ct.); see also *Stanway v. Wyeth Canada Inc.*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192 (B.C. S.C.), at para. 13). The jurisprudence on the approval of third party litigation funding agreements in the class action context — and indeed, the parameters of their legality generally — is still evolving, and no party before this Court has invited us to evaluate it.

96 That said, insofar as third party litigation funding agreements are not *per se* illegal, there is no principled basis upon which to restrict supervising judges from approving such agreements as interim financing in appropriate cases. We acknowledge that this funding differs from more common forms of interim financing that are simply designed to help the debtor "keep the lights on" (see *Royal Oak*, at paras. 7 and 24). However, in circumstances like the case at bar, where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage. In those circumstances, litigation funding furthers the basic purpose of interim financing: allowing the debtor to realize on the value of its assets.

97 We conclude that third party litigation funding agreements may be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. That said, these factors need not be mechanically applied or individually reviewed by the supervising judge. Indeed, not all of them will be significant in every case, nor are they exhaustive. Further guidance may be drawn from other areas in which third party litigation funding agreements have been approved.

98 The foregoing is consistent with the practice that is already occurring in lower courts. Most notably, in *Crystallex*, the Ontario Court of Appeal approved a third party litigation funding agreement in circumstances substantially similar to the case at bar. *Crystallex* involved a mining company that had the right to develop a large gold deposit in Venezuela. Crystallex eventually became insolvent and (similar to Bluberi) was left with only a single significant asset: a US$3.4 billion arbitration claim against Venezuela. After entering *CCAA* protection, Crystallex sought the approval of a third party litigation funding agreement. The agreement contemplated that the lender would advance substantial funds to finance the arbitration in exchange for, among other things, a percentage of the net proceeds of any award or settlement. The supervising judge approved the agreement as interim

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financing pursuant to s. 11.2. The Court of Appeal unanimously found no error in the supervising judge's exercise of discretion. It concluded that s. 11.2 "does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection" (para. 68).

99 A key argument raised by the creditors in *Crystallex* — and one that Callidus and the Creditors' Group have put before us now — was that the litigation funding agreement at issue was a plan of arrangement and not interim financing. This was significant because, if the agreement was in fact a plan, it would have had to be put to a creditors' vote pursuant to ss. 4 and 5 of the *CCAA* prior to receiving court approval. The court in *Crystallex* rejected this argument, as do we.

100 There is no definition of plan of arrangement in the *CCAA*. In fact, the *CCAA* does not refer to plans at all — it only refers to an "arrangement" or "compromise" (see ss. 4 and 5). The authors of *Bankruptcy and Insolvency Law of Canada* offer the following general definition of these terms, relying on early English case law:

> A "compromise" presupposes some dispute about the rights compromised and a settling of that dispute on terms that are satisfactory to the debtor and the creditor. An agreement to accept less than 100¢ on the dollar would be a compromise where the debtor disputes the debt or lacks the means to pay it. "Arrangement" is a broader word than "compromise" and is not limited to something analogous to a compromise. It would include any scheme for reorganizing the affairs of the debtor: *Re Guardian Assur. Co.*, [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations*, [1935] A.C. 185 (P.C.).
>
> (Houlden, Morawetz and Sarra, at §33)

101 The apparent breadth of these terms notwithstanding, they do have some limits. More recent jurisprudence suggests that they require, at minimum, some compromise of creditors' rights. For example, in C*rystallex* the litigation funding agreement at issue (known as the Tenor DIP facility) was held not to be a plan of arrangement because it did not "compromise the terms of [the creditors'] indebtedness or take away ... their legal rights" (para. 93). The Court of Appeal adopted the following reasoning from the lower court's decision, with which we substantially agree:

> A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.
>
> (*Crystallex International Corp., Re*, 2012 ONSC 2125, 91 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]), at para. 50)

102 Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least some compromise of creditors' rights. It follows that a third party litigation funding agreement aimed at extending financing to a debtor company to realize on the value of a litigation asset does not necessarily constitute a plan of arrangement. We would leave it to supervising judges to determine whether, in the particular circumstances of the case before them, a particular third party litigation funding agreement contains terms that effectively convert it into a plan of arrangement. So long as the agreement does not contain such terms, it may be approved as interim financing pursuant to s. 11.2 of the *CCAA*.

103 We add that there may be circumstances in which a third party litigation funding agreement may contain or incorporate a plan of arrangement (e.g., if it contemplates a plan for distribution of litigation proceeds among creditors). Alternatively, a supervising judge may determine that, despite an agreement itself not being a plan of arrangement, it should be packaged with a plan and submitted to a creditors' vote. That said, we repeat that third party litigation funding agreements are not necessarily, or even generally, plans of arrangement.

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104 None of the foregoing is seriously contested before us. The parties essentially agree that third party litigation funding agreements *can* be approved as interim financing. The dispute between them focusses on whether the supervising judge erred in exercising his discretion to approve the LFA in the absence of a vote of the creditors, either because it was a plan of arrangement or because it should have been accompanied by a plan of arrangement. We turn to these issues now.

(3) The Supervising Judge Did Not Err in Approving the LFA

105 In our view, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context (para. 74, citing *Musicians' Pension Fund of Canada (Trustee of)*, at para. 41; *Hayes*, at para. 4). In particular, he canvassed the terms upon which Bentham and Bluberi's lawyers would be paid in the event the litigation was successful, the risks they were taking by investing in the litigation, and the extent of Bentham's control over the litigation going forward (paras. 79 and 81). The supervising judge also considered the unique objectives of *CCAA* proceedings in distinguishing the LFA from ostensibly similar agreements that had not received approval in the class action context (paras. 81-82, distinguishing *Houle*). His consideration of those objectives is also apparent from his reliance on *Crystallex*, which, as we have explained, involved the approval of interim financing in circumstances substantially similar to the case at bar (see paras. 67 and 71). We see no error in principle or unreasonableness to this approach.

106 While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the *CCAA* individually before reaching his conclusion, this was not itself an error. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with Bluberi's *CCAA* proceedings, leads us to conclude that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It bears repeating that, at the time of his decision, the supervising judge had been seized of these proceedings for well over two years and had the benefit of the Monitor's assistance. With respect to each of the s. 11.2(4) factors, we note that:

- the judge's supervisory role would have made him aware of the potential length of Bluberi's *CCAA* proceedings and the extent of creditor support for Bluberi's management (s. 11.2(4)(a) and (c)), though we observe that these factors appear to be less significant than the others in the context of this particular case (see para. 96);

- the LFA itself explains "how the company's business and financial affairs are to be managed during the proceedings" (s. 11.2(4)(b));

- the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi's submission that approval of the LFA would assist it in finalizing a plan "with a view towards achieving maximum realization" of its assets (at para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.'s application, at para. 99; s. 11.2(4)(d));

- the supervising judge was apprised of the "nature and value" of Bluberi's property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));

- the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that "[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, *the only potential recovery* lies with the lawsuit that the Debtors will launch" (at para. 91 (emphasis added); s. 11.2(4)(f)); and

- the supervising judge was also well aware of the Monitor's reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

107 In our view, it is apparent that the supervising judge was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the LFA as interim financing. We

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cannot say that he erred in the exercise of his discretion. Although we are unsure whether the LFA was as favourable to Bluberi's creditors as it might have been — to some extent, it does prioritize Bentham's recovery over theirs — we nonetheless defer to the supervising judge's exercise of discretion.

108 To the extent the Court of Appeal held otherwise, we respectfully do not agree. Generally speaking, our view is that the Court of Appeal again failed to afford the supervising judge the necessary deference. More specifically, we wish to comment on three of the purported errors in the supervising judge's decision that the Court of Appeal identified.

109 First, it follows from our conclusion that LFAs can constitute interim financing that the Court of Appeal was incorrect to hold that approving the LFA as interim financing "transcended the nature of such financing" (para. 78).

110 Second, in our view, the Court of Appeal was wrong to conclude that the LFA was a plan of arrangement, and that *Crystallex* was distinguishable on its facts. The Court of Appeal held that the LFA and associated super-priority Litigation Financing Charge formed a plan because they subordinated the rights of Bluberi's creditors to those of Bentham.

111 We agree with the supervising judge that the LFA is not a plan of arrangement because it does not propose any compromise of the creditors' rights. To borrow from the Court of Appeal in *Crystallex*, Bluberi's litigation claim is akin to a "pot of gold" (para. 4). Plans of arrangement determine how to distribute that pot. They do not generally determine what a debtor company should do to fill it. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the pot once it is filled, nor can it be said to "compromise" those rights. When the "pot of gold" is secure — that is, in the event of any litigation or settlement — the net funds will be distributed to the creditors. Here, if the Retained Claims generate funds in excess of Bluberi's total liabilities, the creditors will be paid in full; if there is a shortfall, a plan of arrangement or compromise will determine how the funds are distributed. Bluberi has committed to proposing such a plan (see supervising judge's reasons, at para. 68, distinguishing *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577 (B.C. C.A.)).

112 This is the very same conclusion that was reached in *Crystallex* in similar circumstances:

> The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.
>
> . . . . .
>
> ... While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. [paras. 82 and 93]

113 We disagree with the Court of Appeal that *Crystallex* should be distinguished on the basis that it involved a single option for creditor recovery (i.e., the arbitration) while this case involves two (i.e., litigation of the Retained Claims and Callidus's New Plan). Given the supervising judge's conclusion that Callidus could not vote on the New Plan, that plan was not a viable alternative to the LFA. This left the LFA and litigation of the Retained Claims as the "only potential recovery" for Bluberi's creditors (supervising judge's reasons, at para. 91). Perhaps more significantly, even if there were multiple options for creditor recovery in either *Crystallex* or this case, the mere presence of those options would not necessarily have changed the character of the third party litigation funding agreements at issue or converted them into plans of arrangement. The question for the supervising judge in each case is whether the agreement before them ought to be approved as interim financing. While other options for creditor recovery may be relevant to that discretionary decision, they are not determinative.

114 We add that the Litigation Financing Charge does not convert the LFA into a plan of arrangement by "subordinat[ing]" creditors' rights (C.A. reasons, at para. 90). We accept that this charge would have the effect of placing secured creditors like Callidus behind in priority to Bentham. However, this result is expressly provided for in s. 11.2 of the *CCAA*. This "subordination" does not convert statutorily authorized interim financing into a plan of arrangement. Accepting this

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interpretation would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote pursuant to s. 11.2(2).

115 Third, we are of the view that the Court of Appeal was wrong to decide that the supervising judge should have submitted the LFA together with a plan to the creditors for their approval (para. 89). As we have indicated, whether to insist that a debtor package their third party litigation funding agreement with a plan is a discretionary decision for the supervising judge to make.

116 Finally, at the appellants' insistence, we point out that the Court of Appeal's suggestion that the LFA is somehow "akin to an equity investment" was unhelpful and potentially confusing (para. 90). That said, this characterization was clearly *obiter dictum*. To the extent that the Court of Appeal relied on it as support for the conclusion that the LFA was a plan of arrangement, we have already explained why we believe the Court of Appeal was mistaken on this point.

VI. Conclusion

117 For these reasons, at the conclusion of the hearing we allowed these appeals and reinstated the supervising judge's order. Costs were awarded to the appellants in this Court and the Court of Appeal.

Appeal allowed.

Pourvoi accueilli.

Footnotes

1 Bluberi does not appear to have filed this claim yet (see 2018 QCCS 1040 (C.S. Que.), at para. 10 (CanLII)).

2 Notably, the Creditors' Group advised Callidus that it would lend its support to the New Plan. It also asked Callidus to reimburse any legal fees incurred in association with that support. At the same time, the Creditors' Group did not undertake to vote in any particular way, and confirmed that each of its members would assess all available alternatives individually.

3 We note that while s. 36 now codifies the jurisdiction of a supervising court to grant a sale and vesting order, and enumerates factors to guide the court's discretion to grant such an order, it is silent on when courts ought to approve a liquidation under the *CCAA* as opposed to requiring the parties to proceed to liquidation under a receivership or the *BIA* regime (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 167-68; A. Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012) 52 *Can. Bus. L.J.* 226, at pp. 243-44 and 247). This issue remains an open question and was not put to this Court in either *Indalex* or these appeals.

4 It bears noting that the Monitor's statement in this regard did not decide whether Callidus would ultimately have been entitled to vote on the First Plan. Because Callidus did not even attempt to vote on the First Plan, this question was never put to the supervising judge.

5 A further exception has been codified in the 2019 amendments to the *CCAA*, which create s. 11.2(5) (see *Budget Implementation Act, 2019, No. 1*, s. 138). This section provides that at the time an initial order is sought, "no order shall be made under subsection [11.2](1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period". This provision does not apply in this case, and the parties have not relied on it. However, it may be that it restricts the ability of supervising judges to approve LFAs as interim financing at the time of granting an Initial Order.

6 The extent of this controversy varies by province. In Ontario, champertous agreements are forbidden by statute (see *An Act respecting Champerty*, R.S.O. 1897, c. 327). In Quebec, concerns associated with champerty and maintenance do not arise as acutely because champerty and maintenance are not part of the law as such (see *Pole Lite ltée c. Banque Nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009 (C.A. Que.); G. Michaud, "New Frontier: The Emergence of Litigation Funding in the Canadian Insolvency Landscape" in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 221, at p. 231).

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KeyCite treatment
Most Negative Treatment: Distinguished
Most Recent Distinguished: Arrangement de MPECO Construction inc. | 2019 QCCS 297, 2019 CarswellQue 730, EYB 2019-306949, 67 C.B.R. (6th) 87 | (Que. Bktcy., Feb 4, 2019)

2010 SCC 60, 2010 CSC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3420, 2010 CarswellBC 3419, 2010 CSC 60, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2010] S.C.J. No. 60, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)

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

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant
Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency
Related Abridgment Classifications
Tax
I General principles
I.7 Tax claims in bankruptcy proceedings
Tax
III Goods and Services Tax [GST] and Harmonized Sales Tax [HST]
III.12 Collection and remittance
III.12.b GST/HST held in trust
Headnote
Tax --- Goods and Services Tax — Collection and remittance — GST held in trust
Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute

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provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown.

Taxation --- Taxe sur les produits et services — Perception et versement — Montant de TPS détenu en fiducie

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

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Taxation --- Principes généraux — Priorité des créances fiscales dans le cadre de procédures en faillite

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

The debtor company owed the Crown under the Excise Tax Act (ETA) for GST that was not remitted. The debtor commenced proceedings under the Companies' Creditors Arrangement Act (CCAA). Under an order by the B.C. Supreme Court, the amount of the tax debt was placed in a trust account, and the remaining proceeds from the sale of the debtor's assets were paid to the major secured creditor. The debtor's application for a partial lifting of the stay of proceedings in order to assign itself into bankruptcy was granted, while the Crown's application for the immediate payment of the unremitted GST was dismissed.

The Crown's appeal to the B.C. Court of Appeal was allowed. The Court of Appeal found that the lower court was bound by the ETA to give the Crown priority once bankruptcy was inevitable. The Court of Appeal ruled that there was a deemed trust under s. 222 of the ETA or that an express trust was created in the Crown's favour by the court order segregating the GST funds in the trust account.

The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Deschamps J. (McLachlin C.J.C., Binnie, LeBel, Charron, Rothstein, Cromwell JJ. concurring): A purposive and contextual analysis of the ETA and CCAA yielded the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the CCAA when it amended the ETA in 2000. Parliament had moved away from asserting priority for Crown claims in insolvency law under both the CCAA and Bankruptcy and Insolvency Act (BIA). Unlike for source deductions, there was no express statutory basis in the CCAA or BIA for concluding that GST claims enjoyed any preferential treatment. The internal logic of the CCAA also militated against upholding a deemed trust for GST claims.

Giving the Crown priority over GST claims during CCAA proceedings but not in bankruptcy would, in practice, deprive companies of the option to restructure under the more flexible and responsive CCAA regime. It seemed likely that Parliament had inadvertently succumbed to a drafting anomaly, which could be resolved by giving precedence to s. 18.3 of the CCAA. Section 222(3) of the ETA could no longer be seen as having impliedly repealed s. 18.3 of the CCAA by being passed subsequently to the CCAA, given the recent amendments to the CCAA. The legislative context supported the conclusion that s. 222(3) of the ETA was not intended to narrow the scope of s. 18.3 of the CCAA.

The breadth of the court's discretion under the CCAA was sufficient to construct a bridge to liquidation under the BIA, so there was authority under the CCAA to partially lift the stay of proceedings to allow the debtor's entry into liquidation. There should be no gap between the CCAA and BIA proceedings that would invite a race to the courthouse to assert priorities.

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The court order did not have the certainty that the Crown would actually be the beneficiary of the funds sufficient to support an express trust, as the funds were segregated until the dispute between the creditor and the Crown could be resolved. The amount collected in respect of GST but not yet remitted to the Receiver General of Canada was not subject to a deemed trust, priority or express trust in favour of the Crown.

Per Fish J. (concurring): Parliament had declined to amend the provisions at issue after detailed consideration of the insolvency regime, so the apparent conflict between s. 18.3 of the CCAA and s. 222 of the ETA should not be treated as a drafting anomaly. In the insolvency context, a deemed trust would exist only when two complementary elements co-existed: first, a statutory provision creating the trust; and second, a CCAA or BIA provision confirming its effective operation. Parliament had created the Crown's deemed trust in the Income Tax Act, Canada Pension Plan and Employment Insurance Act and then confirmed in clear and unmistakable terms its continued operation under both the CCAA and the BIA regimes. In contrast, the ETA created a deemed trust in favour of the Crown, purportedly notwithstanding any contrary legislation, but Parliament did not expressly provide for its continued operation in either the BIA or the CCAA. The absence of this confirmation reflected Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings. Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings, and so s. 222 of the ETA mentioned the BIA so as to exclude it from its ambit, rather than include it as the other statutes did. As none of these statutes mentioned the CCAA expressly, the specific reference to the BIA had no bearing on the interaction with the CCAA. It was the confirmatory provisions in the insolvency statutes that would determine whether a given deemed trust would subsist during insolvency proceedings.

Per Abella J. (dissenting): The appellate court properly found that s. 222(3) of the ETA gave priority during CCAA proceedings to the Crown's deemed trust in unremitted GST. The failure to exempt the CCAA from the operation of this provision was a reflection of clear legislative intent. Despite the requests of various constituencies and case law confirming that the ETA took precedence over the CCAA, there was no responsive legislative revision and the BIA remained the only exempted statute. There was no policy justification for interfering, through interpretation, with this clarity of legislative intention and, in any event, the application of other principles of interpretation reinforced this conclusion. Contrary to the majority's view, the "later in time" principle did not favour the precedence of the CCAA, as the CCAA was merely re-enacted without significant substantive changes. According to the Interpretation Act, in such circumstances, s. 222(3) of the ETA remained the later provision. The chambers judge was required to respect the priority regime set out in s. 222(3) of the ETA and so did not have the authority to deny the Crown's request for payment of the GST funds during the CCAA proceedings.

La compagnie débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA). La débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC). En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs de la débitrice a servi à payer le créancier garanti principal. La demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement immédiat des montants de TPS non remis a été rejetée.

L'appel interjeté par la Couronne a été accueilli. La Cour d'appel a conclu que le tribunal se devait, en vertu de la LTA, de donner priorité à la Couronne une fois la faillite inévitable. La Cour d'appel a estimé que l'art. 222 de la LTA établissait une fiducie présumée ou bien que l'ordonnance du tribunal à l'effet que les montants de TPS soient détenus dans un compte en fiducie créait une fiducie expresse en faveur de la Couronne.

Le créancier a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Deschamps, J. (McLachlin, J.C.C., Binnie, LeBel, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Une analyse téléologique et contextuelle de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000. Le législateur avait mis un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité, sous le régime de la LACC et celui de la Loi sur la faillite et l'insolvabilité (LFI). Contrairement aux retenues à la source, aucune disposition législative expresse ne permettait de conclure que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel sous le régime de la LACC ou celui de la LFI. La logique interne de la LACC allait également à l'encontre du maintien de la fiducie réputée à l'égard des créances découlant de la TPS.

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Le fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet, dans les faits, de priver les compagnies de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC. Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle, laquelle pouvait être corrigée en donnant préséance à l'art. 18.3 de la LACC. On ne pouvait plus considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC parce qu'il avait été adopté après la LACC, compte tenu des modifications récemment apportées à la LACC. Le contexte législatif étayait la conclusion suivant laquelle l'art. 222(3) de la LTA n'avait pas pour but de restreindre la portée de l'art. 18.3 de la LACC.

L'ampleur du pouvoir discrétionnaire conféré au tribunal par la LACC était suffisant pour établir une passerelle vers une liquidation opérée sous le régime de la LFI, de sorte qu'il avait, en vertu de la LACC, le pouvoir de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation. Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse, puisque les fonds étaient détenus à part jusqu'à ce que le litige entre le créancier et la Couronne soit résolu. Le montant perçu au titre de la TPS mais non encore versé au receveur général du Canada ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Fish, J. (souscrivant aux motifs des juges majoritaires) : Le législateur a refusé de modifier les dispositions en question suivant un examen approfondi du régime d'insolvabilité, de sorte qu'on ne devrait pas qualifier l'apparente contradiction entre l'art. 18.3 de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle. Dans un contexte d'insolvabilité, on ne pourrait conclure à l'existence d'une fiducie présumée que lorsque deux éléments complémentaires étaient réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la LFI qui confirme l'existence de la fiducie. Le législateur a établi une fiducie présumée en faveur de la Couronne dans la Loi de l'impôt sur le revenu, le Régime de pensions du Canada et la Loi sur l'assurance-emploi puis, il a confirmé en termes clairs et explicites sa volonté de voir cette fiducie présumée produire ses effets sous le régime de la LACC et de la LFI. Dans le cas de la LTA, il a établi une fiducie présumée en faveur de la Couronne, sciemment et sans égard pour toute législation à l'effet contraire, mais n'a pas expressément prévu le maintien en vigueur de celle-ci sous le régime de la LFI ou celui de la LACC. L'absence d'une telle confirmation témoignait de l'intention du législateur de laisser la fiducie présumée devenir caduque au moment de l'introduction de la procédure d'insolvabilité. L'intention du législateur était manifestement de rendre inopérantes les fiducies présumées visant la TPS dès l'introduction d'une procédure d'insolvabilité et, par conséquent, l'art. 222 de la LTA mentionnait la LFI de manière à l'exclure de son champ d'application, et non de l'y inclure, comme le faisaient les autres lois. Puisqu'aucune de ces lois ne mentionnait spécifiquement la LACC, la mention explicite de la LFI n'avait aucune incidence sur l'interaction avec la LACC. C'était les dispositions confirmatoires que l'on trouvait dans les lois sur l'insolvabilité qui déterminaient si une fiducie présumée continuerait d'exister durant une procédure d'insolvabilité.

Abella, J. (dissidente) : La Cour d'appel a conclu à bon droit que l'art. 222(3) de la LTA donnait préséance à la fiducie présumée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Le fait que la LACC n'ait pas été soustraite à l'application de cette disposition témoignait d'une intention claire du législateur. Malgré les demandes répétées de divers groupes et la jurisprudence ayant confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu et la LFI est demeurée la seule loi soustraite à l'application de cette disposition. Il n'y avait pas de considération de politique générale qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur et, de toutes manières, cette conclusion était renforcée par l'application d'autres principes d'interprétation. Contrairement à l'opinion des juges majoritaires, le principe de la préséance de la « loi postérieure » ne militait pas en faveur de la présance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurait la disposition postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la LACC.

Table of Authorities

Cases considered by *Deschamps J.*:

Air Canada, Re (2003), 42 C.B.R. (4th) 173, 2003 CarswellOnt 2464 (Ont. S.C.J. [Commercial List]) — referred to

Air Canada, Re (2003), 2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List]) — referred to

Alternative granite & marbre inc., Re (2009), *(*sub nom. *Dep. Min. Rev. Quebec v. Caisse populaire Desjardins de Montmagny)* 2009 G.T.C. 2036 (Eng.), *(*sub nom. *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny)* [2009]

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3 S.C.R. 286, 312 D.L.R. (4th) 577, [2009] G.S.T.C. 154, (sub nom. *9083-4185 Québec Inc. (Bankrupt), Re)* 394 N.R. 368, 60 C.B.R. (5th) 1, 2009 SCC 49, 2009 CarswellQue 10706, 2009 CarswellQue 10707 (S.C.C.) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

Canadian Airlines Corp., Re (2000), [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 2000 CarswellAlta 662, 2000 ABQB 442, 265 A.R. 201 (Alta. Q.B.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re (2000), 2000 CarswellOnt 3269, 19 C.B.R. (4th) 158 (Ont. S.C.J.) — referred to

Doré c. Verdun (Municipalité) (1997), (sub nom. *Doré v. Verdun (City))* [1997] 2 S.C.R. 862, (sub nom. *Doré v. Verdun (Ville))* 215 N.R. 81, (sub nom. *Doré v. Verdun (City))* 150 D.L.R. (4th) 385, 1997 CarswellQue 159, 1997 CarswellQue 850 (S.C.C.) — distinguished

Dylex Ltd., Re (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — considered

First Vancouver Finance v. Minister of National Revenue (2002), [2002] 3 C.T.C. 285, (sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 6998 (Eng.), (sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 7007 (Fr.), 288 N.R. 347, 212 D.L.R. (4th) 615, [2002] G.S.T.C. 23, [2003] 1 W.W.R. 1, 45 C.B.R. (4th) 213, 2002 SCC 49, 2002 CarswellSask 317, 2002 CarswellSask 318, [2002] 2 S.C.R. 720 (S.C.C.) — considered

Gauntlet Energy Corp., Re (2003), 30 Alta. L.R. (4th) 192, 2003 ABQB 894, 2003 CarswellAlta 1735, [2003] G.S.T.C. 193, 49 C.B.R. (4th) 213, [2004] 10 W.W.R. 180, 352 A.R. 28 (Alta. Q.B.) — referred to

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) — referred to

Komunik Corp., Re (2010), 2010 CarswellQue 686, 2010 QCCA 183 (C.A. Que.) — referred to

Komunik Corp., Re (2009), 2009 QCCS 6332, 2009 CarswellQue 13962 (C.S. Que.) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1990 CarswellOnt 139, 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282 (Ont. C.A.) — considered

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — not followed

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — referred to

Philip's Manufacturing Ltd., Re (1992), 9 C.B.R. (3d) 25, 67 B.C.L.R. (2d) 84, 4 B.L.R. (2d) 142, 1992 CarswellBC 542 (B.C. C.A.) — referred to

Quebec (Deputy Minister of Revenue) c. Rainville (1979), (sub nom. *Bourgeault, Re)* 33 C.B.R. (N.S.) 301, (sub nom. *Bourgeault's Estate v. Quebec (Deputy Minister of Revenue))* 30 N.R. 24, (sub nom. *Bourgault, Re)* 105 D.L.R. (3d) 270, 1979 CarswellQue 165, 1979 CarswellQue 266, (sub nom. *Quebec (Deputy Minister of Revenue) v. Bourgeault (Trustee of))* [1980] 1 S.C.R. 35 (S.C.C.) — referred to

Reference re Companies' Creditors Arrangement Act (Canada) (1934), [1934] 4 D.L.R. 75, 1934 CarswellNat 1, 16 C.B.R. 1, [1934] S.C.R. 659 (S.C.C.) — referred to

Royal Bank v. Sparrow Electric Corp. (1997), 193 A.R. 321, 135 W.A.C. 321, [1997] 2 W.W.R. 457, 208 N.R. 161, 12 P.P.S.A.C. (2d) 68, 1997 CarswellAlta 112, 1997 CarswellAlta 113, 46 Alta. L.R. (3d) 87, (sub nom. *R. v. Royal Bank)* 97 D.T.C. 5089, 143 D.L.R. (4th) 385, 44 C.B.R. (3d) 1, [1997] 1 S.C.R. 411 (S.C.C.) — considered

Skeena Cellulose Inc., Re (2003), 2003 CarswellBC 1399, 2003 BCCA 344, 184 B.C.A.C. 54, 302 W.A.C. 54, 43 C.B.R. (4th) 187, 13 B.C.L.R. (4th) 236 (B.C. C.A.) — referred to

Skydome Corp., Re (1998), 16 C.B.R. (4th) 118, 1998 CarswellOnt 5922 (Ont. Gen. Div. [Commercial List]) — referred to

Solid Resources Ltd., Re (2002), [2003] G.S.T.C. 21, 2002 CarswellAlta 1699, 40 C.B.R. (4th) 219 (Alta. Q.B.) — referred to

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Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — referred to

United Used Auto & Truck Parts Ltd., Re (1999), 12 C.B.R. (4th) 144, 1999 CarswellBC 2673 (B.C. S.C. [In Chambers]) — referred to

United Used Auto & Truck Parts Ltd., Re (2000), 2000 BCCA 146, 135 B.C.A.C. 96, 221 W.A.C. 96, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, 16 C.B.R. (4th) 141, [2000] 5 W.W.R. 178 (B.C. C.A.) — referred to

Cases considered by *Fish J.*:

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — not followed

Cases considered by *Abella J.* (dissenting):

Canada (Attorney General) v. Canada (Public Service Staff Relations Board) (1977), [1977] 2 F.C. 663, 14 N.R. 257, 74 D.L.R. (3d) 307, 1977 CarswellNat 62, 1977 CarswellNat 62F (Fed. C.A.) — referred to

Doré c. Verdun (Municipalité) (1997), (sub nom. *Doré v. Verdun (City)*) [1997] 2 S.C.R. 862, (sub nom. *Doré v. Verdun (Ville)*) 215 N.R. 81, (sub nom. *Doré v. Verdun (City)*) 150 D.L.R. (4th) 385, 1997 CarswellQue 159, 1997 CarswellQue 850 (S.C.C.) — referred to

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — considered

R. v. Tele-Mobile Co. (2008), 2008 CarswellOnt 1588, 2008 CarswellOnt 1589, 2008 SCC 12, (sub nom. *Tele-Mobile Co. v. Ontario)* 372 N.R. 157, 55 C.R. (6th) 1, (sub nom. *Ontario v. Tele-Mobile Co.)* 229 C.C.C. (3d) 417, (sub nom. *Tele-Mobile Co. v. Ontario)* 235 O.A.C. 369, (sub nom. *Tele-Mobile Co. v. Ontario)* [2008] 1 S.C.R. 305, (sub nom. *R. v. Tele-Mobile Company (Telus Mobility))* 92 O.R. (3d) 478 (note), (sub nom. *Ontario v. Tele-Mobile Co.)* 291 D.L.R. (4th) 193 (S.C.C.) — considered

Statutes considered by *Deschamps J.*:

Bank Act, S.C. 1991, c. 46

Generally — referred to

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

Generally — referred to

s. 67(2) — referred to

s. 67(3) — referred to

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

s. 81.2 [en. 1992, c. 27, s. 38(1)] — considered

s. 86(1) — considered

s. 86(3) — referred to

Bankruptcy Act and to amend the Income Tax Act in consequence thereof, Act to amend the, S.C. 1992, c. 27

Generally — referred to

s. 39 — referred to

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, Act to amend the, S.C. 1997, c. 12

s. 73 — referred to

s. 125 — referred to

s. 126 — referred to

Canada Pension Plan, R.S.C. 1985, c. C-8

Generally — referred to

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s. 23(3) — referred to

s. 23(4) — referred to

Cités et villes, Loi sur les, L.R.Q., c. C-19

en général — referred to

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

art. 2930 — referred to

Companies' Creditors Arrangement Act, Act to Amend, S.C. 1952-53, c. 3

Generally — referred to

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36

Generally — referred to

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

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — referred to

s. 11(4) — referred to

s. 11(6) — referred to

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

s. 11.09 [en. 2005, c. 47, s. 128] — considered

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

s. 18.3 [en. 1997, c. 12, s. 125] — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 18.4 [en. 1997, c. 12, s. 125] — referred to

s. 18.4(1) [en. 1997, c. 12, s. 125] — considered

s. 18.4(3) [en. 1997, c. 12, s. 125] — considered

s. 20 — considered

s. 21 — considered

s. 37 — considered

s. 37(1) — referred to

Employment Insurance Act, S.C. 1996, c. 23

Generally — referred to

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s. 86(2) — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to
Excise Tax Act, R.S.C. 1985, c. E-15
Generally — referred to

s. 222(1) [en. 1990, c. 45, s. 12(1)] — referred to

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered
Fairness for the Self-Employed Act, S.C. 2009, c. 33
Generally — referred to
Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
s. 227(4) — referred to

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — referred to
Interpretation Act, R.S.C. 1985, c. I-21
s. 44(f) — considered
Personal Property Security Act, S.A. 1988, c. P-4.05
Generally — referred to
Sales Tax and Excise Tax Amendments Act, 1999, S.C. 2000, c. 30
Generally — referred to
Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1
Generally — referred to

s. 69 — referred to

s. 128 — referred to

s. 131 — referred to

Statutes considered *Fish J.*:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 67(2) — considered

s. 67(3) — considered
Canada Pension Plan, R.S.C. 1985, c. C-8
Generally — referred to

s. 23 — considered
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered
Employment Insurance Act, S.C. 1996, c. 23
Generally — referred to

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s. 86(2) — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(1) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3)(a) [en. 1990, c. 45, s. 12(1)] — considered

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

Generally — referred to

s. 227(4) — considered

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — considered

s. 227(4.1)(a) [en. 1998, c. 19, s. 226(1)] — considered

Statutes considered *Abella J.* (dissenting):

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

Generally — referred to

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

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

Interpretation Act, R.S.C. 1985, c. I-21

s. 2(1)"enactment" — considered

s. 44(f) — considered

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Generally — referred to

APPEAL by creditor from judgment reported at 2009 CarswellBC 1195, 2009 BCCA 205, [2009] G.S.T.C. 79, 98 B.C.L.R. (4th) 242, [2009] 12 W.W.R. 684, 270 B.C.A.C. 167, 454 W.A.C. 167, 2009 G.T.C. 2020 (Eng.) (B.C. C.A.), allowing Crown's appeal from dismissal of application for immediate payment of tax debt.

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***Deschamps J.*:**

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

1. Facts and Decisions of the Courts Below

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

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

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

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

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy

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was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)*, [2005] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

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

2. Issues

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

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

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

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

3. Analysis

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

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

3.1 Purpose and Scope of Insolvency Law

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

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

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creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

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

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

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

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

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

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

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

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

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

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

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

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory

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schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

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

3.2 GST Deemed Trust Under the CCAA

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

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp., Re*, 2009 QCCS 6332 (C.S. Que.), leave to appeal granted, 2010 QCCA 183 (C.A. Que.)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

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

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

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

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

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

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33 In *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

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

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

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

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

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

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

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

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

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

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

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

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

> **18.4** (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution ....

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

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

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219, [2003] G.S.T.C. 21 (Alta. Q.B.); *Gauntlet*

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

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

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

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

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

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

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

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

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of

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resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

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

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

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

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

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

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

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3.3 Discretionary Power of a Court Supervising a CCAA Reorganization

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List])), at para. 10, *per* Farley J.).

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

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

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

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

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

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

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the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA's* supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

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

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

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

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

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

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

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

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

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

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

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

74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

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

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

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

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust,

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"[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

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

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

3.4 Express Trust

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

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

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

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

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

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

4. Conclusion

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

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

***Fish J. (concurring)*:**

I

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

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

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

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

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

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

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II

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

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

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

> **227 (4) Trust for moneys deducted** — Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

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

> **(4.1) Extension of trust** — Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed
>
> > (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...
> >
> > ...
>
> ... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

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

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

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

> **67** (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.
>
> (3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

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

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

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

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

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

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

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

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

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.), at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the

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near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

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

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

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

III

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

***Abella J. (dissenting)*:**

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

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

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

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

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

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

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

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

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

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

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

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

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

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

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> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

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

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

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

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

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

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

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

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

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

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

129 It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663 (Fed. C.A.), dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

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

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

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

> **37.**(1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

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

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.
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> (*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

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

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

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

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

136 I would dismiss the appeal.

Appeal allowed.

Pourvoi accueilli.

Appendix

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

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

...

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

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

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

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

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

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

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

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

...

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

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

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

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

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

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

...

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

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

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

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

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

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

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

...

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

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

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

...

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

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

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

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

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

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

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

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

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

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

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

...

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

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

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

...

(3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act)*, any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn

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in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

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

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

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

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

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

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

but it shall comprise

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

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

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

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

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

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

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

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

...

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

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

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

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

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

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

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

Footnotes

1 Section 11 was amended, effective September 18, 2009, and now states:
11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

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

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2015 ONSC 124
Ontario Superior Court of Justice [Commercial List]

4519922 Canada Inc., Re

2015 CarswellOnt 178, 2015 ONSC 124, 22 C.B.R. (6th) 44, 249 A.C.W.S. (3d) 508

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36 as Amended

In the Matter of a Plan of Compromise or Arrangement of 4519922 Canada Inc.

Newbould J.

Heard: December 8, 2014; January 6, 2015
Judgment: January 12, 2015
Docket: CV-1410791-00CL

Counsel: Robert I. Thornton, John T. Porter, Lee M. Nicholson, Asim Iqbal for Applicant
Harry M. Fogul for 22, former CLCA partners
Orestes Pasparakis, Evan Cobb for Insurers
Avram Fishman, Mark Meland for German and Canadian Bank Groups, Widdrington Estate and Trustee of Castor Holdings Limited
James H. Grout for 22, former CLCA partners
Chris Reed for 8, former CLCA partners
Andrew Kent for 5, former CLCA partners
Richard B. Jones for one, former CLCA partne
John MacDonald for Pricewaterhouse Coopers LLP
James A. Woods, Sylvain Vauclair, Bogdan Catanu, Neil Peden for Chrysler Canada Inc. and CIBC Mellon Trust Company
Jay A. Swartz for proposed Monitor Ernst & Young Inc.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.a Grant and length of stay
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.d Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Extension of order
Applicant was corporation and was partner in accounting firm — In 1993, 96 plaintiffs commenced negligence actions against accounting firm and 311 of its individual partners claiming approximately $1 billion in damages — Test case in this litigation resulted in judgment of $4,978,897.51, and leave to appeal this judgment was dismissed by Supreme Court of Canada in January 2014 — Applicant engaged in negotiations with remaining plaintiffs in negligence actions — These negotiations culminated with execution of term sheet outlining plan of arrangement under Companies' Creditors Arrangement Act (CCAA) that could achieve global resolution to outstanding litigation — In December 2014, applicant obtained initial order granting it and accounting firm protection under CCAA — C Inc., which had very large claim against accounting firm, had not been given

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notice of CCAA application — C Inc. brought motion to set aside initial order and to dismiss CCAA application — Motion dismissed — CCAA proceeding would permit applicant and its stakeholders means of attempting to arrive at global settlement of all claims — There was no issue as to good faith of applicant in CCAA proceeding — Initial order should not be set aside and CCAA application dismissed on basis of defence tactics in test case — Term sheet was supported by overwhelming number of creditors — C Inc. was seeking to impose its will on all other creditors by attempting to prevent them from voting on proposed plan — Court's primary concern under CCAA had to be for debtor and all of its creditors — There was no prejudice to C Inc. given that its contingent claim was not scheduled to be tried until 2017 at earliest — Issues raised by C Inc. with respect to term sheet were premature and could be dealt with later in proceedings as required.

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

Creditors' committee — Applicant was corporation and was partner in accounting firm — In 1993, 96 plaintiffs commenced negligence actions against accounting firm and 311 of its individual partners claiming approximately $1 billion in damages — Test case in this litigation resulted in judgment of $4,978,897.51, and leave to appeal this judgment was dismissed by Supreme Court of Canada in January 2014 — Applicant engaged in negotiations with remaining plaintiffs in negligence actions — These negotiations culminated with execution of term sheet outlining plan of arrangement under Companies' Creditors Arrangement Act (CCAA) that could achieve global resolution to outstanding litigation — In December 2014, applicant obtained initial order granting it and accounting firm protection under CCAA — Initial order provided for creditors' committee (committee), and it also provided that accounting firm should be entitled to pay reasonable fees and disbursements of legal counsel to committee — C Inc., which had very large claim against accounting firm, had not been given notice of CCAA application — C Inc. brought motion to vary initial order to delete appointment of committee and provision for payment of committee's legal fees and expenses — Motion dismissed — Committee was result of intensely negotiated term sheet that formed foundation of plan — Altering term sheet removing committee could frustrate applicant's ability to develop viable plan and could jeopardize existing support from majority of claimants — Other creditors had no objection if C Inc. wanted to join committee — C Inc.'s complaints about claim process proposed in term sheet was not reason to deny existence of committee, but rather would be matter for discussion when claims process came before court for approval — Costs of paying committee in relation to amounts at stake would be relatively minimal.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Miscellaneous

Extending stay to include insurers of insolvent accounting firm.

Table of Authorities

Cases considered by *Newbould J.*:

Alberta Treasury Branches v. Tallgrass Energy Corp (2013), 8 C.B.R. (6th) 161, 2013 ABQB 432, 2013 CarswellAlta 1496 (Alta. Q.B.) — considered

Alexis Paragon Limited Partnership, Re (2014), 2014 ABQB 65, 2014 CarswellAlta 165, 9 C.B.R. (6th) 43 (Alta. Q.B.) — considered

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

Calpine Canada Energy Ltd., Re (2007), 35 C.B.R. (5th) 27, 410 W.A.C. 25, 417 A.R. 25, 2007 ABCA 266, 2007 CarswellAlta 1097, 80 Alta. L.R. (4th) 60, 33 B.L.R. (4th) 94 (Alta. C.A. [In Chambers]) — referred to

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115, 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) — followed

Crystallex International Corp., Re (2011), 2011 ONSC 7701, 2011 CarswellOnt 15034, 89 C.B.R. (5th) 313 (Ont. S.C.J. [Commercial List]) — considered

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

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — considered

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

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Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re (2013), 2013 CarswellQue 8420, 2013 QCCS 3777 (Que. Bktcy.) — considered

Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — considered

Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 57, 2006 CarswellOnt 720 (Ont. S.C.J. [Commercial List]) — considered

Priszm Income Fund, Re (2011), 2011 ONSC 2061, 2011 CarswellOnt 2258, 75 C.B.R. (5th) 213 (Ont. S.C.J.) — referred to

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

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

Statutes considered:

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

s. 2 "insolvent person" — considered

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

Generally — referred to

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

Generally — referred to

s. 2(1) "debtor company" (a) — considered

s. 3(1) — considered

s. 11 — considered

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

Generally — referred to

MOTION by creditor of insolvent accounting firm to set aside or vary initial order issued under *Companies' Creditors Arrangement Act*; MOTION by partner of accounting firm to extend stay contained in initial order to include insurers of accounting firm.

***Newbould J.*:**

1 On December 8, 2014 the applicant 4519922 Canada Inc. ("451"), applied for an Initial Order granting it protection under the *Companies' Creditors Arrangement Act* ("CCAA"), extending the protection of the Initial Order to the partnership Coopers & Lybrand Chartered Accounts ("CLCA"), of which it is a partner and to CLCA's insurers, and to stay the outstanding litigation in the Quebec Superior Court relating to Castor Holdings Limited ("Castor") during the pendency of these proceedings. The relief was supported by the Canadian and German bank groups who are plaintiffs in the Quebec litigation, by the Widdrington Estate that has a final judgment against CLCA, by the insurers of CLCA and by 22 former CLCA partners who appeared on the application.

2 The material in the application included a term sheet which the applicant wishes to use as a basis of a plan and which provides for an injection of approximately $220 million in return for a release from any further litigation. The term sheet was supported by all parties who appeared.

3 I granted the order with a stay to January 7, 2015 for reasons to follow, but in light of the fact that Chrysler Canada Inc., with a very large claim against CLCA in the litigation, had not been given notice of the application, ordered that Chrysler be given notice to make any submissions regarding the Initial Order if it wished to do so.

4 Chrysler has now moved to set aside the Initial Order, or in the alternative to vary it to delete the appointment of a creditors' committee and the provision for payment of the committee's legal fees and expenses. On the return of Chrysler's motion, a number of other former CLCA partners and PricewaterhouseCoopers appeared in support of the granting of the Initial Order.

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Structure of Coopers & Lybrand Chartered Accounts

5 The applicant 451 is a corporation continued pursuant to the provisions of the *Canada Business Corporations Act*, and its registered head office is in Toronto, Ontario. It and 4519931 Canada Inc. ("4519931") are the only partners of CLCA.

6 CLCA is a partnership governed by the *Partnerships Act (Ontario)* with its registered head office located in Toronto, Ontario. It was originally established in 1980 under the name of "Coopers & Lybrand" and was engaged in the accountancy profession. On September 2, 1985, the name "Coopers & Lybrand" was changed to "Coopers & Lybrand Chartered Accountants" and the partnership continued in the accountancy profession operating under the new name. Until 1998, CLCA was a national firm of chartered accountants that provided audit and accounting services from offices located across Canada and was a member of a global network of professional firms.

7 In order to comply with the requirements of the various provincial Institutes of Chartered Accountants across Canada, many of which restricted chartered accountants providing audit services from being partners with persons who were not chartered accountants, Coopers & Lybrand Consulting Group ("CLCG") was established under the *Partnerships Act (Ontario)* in September 1985 to provide management consulting services. Concurrent with the formation of CLCG, Coopers & Lybrand ("OpCo") was established as a partnership of CLCA, CLCG and two other parties to develop and manage the CLCA audit and CLCG management consulting practices that had to remain separate. Until 1998, OpCo owned most of the operating assets of CLCA and CLCG. OpCo is governed by the Partnerships Act (Ontario) and its registered head office is in Toronto.

8 In 1998, the member firms of the global networks of each of Coopers & Lybrand and Price Waterhouse agreed upon a business combination of the two franchises. To effect the transaction in Canada, substantially all of CLCA's and CLCG's business assets were sold to PricewaterhouseCoopers LLP ("PwC"), which entity combined the operations of the Coopers & Lybrand entities and Price Waterhouse entities, and the partners of CLCA and CLCG at that time became partners of PwC. Subsequent to the closing of the PwC transaction, CLCA continued for the purpose of winding up its obligations and CLCA and CLCG retained their partnership interests in OpCo. By 2006, all individual CLCA partners had resigned and been replaced by two corporate partners to ensure CLCA's continued existence to deal with the continuing claims and obligations.

9 Since 1998, OpCo has administered the wind up of CLCA and CLCG's affairs, in addition to its own affairs, including satisfying outstanding legacy obligations, liquidating assets and administering CLCA's defence in the Castor litigation. In conjunction with OpCo, 451 and 4519931 have overseen the continued wind up of CLCA's affairs. The sole shareholders of 451 and 4519931 are two former CLCA partners. 451 and 4519931 have no assets or interests aside from their partnership interests in CLCA.

Castor Holdings litigation

10 Commencing in 1993, 96 plaintiffs commenced negligence actions against CLCA and 311 of its individual partners claiming approximately $1 billion in damages. The claims arose from financial statements prepared by Castor and audited by CLCA, as well as certain share valuation letters and certificates for "legal for life" opinions. The claims are for losses relating to investments in or loans made to Castor in the period 1988 to 1991. A critical issue in the Castor litigation was whether CLCA was negligent in doing its work during the period 1988-1991.

11 Fifty-six claims have either been settled or discontinued. Currently, with interest, the plaintiffs in the Castor litigation collectively claim in excess of $1.5 billion.

12 Due to the commonality of the negligence issues raised in the actions, it was decided that a single case, brought by Peter Widdrington claiming damages in the amount of $2,672,960, would proceed to trial and all other actions in the Castor litigation would be suspended pending the outcome of the Widdrington trial. All plaintiffs in the Castor litigation were given status in the Widdrington trial on the issues common to the various claims and the determination regarding common issues, including the issues of negligence and applicable law, was to be binding in all other cases.

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13 The first trial in the Widdrington action commenced in September 1998, but ultimately was aborted in 2006 due to the presiding judge's illness and subsequent retirement. The new trial commenced in January 2008 before Madam Justice St. Pierre. A decision was rendered in April 2011 in which she held that Castor's audited consolidated financial statements for the period of 1988-1990 were materially misstated and misleading and that CLCA was negligent in performing its services as auditor to Castor during that period. She noted that that the overwhelming majority of CLCA's partners did not have any involvement with Castor or the auditing of the financial statements prepared by Castor.

14 The decision in the Widdrington action was appealed to the Quebec Court of Appeal which on the common issues largely upheld the lower court's judgment. The only common issue that was overturned was the nature of the defendant partners' liability. The Quebec Court of Appeal held that under Quebec law, the defendant partners were severally liable. As such, each individual defendant partner is potentially and contingently responsible for his or her several share of the damages suffered by each plaintiff in each action in the Castor litigation for the period that he or she was a partner in the years of the negligence.

15 On January 9, 2014, the defendants' application for leave to appeal the Widdrington decision to the Supreme Court of Canada was dismissed.

16 The Widdrington action has resulted in a judgment in the amount of $4,978,897.51, inclusive of interest, a cost award in the amount of $15,896,297.26 plus interest, a special fee cost award in the amount of $2.5 million plus interest, and a determination of the common issue that CLCA was negligent in performing its services as auditor to Castor during the relevant period.

17 There remain 26 separate actions representing 40 claims that have not yet been tried. Including interest, the remaining plaintiffs now claim more than $1.5 billion in damages. Issues of causation, reliance, contributory negligence and damages are involved in them.

18 The Castor Litigation has given rise to additional related litigation:

(a) Castor's trustee in bankruptcy has challenged the transfer in 1998 of substantially all of the assets used in CLCA's business to PwC under the provisions of Quebec's bulk sales legislation. As part of the PwC transaction, CLCA, OpCo and CLCG agreed to indemnify PwC from any losses that it may suffer arising from any failure on the part of CLCA, OpCo or CLCG to comply with the requirements of any bulk sales legislation applicable to the PwC transaction. In the event that PwC suffers any loss arising from the bulk sales action, it has the right to assert an indemnity claim against CLCA, OpCo and CLCG.

(b) Certain of the plaintiffs have brought an action against 51 insurers of CLCA. They seek a declaration that the policies issued by the insurers are subject to Quebec law. The action would determine whether the insurance coverage is costs-inclusive (i.e. defence costs and other expenses are counted towards the total insurance coverage) or costs-in-addition (i.e. amounts paid for the defence of claims do not erode the policy limits). The insurers assert that any insurance coverage is costs-inclusive and has been exhausted. If the insurers succeed, there will be no more insurance to cover claims. If the insurers do not succeed and the insurance policies are deemed to be costs-in-addition, the insurers may assert claims against CLCA for further premiums resulting from the more extensive coverage.

(c) The claim against the insurers was set to proceed to trial in mid-January 2015 for approximately six months. CLCA is participating in the litigation as a mis-en-cause and it has all the rights of a defendant to contest the action and is bound by the result. As a result of the stay in the Initial Order, the trial has been put off.

(d) There have been eight actions brought in the Quebec Superior Court challenging transactions undertaken by certain partners and parties related to them (typically a spouse) (the "Paulian Actions").

(e) There is a pending appeal to the Quebec Court of Appeal involving an order authorizing the examination after judgment in the Widdrington action of Mr. David W. Smith.

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19 The next trial to proceed against CLCA and the individual partners will be in respect of claims made by three German banks. It is not expected to start until at the least the fall of 2015 and a final determination is unlikely until 2017 at the earliest, with any appeals taking longer. It is anticipated that the next trial after the three German banks trial will be in respect of Chrysler's claim. Mr. Woods, who acts for Chrysler, anticipates that it will not start until 2017 with a trial decision perhaps being given in 2019 or 2020, with any appeals taking longer. The remaining claims will not proceed until after the Chrysler trial.

20 The fees incurred by OpCo and CLCA in the defence of the Widdrington action are already in excess of $70 million. The total spent by all parties already amounts to at least $150 million. There is evidence before me of various judges in Quebec being critical of the way in which the defence of the Widdrington action has been conducted in a "scorched earth" manner.

Individual partner defendants

21 Of the original 311 defendant partners, twenty-seven are now deceased. Over one hundred and fifty are over sixty-five years of age, and sixty-five more will reach sixty-five years of age within five years. There is a dispute about the number of defendant partners who were partners of CLCA at the material time. CLCA believes that twenty-six were wrongly named in the Castor litigation (and most have now been removed), a further three were named in actions that were subsequently discontinued, some were partners for only a portion of the 1988-1991 period and some were named in certain actions but not others. Six of the defendant partners have already made assignments in bankruptcy.

Analysis

(i) Applicability of the CCAA

22 Section 3(1) of the CCAA provides that it applies to a debtor company where the total claims against the debtor company exceed $5 million. By virtue of section 2(1)(a), a debtor company includes a company that is insolvent. Chrysler contends that the applicant has not established that it is insolvent.

23 The insolvency of a debtor is assessed at the time of the filing of the CCAA application. While the CCAA does not define "insolvent", the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* is commonly referred to for guidance although the BIA definition is given an expanded meaning under the CCAA. See Holden, Morawetz & Sarra, *the 2013-2014 Annotated Bankruptcy and Insolvency Act* (Carswell) at N§12 and *Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]) (per Farley J.); leave to appeal to the C of A refused 2004 CarswellOnt 2936 (Ont. C.A.).

24 The BIA defines "insolvent person" as follows:

> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

25 The applicant submits that it is insolvent under all of these tests.

26 The applicant 451 is a debtor company. It is a partner of CLCA and is liable as a principal for the partnership's debts incurred while it is a partner.

27 At present, CLCA's outstanding obligations for which the applicant 451 is liable include: (i) various post-retirement obligations owed to former CLCA partners, the present value of which is approximately $6.25 million (the "Pre-71 Entitlements"); (ii) $16,026,189 payable to OpCo on account of a loan advanced by OpCo on October 17, 2011 to allow CLCA

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to pay certain defence costs relating to the Castor litigation; (iii) the Widdrington costs award in the amount of $18,783,761.66, inclusive of interest as at December 1, 2014, which became due and payable to the plaintiff's counsel on November 27, 2014; (iv) the special fee in the amount of $2,675,000, inclusive of interest as at December 1, 2014, awarded to the plaintiff's counsel in the Widdrington action; and (v) contingent liabilities relating to or arising from the Castor litigation, the claims of which with interest that have not yet been decided being approximately $1.5 billion.

28 The only asset of the applicant 451 on its balance sheet is its investment of $100 in CLCA. The applicant is a partner in CLCA which in turn is a partner in OpCo. At the time of the granting of the Initial Order, Ernst & Young Inc., the proposed Monitor, stated in its report that the applicant was insolvent based on its review of the financial affairs of the applicant, CLCA and OpCo.

29 Mr. Peden in argument on behalf of Chrysler analyzed the balance sheets of CLCA and OpCo and concluded that there were some $39 million in realizable assets against liabilities of some $21 million, leaving some $18 million in what he said were liquid assets. Therefore he concluded that these assets of $18 million are available to take care of the liabilities of 451.

30 I cannot accept this analysis. It was unsupported by any expert accounting evidence and involved assumptions regarding netting out amounts, one of some $6.5 million owing to pre-1971 retired partners, and one of some $16 million owing by CLCA to OpCo for defence costs funded by OpCo. He did not consider the contingent claims against the $6.5 million under the indemnity provided to PWC, nor did he consider that the $16 million was unlikely to be collectible by OpCo as explained in the notes to the financial statements of 451.

31 This analysis also ignored the contingent $1.5 billion liabilities of CLCA in the remaining Castor litigation and the effect that would have on the defence costs and for which the applicant 451 will have liability and a contingent liability for cost awards rendered in that litigation against CLCA. These contingent liabilities must be taken into account in an insolvency analysis under the subsection (c) definition of an insolvent person in the BIA which refers to obligations due and accruing due. In *Stelco Inc., Re*, *supra*, Farley J. stated that all liabilities, contingent or unliquidated, have to be taken into account. See also *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. [Commercial List]) (per Farley J.).

32 It is obvious in this case that if the litigation continues, the defence costs for which the applicant 451 will have liability alone will continue and will more than eat up whatever cash OpCo may have. As well, the contingent liabilities of CLCA in the remaining $1.5 billion in claims cannot be ignored just because CLCA has entered defences in all of them. The negligence of CLCA has been established for all of these remaining cases in the Widdrington test case. The term sheet provides that the claims of the German and Canadian banks, approximately $720 million in total, and the claim of the Trustee of CLCA of approximately $108 million, will be accepted for voting and distribution purposes in a plan of arrangement. While there is no evidence before me at this stage what has led to the decision of CLCA and its former partners to now accept these claims, I can only conclude that in the circumstances it was considered by these defendants that there was exceptional risk in the actions succeeding. I hesitate to say a great deal about this as the agreement in the term sheet to accept these claims for voting and distribution purposes will no doubt be the subject of further debate in these proceedings at the appropriate time.

33 As stated, the balance sheet of the applicant 451 lists as its sole asset its investment of $100 in CLCA. The notes to the financial statements state that CLCA was indebted to OpCo at the time, being June 30, 2014, for approximately $16 million and that its only asset available to satisfy that liability was its investment in OpCo on which it was highly likely that there would be no recovery. As a result 451 would not have assets to support its liabilities to OpCo.

34 For this reason, as well as the contingent risks of liability of CLCA in the remaining claims of $1.5 billion, it is highly likely that the $100 investment of the applicant 451 in CLCA is worthless and unable to fund the current and future obligations of the applicant caused by the CLCA litigation.

35 I accept the conclusion of Ernst & Young Inc. that the applicant 451 is insolvent. I find that the applicant has established its insolvency at the time of the commencement of this CCAA proceeding.

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(ii) Should an Initial Order be made and if so should it extend to CLCA?

36 The applicant moved for a stay in its favour and moved as well to extend the stay to CLCA and all of the outstanding Castor litigation. I granted that relief in the Initial Order. Chrysler contends that there should be no stay of any kind. It has not expressly argued that if a stay is granted against the applicant it should not be extended to CLCA, but the tenor of its arguments would encompass that.

37 I am satisfied that if the stay against the applicant contained in the Initial Order is maintained, it should extend to CLCA and the outstanding Castor litigation. A CCAA court may exercise its jurisdiction to extend protection by way of the stay of proceedings to a partnership related to an applicant where it is just and reasonable or just and convenient to do so. The courts have held that this relief is appropriate where the operations of a debtor company are so intertwined with those of a partner or limited partnership in question that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor company. See *Priszm Income Fund, Re* (2011), 75 C.B.R. (5th) 213 (Ont. S.C.J.) per Morawetz J. The stay is not granted under section 11 of the CCAA but rather under the court's inherent jurisdiction. It has its genesis in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) and has been followed in several cases, including *Canwest Publishing Inc./Publications Canwest Inc., Re* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) per Pepall J. (as she then was) and *Calpine Canada Energy Ltd., Re* (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.) per Romaine J.

38 The applicant 451's sole asset is its partnership interest in the CLCA partnership and its liabilities are derived solely from that interest. The affairs of the applicant and CLCA are clearly intertwined. Not extending the stay to CLCA and the Castor litigation would significantly impair the effectiveness of the stay in respect of 451. It would in fact denude it of any force at all as the litigation costs would mount and it would in all likelihood destroy any ability to achieve a global settlement of the litigation. CLCA is a necessary party to achieve a resolution of the outstanding litigation, and significant contributions from its interest in OpCo and from its former partners are anticipated under the term sheet in exchange for releases to be provided to them.

39 Chrysler relies on the principle that if the technical requirements for a CCAA application are met, there is discretion in a court to deny the application, and contends that for several reasons the equities in this case require the application to be met. It says that there is no business being carried on by the applicant or by CLCA and that there is no need for a CCAA proceeding to effect a sale of any assets as a going concern. It says there will be no restructuring of a business.

40 Cases under the CCAA have progressed since the earlier cases such as *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) which expressed the purpose of the CCAA to be to permit insolvent companies to emerge and continue in business. The CCAA is not restricted to companies that are to be kept in business. See *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) at para. 33 (per Brown J. as he then was). There are numerous cases in which CCAA proceedings were permitted without any business being conducted.

41 To cite a few, in *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. [Commercial List]) the applicants sought relief under the CCAA principally as a means of achieving a global resolution of a large number of product liability and other lawsuits. The applicants had sold all of its operating assets prior to the CCAA application and had no remaining operating business. In *Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re*, 2013 QCCS 3777 (Que. Bktcy.) arising out of the Lac-Mégant train disaster, it was acknowledged that the debtor would be sold or dismantled in the course of the CCAA proceedings. The CCAA proceedings were brought to deal with litigation claims against it and others. In *Crystallex International Corp., Re*, 2011 ONSC 7701 (Ont. S.C.J. [Commercial List]) the CCAA is currently being utilized by a company with no operating business, the only asset of which is an arbitration claim.

42 Chrysler contends, as stated in its factum, that the pith and substance of this case is not about the rescue of a business; it is to shield the former partners of CLCA from their liabilities in a manner that should not be approved by this court. Chrysler refers to several statements by judges beginning in 2006 in the Castor litigation who have been critical of the way in which the Widdrington test case has been defended, using such phrases as "a procedural war of attrition" and "scorched earth" strategies. Chrysler contends that now that the insurance proceeds have run out and the former partners face the prospect of bearing the cost

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of litigation which that plaintiffs have had to bear throughout the 22-year war of attrition, the former partners have convinced the German and Canadian banks to agree to the compromise set out in the term sheet. To grant them relief now would, it is contended, reward their improper conduct.

43 Chrysler refers to a recent decision in Alberta, *Alexis Paragon Limited Partnership, Re*, 2014 ABQB 65 (Alta. Q.B.) in which a CCAA application was denied and a receiver appointed at the request of its first secured creditor. In that case Justice Thomas referred to a statement of Justice Romaine in *Alberta Treasury Branches v. Tallgrass Energy Corp*, 2013 ABQB 432 (Alta. Q.B.) in which she stated that an applicant had to establish that it has acted and is acting in good faith and with due diligence. Justice Thomas referred to past failures of the applicant to act with due diligence in resolving its financial issues and on that ground denied the CCAA application. Chrysler likens that to the manner in which the Widdrington test case was defended by CLCA.

44 I am not entirely sure what Justice Romaine precisely had in mind in referring to the need for an applicant to establish that "it has acted and is acting with good faith and with due diligence" but I would think it surprising that a CCAA application should be defeated on the failure of an applicant to have dealt with its affairs in a diligent manner in the past. That could probably said to have been the situation in a majority of cases, or at least arguably so, and in my view the purpose of CCAA protection is to attempt to make the best of a bad situation without great debate whether the business in the past was properly carried out. Did the MM&A railway in Lac-Mégantic act with due diligence in its safety practices? It may well not have, but that could not have been a factor considered in the decision to give it CCAA protection.

45 I do understand that need for an applicant to act in the CCAA process with due diligence and good faith, but I would be reluctant to lay down any fixed rule as to how an applicant's actions prior to the CCAA application should be considered. I agree with the statement of Farley J. in *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]) that it is the good faith of an applicant in the CCAA proceedings that is the issue:

> Allegations ... of bad faith as to past activities have been made against the CCAA applicants and the Gardiner interests. However, the question of good faith is with respect to how these parties are conducting themselves in these CCAA proceedings.

46 There is no issue as to the good faith of the applicant in this CCAA proceeding. I would not set aside the Initial Order and dismiss the application on the basis of the defence tactics in the Widdrington test case.

47 The Castor litigation has embroiled CLCA and the individual partners for over 20 years. If the litigation is not settled, it will take many more years. Chrysler concedes that it likely will take at least until 2020 for the trial process on its claim to play out and then several more years for the appellate process to take its course. Other claims will follow the Chrysler claim. The costs have been enormous and will continue to escalate.

48 OpCo has dedicated all of its resources to the defence of the Castor litigation and it will continue to do so. OpCo has ceased distributions to its partners, including CLCA, in order to preserve funds for the purpose of funding the defence of the litigation. If the Castor litigation continues, further legal and other costs will be incurred by OpCo and judgments may be rendered against CLCA and its partners. If so, those costs and judgments will have to be paid by OpCo through advances from OpCo to CLCA. Since CLCA has no sources of revenue or cash inflow other than OpCo, the liabilities of CLCA, and therefore the applicant, will only increase.

49 If the litigation is not settled, CLCA's only option will be to continue in its defence of the various actions until either it has completely depleted its current assets (thereby exposing the defendant partners to future capital calls), or a satisfactory settlement or judicial determination has been reached. If no such settlement or final determination is achieved, the cost of the defence of the actions could fall to the defendant partners in their personal capacities. If a resolution cannot be reached, the amount that will be available for settlement will continue to decrease due to ongoing legal costs and other factors while at the same time, the damages claimed by the plaintiffs will continue to increase due to accruing interest. With the commencement of further trials, the rate of decrease of assets by funding legal costs will accelerate.

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50 After a final determination had been reached on the merits in the Widdrington action, CLCA's board of directors created a committee comprised of certain of its members to consider the next steps in dealing with CLCA's affairs given that, with the passage of time, the defendant partners may ultimately be liable in respect of negligence arising from the Castor audits without a settlement.

51 Over the course of several months, the committee and the defendant partners evaluated many possible settlement structures and alternatives and after conferring with counsel for various plaintiffs in the Castor litigation, the parties agreed to participate in a further mediation. Multiple attempts had earlier been made to mediate a settlement. Most recently, over the course of four weeks in September and October 2014, the parties attended mediation sessions, both plenary and individually. Chrysler participated in the mediation.

52 Although a settlement could not be reached, the applicant and others supporting the applicant believe that significant progress was achieved in the mediation. In light of this momentum, the applicant and CLCA continued settlement discussions with certain plaintiffs willing to engage in negotiations. These discussions culminated with the execution of a term sheet outlining a plan of arrangement under the CCAA that could achieve a global resolution to the outstanding litigation.

53 A CCAA proceeding will permit the applicant and its stakeholders a means of attempting to arrive at a global settlement of all claims. If there is no settlement, the future looks bleak for everyone but the lawyers fighting the litigation.

54 The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It is also intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Without a stay, such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan would succeed. See *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) per Farley J.

55 In this case it would be unfair to one plaintiff who is far down the line on a trial list to have to watch another plaintiff with an earlier trial date win and collect on a judgment from persons who may not have the funds to pay a later judgment. That would be chaos that should be avoided. A recent example of a stay being made to avoid such a possibility is the case of *Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re* which stayed litigation arising out of the Lac-Mégant train disaster. See also *Muscletech Research & Development Inc., Re*.

56 In this case, the term sheet that the applicant anticipates will form the basis of a proposed Plan includes, among other elements:

> (a) the monetization of all assets of CLCA and its partnership OpCo to maximize the net proceeds available to fund the plan, including all applicable insurance entitlements that are payable or may become payable, which proceeds will be available to satisfy the determined or agreed claims of valid creditors;
>
> (b) contributions from a significant majority of the defendant partners;
>
> (c) contributions from non-defendant partners of CLCA and CLCG exposed under the PwC indemnity;
>
> (d) contributions from CLCA's insurers and other defendants in the outstanding litigation;
>
> (e) the appointment of Ernst & Young Inc. as Monitor to oversee the implementation of the plan, including to assist with the realization and monetization of assets and to oversee (i) the capital calls to be made upon the defendant partners, (ii) a claims process, and (iii) the distribution of the aggregate proceeds in accordance with the plan; and

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(f) provision to all parties who contribute amounts under the plan, of a court-approved full and final release from and bar order against any and all claims, both present and future, of any kind or nature arising from or in any way related to Castor.

57 This term sheet is supported by the overwhelming number of creditors, including 13 German banks, 8 Canadian banks, over 100 creditors of Castor represented by the Trustee in bankruptcy of Castor and the Widdrington estate. It is also supported by the insurers. The plaintiffs other than Chrysler, representing approximately 71.2% of the face value of contingent claims asserted in the outstanding litigation against CLCA, either support, do not oppose or take no position in respect of the granting of the Initial Order. Chrysler represents approximately 28.8% of the face value of the claims.

58 Counsel for the German and Canadian banks points out that it has been counsel to them in the Castor claims and was counsel for the Widdrington estate in its successful action. The German and Canadian banks in their factum agree that during the course of the outstanding litigation over the past 20 years, they have been subjected to a "scorched earth", "war of attrition" litigation strategy adopted by CLCA and its former legal counsel. Where they seriously part company with Chrysler is that they vigorously disagree that such historical misconduct should prevent the CLCA group from using the CCAA to try to achieve the proposed global settlement with their creditors in order to finally put an end to this war of attrition and to enable all valid creditors to finally receive some measure of recovery for their losses.

59 It is argued by the banks and others that if Chrysler is successful in defeating the CCAA proceedings, the consequence would be to punish all remaining Castor plaintiffs and to deprive them of the opportunity of arriving at a global settlement, thus exacerbating the prejudice which they have already suffered. Chrysler, as only one creditor of the CLCA group, is seeking to impose its will on all other creditors by attempting to prevent them from voting on the proposed Plan; essentially, the tyranny of the minority over the majority. I think the banks have a point. The court's primary concern under the CCAA must be for the debtor and all of its creditors. While it is understandable that an individual creditor may seek to obtain as much leverage as possible to enhance its negotiating position, the objectives and purposes of a CCAA should not be frustrated by the self-interest of a single creditor. See *Calpine Canada Energy Ltd., Re*, 2007 ABCA 266 (Alta. C.A. [In Chambers]), at para 38, per O'Brien J.A.

60 The German and Canadian banks deny that their resolve has finally been broken by the CLCA in its defence of the Castor litigation. On the contrary, they state a belief that due to litigation successes achieved to date, the time is now ripe to seek to resolve the outstanding litigation and to prevent any further dissipation of the assets of those stakeholders funding the global settlement. Their counsel expressed their believe that if the litigation continues as suggested by Chrysler, the former partners will likely end up bankrupt and unable to put in to the plan what is now proposed by them. They see a change in the attitude of CLCA by the appointment of a new committee of partners to oversee this application and the appointment of new CCAA counsel in whom they perceive an attitude to come to a resolution. They see CLCA as now acting in good faith.

61 Whether the banks are correct in their judgments and whether they will succeed in this attempt remains to be seen, but they should not be prevented from trying. I see no prejudice to Chrysler. Chrysler's contingent claim is not scheduled to be tried until 2017 at the earliest, and it will likely still proceed to trial as scheduled if a global resolution cannot be achieved in the course of this CCAA proceeding. Further, since Chrysler has not obtained a judgment or settlement in respect of its contingent claim, the Initial Order has not stayed any immediate right available to Chrysler. The parties next scheduled to proceed to trial in the outstanding litigation who have appeared, the insurers and then the three German banks, which are arguably the most affected by the issuance of a stay of proceedings, have indicated their support for this CCAA proceeding and Initial Order, including the stay of proceedings.

62 What exactly Chrysler seeks in preventing this CCAA application from proceeding is not clear. It is hard to think that it wants another 10 years of hard fought litigation before its claim is finally dealt with. During argument, Mr. Vauclair did say that Chrysler participated in the unsuccessful mediation and that it has been willing to negotiate. That remains to be seen, but this CCAA process will give it that opportunity.

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63 Chrysler raises issues with the term sheet, including the provision that the claims of the German and Canadian banks and the Trustee of Castor will be accepted but that the Chrysler claim will be determined in a claims process. Chrysler raises issues regarding the proposed claims process and whether the individual CLCA former partners should be required to disclose all of their assets. These issues are premature and can be dealt with later in the proceedings as required.

64 Mr. Kent, who represents a number of former CLCA partners, said in argument that the situation cries out for settlement and that there are many victims other than the creditors, namely the vast majority of the former CLCA partners throughout Canada who had nothing to do with the actions of the few who were engaged in the Castor audit. The trial judge noted that the main CLCA partner who was complicit in the Castor Ponzi scheme hid from his partners his relationships with the perpetrators of the scheme.

65 Mr. Kent's statement that the situation cries out for settlement has support in the language of the trial judge in the Widdrington test case. Madame Justice St. Pierre said in her opening paragraph on her lengthy decision:

> **1** Time has come to put an end to the longest running judicial saga in the legal history of Quebec and Canada.

66 At the conclusion of her decision, she stated:

> **3637** Defendants say litigation is far from being finished since debates will continue on individual issues (reliance and damages), on a case by case basis, in the other files. They might be right. They might be wrong. They have to remember that litigating all the other files is only one of multiple options. Now that the litigants have on hand answers to all common issues, resolving the remaining conflicts otherwise is clearly an option (for example, resorting to alternative modes of conflict resolution).

67 In my view the CCAA is well able to provide the parties with a structure to attempt to resolve the outstanding Castor litigation. The Chrysler motion to set aside the Initial Order and to dismiss the CCAA application is dismissed.

(iii) Should the stay be extended to the insurers?

68 The applicant 451 moves as well to extend the stay to the insurers of CLCA. This is supported by the insurers. The trial against the insurers was scheduled to commence on January 12, 2015 but after the Initial Order was made, it was adjourned pending the outcome of the motion by Chrysler to set aside the Initial Order. Chrysler has made no argument that if the Initial Order is permitted to stand that it should be amended to remove the stay of the action against the insurers.

69 Under the term sheet intended to form the basis of a plan to be proposed by the applicant, the insurers have agreed to contribute a substantial amount towards a global settlement. It could not be expected that they would be prepared to do so if the litigation were permitted to proceed against them with all of the costs and risks associated with that litigation. Moreover, it could well have an effect on the other stakeholders who are prepared to contribute towards a settlement.

70 A stay is in the inherent jurisdiction of a court if it is in the interests of justice to do so. While many third party stays have been in favour of partners to applicant corporations, the principle is not limited to that situation. It could not be as the interests of justice will vary depending on the particulars of any case.

71 In *Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re*, Castonguay, J.C.S. stayed litigation against the insurers of the railway. In doing so, he referred to the exceptional circumstances and the multiplicity of proceedings already instituted and concluded it was in the interests of sound administration of justice to stay the proceedings, stating:

> En raison des circonstances exceptionnelles de la présente affaire et devant la multiplicité des recours déjà intentés et de ceux qui le seront sous peu, il est dans l'intérêt d'une saine administration de la justice d'accorder cette demande de MMA et d'étendre la suspension des recours à XL.

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72 In my view, it is in the interests of justice that the stay of proceedings extend to the action against the insurers.

(iv) Should a creditors' committee be ordered and its fees paid by CLCA?

73 The Initial Order provides for a creditors' committee comprised of one representative of the German bank group, one representative of the Canadian bank group, and the Trustee in bankruptcy of Castor. It also provides that CLCA shall be entitled to pay the reasonable fees and disbursements of legal counsel to the creditors' committee. Chrysler opposes these provisions.

74 The essential argument of Chrysler is that a creditors' committee is not necessary as the same law firm represents all of the banks and the Trustee of Castor. Counsel for the banks and the Trustee state that the German bank group consists of 13 distinct financial institutions and the Canadian bank group consists of 8 distinct financial institutions and that there is no evidence in the record to the effect that their interests do not diverge on material issues. As for the Castor Trustee, it represents the interests of more than 100 creditors of Castor, including Chrysler, the German and Canadian bank groups, and various other creditors. They says that a creditors' committee brings order and allows for effective communication with all creditors.

75 CCAA courts routinely recognize and accept *ad hoc* creditors' committees. It is common for critical groups of critical creditors to form an *ad hoc* creditors' committee and confer with the debtor prior to a CCAA filing as part of out-of-court restructuring efforts and to continue to function as an *ad hoc* committee during the CCAA proceedings. See Robert J. Chadwick & Derek R. Bulas, *"Ad Hoc Creditors' Committees in CCAA Proceedings: The Result of a Changing and Expanding Restructuring World"*, in Janis P. Sarra, ed, Annual Review of Insolvency Law 2011 (Toronto:Thomson Carswell) 119 at pp 120-121.

76 Chrysler refers to the fact that it is not to be a member of the creditors' committee. It does not ask to be one. Mr. Meland, counsel for the two bank groups and for the Trustee of Castor said during argument that they have no objection if Chrysler wants to join the committee. If Chrysler wished to join the committee, however, it would need to be considered as to whether antagonism, if any, with other members would rob the committee of any benefit.

77 Chrysler also takes exception to what it says is a faulty claims process proposed in the term sheet involving the creditors' committee. Whether Chrysler is right or not in its concern, that would not be a reason to deny the existence of the committee but rather would be a matter for discussion when a proposed claims process came before the court for approval.

78 The creditors' committee in this case is the result of an intensely negotiated term sheet that forms the foundation of a plan. The creditors' committee was involved in negotiating the term sheet. Altering the terms of the term sheet by removing the creditors' committee could frustrate the applicant's ability to develop a viable plan and could jeopardize the existing support from the majority of claimants. I would not accede to Chrysler's request to remove the Creditors' committee.

79 So far as the costs of the committee are concerned, I see this as mainly a final cri de couer from Chrysler. The costs in relation to the amounts at stake will no doubt be relatively minimal. Chrysler says it is galling to see it having to pay 28% (the size of its claim relative to the other claims) to a committee that it thinks will work against its interests. Whether the committee will work against its interests is unknown. I would note that it is not yet Chrysler's money, but CLCA's. If there is no successful outcome to the CCAA process, the costs of the committee will have been borne by CLCA. If the plan is successful on its present terms, there will be $220 million available to pay claims, none of which will have come from Chrysler. I would not change the Initial Order an deny the right of CLCA to pay the costs of the creditors' committee.

80 Finally, Chrysler asks that if the costs are permitted to be paid by CLCA, a special detailed budget should be made and provided to Chrysler along with the amounts actually paid. I see no need for any particular order. The budget for these fees is and will be continued to be contained in the cash flow forecast provided by the Monitor and comparisons of actual to budget will be provided by the Monitor in the future in the normal course.

Conclusion

81 The motion of Chrysler is dismissed. The terms of the Initial Order are continued.

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Order accordingly.

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KeyCite treatment
Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): National Bank of Canada v. Sunterra Food Corporation | 2026 ABKB 206, 2026 CarswellAlta 693, [2026] A.W.L.D. 1408 | (Alta. K.B., Mar 18, 2026)

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

Canwest Global Communications Corp., Re

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

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

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

Pepall J.

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

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

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

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

Table of Authorities

Cases considered by *Pepall J.*:

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

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

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

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

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

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

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

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

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

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

Statutes considered:

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

Generally — referred to

Bankruptcy Code, 11 U.S.C.

Chapter 15 — referred to

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

Generally — referred to

s. 106(6) — referred to

s. 133(1) — referred to

s. 133(1)(b) — referred to

s. 133(3) — referred to

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

Generally — considered

s. 2 "debtor company" — referred to

s. 11 — considered

s. 11(2) — referred to

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

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

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s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

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

s. 11.4(1) [en. 1997, c. 12, s. 124] — referred to

s. 11.4(3) [en. 1997, c. 12, s. 124] — considered

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

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

s. 23 — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 137(2) — considered

Rules considered:

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

R. 38.09 — referred to

APPLICATION for relief pursuant to *Companies' Creditors Arrangement Act.*

***Pepall J.*:**

1 Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act*. [1] The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations); (ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

2 The Canwest Global enterprise as a whole includes the applicants, the partnerships and Canwest Global's other subsidiaries that are not applicants. The term Canwest will be used to refer to the entire enterprise. The term CMI Entities will be used to refer to the applicants and the three aforementioned partnerships. The following entities are not applicants nor is a stay sought in respect of any of them: the entities in Canwest's newspaper publishing and digital media business in Canada (other than the National Post Company) namely the Canwest Limited Partnership, Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc.; the Canadian subscription based specialty television channels acquired from Alliance Atlantis Communications Inc. in August, 2007 which are held jointly with Goldman Sachs Capital Partners and operated by CW Investments Co. and its subsidiaries; and subscription-based specialty television channels which are not wholly owned by CTLP.

3 No one appearing opposed the relief requested.

Backround Facts

4 Canwest is a leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty television channels and newspaper publishing and digital media operations.

5 As of October 1, 2009, Canwest employed the full time equivalent of approximately 7,400 employees around the world. Of that number, the full time equivalent of approximately 1,700 are employed by the CMI Entities, the vast majority of whom work in Canada and 850 of whom work in Ontario.

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6 Canwest Global owns 100% of CMI. CMI has direct or indirect ownership interests in all of the other CMI Entities. Ontario is the chief place of business of the CMI Entities.

7 Canwest Global is a public company continued under the *Canada Business Corporations Act*[2] . It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be beneficially owned by Canadians. The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

8 The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

9 Economic conditions did not improve nor did the financial circumstances of the CMI Entities. They experienced significant tightening of credit from critical suppliers and trade creditors, a further reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees.

10 In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six occasions. On March 15, 2009, it failed to make an interest payment of US$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated noteholders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement was reached wherein CMI and its subsidiary CTLP agreed to issue US$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving asset based loan facility of up to $75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

11 Canwest Global reports its financial results on a consolidated basis. As at May 31, 2009, it had total consolidated assets with a net book value of $4.855 billion and total consolidated liabilities of $5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling $2.742 billion as at May 31, 2009 and the CMI Entities had indebtedness of approximately $954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by $272 million or 11% compared to the same period in 2008. In addition, operating income before amortization decreased by $253 million or 47%. It reported a consolidated net loss of $1.578 billion compared to $22 million for the same period in 2008. CMI reported that revenues for the Canadian television operations decreased by $8 million or 4% in the third quarter of 2009 and operating profit was $21 million compared to $39 million in the same period in 2008.

12 The board of directors of Canwest Global struck a special committee of the board ("the Special Committee") with a mandate to explore and consider strategic alternatives in order to maximize value. That committee appointed Thomas Strike, who is the President, Corporate Development and Strategy Implementation of Canwest Global, as Recapitalization Officer and retained Hap Stephen, who is the Chairman and CEO of Stonecrest Capital Inc., as a Restructuring Advisor ("CRA").

13 On September 15, 2009, CMI failed to pay US$30.4 million in interest payments due on the 8% senior subordinated notes.

14 On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US$761,054,211. They were guaranteed by all of the CMI

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Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of $75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to $23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of $100 million.

15 Consents from a majority of the 8% senior subordinated noteholders were necessary to allow the sale of the Ten Holdings shares. A Use of Cash Collateral and Consent Agreement was entered into by CMI, CMIH, certain consenting noteholders and others wherein CMIH was allowed to lend the proceeds of sale to CMI.

16 The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately $634 million were realized. The proceeds were applied to fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for certain letters of credit in an aggregate face amount of $10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US$393.25 million.

17 In consideration for the loan provided by CMIH to CMI, CMI issued a secured intercompany note in favour of CMIH in the principal amount of $187.3 million and an unsecured promissory note in the principal amount of $430.6 million. The secured note is subordinated to the CIT facility and is secured by a first ranking charge on the property of CMI and the guarantors. The payment of all amounts owing under the unsecured promissory note are subordinated and postponed in favour of amounts owing under the CIT facility. Canwest Global, CTLP and others have guaranteed the notes. It is contemplated that the debt that is the subject matter of the unsecured note will be compromised.

18 Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

19 The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a support agreement and term sheet. The recapitalization transaction contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

20 CMI has agreed to maintain not more than $2.5 million as cash collateral in a deposit account with the Bank of Nova Scotia to secure cash management obligations owed to BNS. BNS holds first ranking security against those funds and no court ordered charge attaches to the funds in the account.

21 The CMI Entities maintain eleven defined benefit pension plans and four defined contribution pension plans. There is an aggregate solvency deficiency of $13.3 million as at the last valuation date and a wind up deficiency of $32.8 million. There are twelve television collective agreements eleven of which are negotiated with the Communications, Energy and Paperworkers

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Union of Canada. The Canadian Union of Public Employees negotiated the twelfth television collective agreement. It expires on December 31, 2010. The other collective agreements are in expired status. None of the approximately 250 employees of the National Post Company are unionized. The CMI Entities propose to honour their payroll obligations to their employees, including all pre-filing wages and employee benefits outstanding as at the date of the commencement of the CCAA proceedings and payments in connection with their pension obligations.

Proposed Monitor

22 The applicants propose that FTI Consulting Canada Inc. serve as the Monitor in these proceedings. It is clearly qualified to act and has provided the Court with its consent to act. Neither FTI nor any of its representatives have served in any of the capacities prohibited by section of the amendments to the CCAA.

Proposed Order

23 I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

24 This case involves a consideration of the amendments to the CCAA that were proclaimed in force on September 18, 2009. While these were long awaited, in many instances they reflect practices and principles that have been adopted by insolvency practitioners and developed in the jurisprudence and academic writings on the subject of the CCAA. In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.

(a) Threshhold Issues

25 Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding $5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*[3] definition and under the more expansive definition of insolvency used in *Stelco Inc., Re*[4]. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

26 Secondly, the required statement of projected cash-flow and other financial documents required under section 11(2) of the CCAA have been filed.

(b) Stay of Proceedings

27 Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

28 The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute

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a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

29 While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Lehndorff General Partner Ltd., Re*[5]; *Smurfit-Stone Container Canada Inc., Re*[6]; and *Calpine Canada Energy Ltd., Re*[7]. In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

30 Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Cadillac Fairview Inc., Re*[8] and *Global Light Telecommunications Inc., Re*[9]

(C) DIP Financing

31 Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(b), if any.

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32 In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

33 Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to $100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately $10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

34 Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is $10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

35 Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

36 For all of these reasons, I was prepared to approve the DIP facility and charge.

(d) Administration Charge

37 While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

> (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

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> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

38 I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

39 As with the DIP charge, the issue relating to notice to affected secured creditors has been addressed appropriately by the applicants. The amount requested is up to $15 million. The beneficiaries of the charge are: the Monitor and its counsel; counsel to the CMI Entities; the financial advisor to the Special Committee and its counsel; counsel to the Management Directors; the CRA; the financial advisor to the Ad Hoc Committee; and RBC Capital Markets and its counsel. The proposed Monitor supports the aforementioned charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the CMI Entities. The applicants submit that the above-note professionals who have played a necessary and integral role in the restructuring activities to date are necessary to implement the recapitalization transaction.

40 Estimating quantum is an inexact exercise but I am prepared to accept the amount as being appropriate. There has obviously been extensive negotiation by stakeholders and the restructuring is of considerable magnitude and complexity. I was prepared to accept the submissions relating to the administration charge. I have not included any requirement that all of these professionals be required to have their accounts scrutinized and approved by the Court but they should not preclude this possibility.

(e) Critical Suppliers

41 The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect to the provision of essential goods and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

42 Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, the person is a supplier of goods or services to the company, and that the goods or services that are supplied are critical to the company's continued operation. While one might interpret section 11.4 (3) as requiring a charge any time a person is

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declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

43 In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

44 The applicants also seek a directors' and officers' ("D &O") charge in the amount of $20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank pari passu with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first $85 million payable under the secured intercompany note.

45 Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

46 I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

47 The proposed Monitor reports that the amount of $20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The

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

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

(g) Key Employee Retention Plans

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

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

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

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

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Annual Meeting

53 The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

54 CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

Other

55 The applicants request authorization to commence Chapter 15 proceedings in the U.S. Continued timely supply of U.S. network and other programming is necessary to preserve going concern value. Commencement of Chapter 15 proceedings to have the CCAA proceedings recognized as "foreign main proceedings" is a prerequisite to the conversion of the CIT facility into the DIP facility. Authorization is granted.

56 Canwest's various corporate and other entities share certain business services. They are seeking to continue to provide and receive inter-company services in the ordinary course during the CCAA proceedings. This is supported by the proposed Monitor and FTI will monitor and report to the Court on matters pertaining to the provision of inter-company services.

57 Section 23 of the amended CCAA now addresses certain duties and functions of the Monitor including the provision of notice of an Initial Order although the Court may order otherwise. Here the financial threshold for notice to creditors has been increased from $1000 to $5000 so as to reduce the burden and cost of such a process. The proceedings will be widely published in the media and the Initial Order is to be posted on the Monitor's website. Other meritorious adjustments were also made to the notice provisions.

58 This is a "pre-packaged" restructuring and as such, stakeholders have negotiated and agreed on the terms of the requested order. That said, not every stakeholder was before me. For this reason, interested parties are reminded that the order includes the usual come back provision. The return date of any motion to vary, rescind or affect the provisions relating to the CIT credit agreement or the CMI DIP must be no later than November 5, 2009.

59 I have obviously not addressed every provision in the order but have attempted to address some key provisions. In support of the requested relief, the applicants filed a factum and the proposed Monitor filed a report. These were most helpful. A factum is required under Rule 38.09 of the Rules of Civil Procedure. Both a factum and a proposed Monitor's report should customarily be filed with a request for an Initial Order under the CCAA.

Conclusion

60 Weak economic conditions and a high debt load do not a happy couple make but clearly many of the stakeholders have been working hard to produce as desirable an outcome as possible in the circumstances. Hopefully the cooperation will persist.

Application granted.

Footnotes

1 R.S.C. 1985, c. C. 36, as amended

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2 R.S.C. 1985, c.C.44.

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

4 (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal refused 2004 CarswellOnt 2936 (Ont. C.A.).

5 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).

6 [2009] O.J. No. 349 (Ont. S.C.J. [Commercial List]).

7 (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.).

8 (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]).

9 (2004), 33 B.C.L.R. (4th) 155 (B.C. S.C.).

10 (2003), 39 C.B.R. (4th) 216 (Ont. S.C.J.).

11 [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]). That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.

12 [2002] 2 S.C.R. 522 (S.C.C.).

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2025 ABKB 51, 2025 CarswellAlta 164, [2025] A.W.L.D. 1312, 2025 A.C.W.S. 656

KeyCite treatment
Most Negative Treatment: Leave to appeal allowed
Most Recent Leave to appeal allowed: Angus A2A GP Inc v. Alvarez & Marsal Canada Inc | 2025 ABCA 147, 2025 CarswellAlta 930, [2025] A.W.L.D. 2163, [2025] A.W.L.D. 2164, [2025] A.W.L.D. 2165, 19 C.B.R. (7th) 217, 2025 A.C.W.S. 2227 | (Alta. C.A., Apr 28, 2025)

2025 ABKB 51
Alberta Court of King's Bench

Angus A2A GP Inc (Re)

2025 CarswellAlta 164, 2025 ABKB 51, [2025] A.W.L.D. 1312, 2025 A.C.W.S. 656

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ANGUS A2A GP INC., ANGUS MANOR PARK A2A GP INC., ANGUS MANOR PARK A2A CAPITAL CORP., ANGUS MANOR PARK A2A DEVELOPMENTS INC., HILLS OF WINDRIDGE A2A GP INC., FOSSIL CREEK A2A GP INC., FOSSIL CREEK A2A, A2A DEVELOPMENTS INC., SERENE COUNTRY HOMES (CANADA) INC. and A2A CAPITAL SERVICES CANADA INC.

Colin C.J. Feasby J.

Heard: January 17, 2025
Judgment: January 29, 2025
Docket: Calgary 2401-15969

Counsel: Kelsey J. Meyer, Luc Rollingson, for Fossil Creek A2A Developments, LLC and Windridge A2A Developments, LLC
Daniel Jukes, Sammy Lee, Stephen Barbier, for Angus A2A GP Inc., Angus Manor Park A2A GP Inc., Angus Manor Park A2A Capital Corp., Angus Manor Park A2A Developments Inc., Hills of Windridge A2A GP Inc, Fossil Creek A2A GP Inc., A2A Developments Inc., Serene Country Homes (Canada) Inc., A2A Capital Services Canada Inc.
Robyn Gurofsky, Kaitlyn M. G. Wong, for Canadian Investors
Howard A. Gorman, K.C., Daniel L.W. Stethem, for Offshore Investors
Jeffrey Oliver, Danica Jorgenson, for Alvarez & Marsal Canada Inc. (the Monitor)
Kyle Kashuba, for Pillar Capital Corp. (the Interim Lender)

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 Application of Act
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Application of Act
Applicant Canadian equity investors and creditors ("Canadian Investors") were granted initial order pursuant to Companies Creditors Arrangement Act (CCAA) with respect to respondent, related entities involved in real estate ventures in Ontario and Texas — Respondents applied to set aside initial order and amended and restated initial order (ARIO) — Application dismissed — CCAA order was immediately enforceable across Canada without recognition proceedings in other provinces and could be recognized and given effect in US through proceedings under U.S. Bankruptcy Code — Where national and international coordination was required to preserve debtor's assets and maximize recovery for creditors, federal insolvency statute was preferable to provincial statute — Respondents were insolvent — Applicants represented interests of most investors

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— There was no secured creditor that might be prejudiced by CCAA proceedings — Decision to grant initial order was correct — CCAA proceedings were appropriate, with exception of proceeds of sale of designated lands which were out of CCAA's reach.

Table of Authorities

Cases considered by *Colin C.J. Feasby J.*:

Angus A2A GP Inc (Re) (2024), 2024 ABKB 769, 2024 CarswellAlta 3424 (Alta. K.B.) — referred to

Aquino v. Aquino (2021), 2021 ONSC 7797, 2021 CarswellOnt 17491, 96 C.B.R. (6th) 138 (Ont. S.C.J.) — referred to

Aquino v. Bondfield Construction Co. (2024), 2024 SCC 31, 2024 CSC 31, 2024 CarswellOnt 15328, 2024 CarswellOnt 15329, 496 D.L.R. (4th) 613, 54 B.L.R. (6th) 1, 15 C.B.R. (7th) 207 (S.C.C.) — referred to

Arrangement relatif à Bloom Lake General (2021), 2021 QCCS 2946, 2021 CarswellQue 11345, 93 C.B.R. (6th) 285 (C.S. Que.) — referred to

Ashcroft Urban Developments Inc. (Re) (2024), 2024 ONSC 7192, 2024 CarswellOnt 20248, 16 C.B.R. (7th) 338 (Ont. S.C.J.) — referred to

BG International Ltd. v. Canadian Superior Energy Inc. (2009), 2009 ABCA 127, 2009 CarswellAlta 469, 53 C.B.R. (5th) 161, 71 C.P.C. (6th) 156, 457 W.A.C. 38, 457 A.R. 38 (Alta. C.A.) — referred to

BZAM Ltd. Plan of Arrangement (2024), 2024 ONSC 1645, 2024 CarswellOnt 3802 (Ont. S.C.J. [Commercial List]) — considered

Canada v. Canada North Group Inc. (2021), 2021 SCC 30, 2021 CSC 30, 2021 CarswellAlta 1780, 2021 CarswellAlta 1781, 2021 D.T.C. 5080, (sub nom. *La Reine c. Canada North Group Inc.)* 2021 D.T.C. 5081, 91 C.B.R. (6th) 1, [2021] 5 C.T.C. 111, 28 Alta. L.R. (7th) 1, [2021] 10 W.W.R. 1, 460 D.L.R. (4th) 309, 19 B.L.R. (6th) 1, [2021] 2 S.C.R. 571, [2021] 2 R.C.S. 571 (S.C.C.) — considered

Delta 9 Cannabis Inc (Re) (2024), 2024 ABKB 657, 2024 CarswellAlta 2883, 16 C.B.R. (7th) 93 (Alta. K.B.) — referred to

Douez v. Facebook, Inc. (2017), 2017 SCC 33, 2017 CSC 33, 2017 CarswellBC 1663, 2017 CarswellBC 1664, 1 C.P.C. (8th) 213, 97 B.C.L.R. (5th) 1, [2017] 7 W.W.R. 637, 3 C.P.C. (8th) 1, 411 D.L.R. (4th) 434, 71 B.L.R. (5th) 1, [2017] 1 S.C.R. 751, [2017] 1 R.C.S. 751 (S.C.C.) — referred to

Inducon Development Corp., Re (1991), 8 C.B.R. (3d) 306, 1991 CarswellOnt 219 (Ont. Gen. Div.) — considered

Industrial Properties Regina Limited v. Copper Sands Land Corp. (2018), 2018 SKCA 36, 2018 CarswellSask 252, 61 C.B.R. (6th) 38, 422 D.L.R. (4th) 749 (Sask. C.A.) — referred to

Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada (2006), 2006 SCC 21, 2006 CarswellOnt 3265, 2006 CarswellOnt 3266, [2006] I.L.R. I-4512, 36 C.C.L.I. (4th) 161, 267 D.L.R. (4th) 1, 348 N.R. 307, 80 O.R. (3d) 557 (note), 211 O.A.C. 363, [2006] 1 S.C.R. 744, [2006] R.R.A. 523 (S.C.C.) — referred to

Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co. (2016), 2016 SCC 37, 2016 CSC 37, 2016 CarswellAlta 1699, 2016 CarswellAlta 1700, [2016] 10 W.W.R. 419, 54 B.L.R. (5th) 1, 59 C.C.L.I. (5th) 173, 56 C.L.R. (4th) 1, 487 N.R. 1, [2016] I.L.R. I-5917, 404 D.L.R. (4th) 258, [2016] 2 S.C.R. 23, 19 Admin. L.R. (6th) 1, [2016] 2 R.C.S. 23 (S.C.C.) — referred to

Original Traders Energy Ltd., (Re) (2024), 2024 ONSC 325, 2024 CarswellOnt 574, 11 C.B.R. (7th) 13 (Ont. S.C.J. [Commercial List]) — referred to

Pride Holdings Group Inc. (2024), 2024 ONSC 1830, 2024 CarswellOnt 21022 (Ont. S.C.J.) — considered

Priszm Income Fund, Re (2011), 2011 ONSC 2061, 2011 CarswellOnt 2258, 75 C.B.R. (5th) 213 (Ont. S.C.J.) — considered

Target Canada Co., Re (2015), 2015 ONSC 303, 2015 CarswellOnt 620, 22 C.B.R. (6th) 323 (Ont. S.C.J.) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, 2010 CSC 60 (S.C.C.) — referred to

9354-9186 Québec inc. v. Callidus Capital Corp. (2020), 2020 SCC 10, 2020 CSC 10, 2020 CarswellQue 3772, 2020 CarswellQue 3773, 78 C.B.R. (6th) 1, 444 D.L.R. (4th) 373, 1 B.L.R. (6th) 1, [2020] 1 S.C.R. 521 (S.C.C.) — considered

Statutes considered:

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Bankruptcy Code, 11 U.S.C.
Chapter 15 — referred to
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 2 "insolvent person" — considered
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 2(1) "company" — referred to

s. 11 — referred to

s. 11.02(1) [en. 2005, c. 47, s. 128] — referred to

s. 23(1)(c) — referred to
Judicature Act, R.S.A. 2000, c. J-2
Generally — referred to

s. 13(2) — referred to

Proceeding

Motion/Application to Set Aside.

APPLICATION to set aside initial order and amended and restated initial order.

***Colin C.J. Feasby J.*:**

Reasons for Decision

I. Introduction

1 The matter before the Court raises important questions about the proper use of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended ("*CCAA*"). The *CCAA* is an insolvency statute that is typically used to restructure a debtor company's affairs. The present application was commenced by creditors and equity investors to preserve assets, unseat management, conduct an investigation, and facilitate and maximize recovery for stakeholders. The *CCAA*'s greatest attribute is its flexibility; the question in the present case is whether it is flexible enough to accommodate the proposed use.

2 A group of Canadian investors (the "Canadian Investors") applied for and were granted an Initial Order pursuant to the *CCAA* on November 14, 2024 in respect of various related entities involved in real estate development ventures in Ontario and Texas. I refer to the entities subject to the Initial Order as the Canadian Respondents and the US LLCs and when referring to them together I call them the Respondents. The Initial Order appointed counsel to represent investors from outside Canada (the "Offshore Investors"). For convenience, I refer to the Canadian Investors and Offshore Investors as the Applicants even though the Offshore Investors are not, strictly speaking, applicants because the two groups are aligned in respect of the Initial Order and ARIO.

3 The Respondents ask the Court to set aside the Initial Order and the Amended and Restated Initial Order ("ARIO") thereby terminating the *CCAA* proceedings. To decide whether the *CCAA* proceedings should continue, I must consider the purpose and reach of the *CCAA*. The Respondents submit that the Applicants are, in essence, equity investors who have misused the *CCAA* to advance what should be conventional civil claims. The Respondents further assert that management is best placed to maximize value for investors through the sale of the real estate projects. The Applicants concede that their use of the *CCAA* is novel but contend that it is consistent with the purposes of the *CCAA* and justified in the circumstances.

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4 The US LLCs also assert that the *CCAA* proceedings are destined to fail in relation to the US real estate projects because the Respondents' US real estate assets and bank accounts are beyond the reach of the *CCAA* proceedings. The US LLCs also contend that the Court has no jurisdiction over them because they are not doing business in Canada and thus cannot be "debtor companies" or "affiliated companies" as defined by the *CCAA*. The Applicants respond that the business of the US LLCs is inextricably intertwined with the various Canadian entities such that they are necessary parties to the *CCAA* proceedings regardless of whether they are doing business in Canada.

5 The Applicants submit that if the Respondents are correct that the Court does not have jurisdiction under the *CCAA* or for other reasons the *CCAA* proceedings must be terminated, the Court should appoint a receiver over the Respondents. The Applicants assert that the Respondents are insolvent and have demonstrated an inability or unwillingness to manage their assets to maximize returns to investors. The Respondents submit that it would not be just or convenient to appoint a receiver because the management is in the best position to liquidate the real estate projects and the appointment of a receiver would prevent management from maximizing value.

6 The present matter is a continuation of the Comeback Hearing to confirm the appropriateness of the *CCAA* proceedings and the Respondents' application to set aside the Initial Order and ARIO. I explained in ***A2A GP Inc (Re)***, 2024 ABQB 769 at para 22 the onus remains on the Applicants to show that *CCAA* proceedings are appropriate: see also, ***Target Canada (Re)***, 2015 ONSC 303 at para 84 *per* Morawetz RSJ, as he then was.

II. Procedural Background

A. Initial Order

7 The Initial Order application was made before me on November 14, 2024. The application was presented as a matter of serious urgency because the Applicants feared that conditions on the sale of the Ontario property, Angus Manor Park ("Angus Manor"), would be waived the following day and the sale would become firm. The Respondents were represented by their corporate counsel who had little more than one day's notice of the application. The Initial Order application was effectively made *ex parte*.

8 The Canadian Investors submitted that even though they did not have the right to vote on any sale of Angus Manor, they had the power to direct the corporate entity that serves as the general partner of the limited partnership that holds the interests in land. The Canadian Investors complained that they had not received notice or details of the pending sale. The Applicants further demonstrated that the corporate entity that was registered on the Angus Manor title had been struck from the Ontario corporate registry. The Applicants submitted that they had learned from a Facebook posting that the sale of Angus Manor was to be effected through a vendor take back (VTB) structure with a $3 million payment at closing with the balance of the $14 million purchase price to be paid in 2029.

9 The Applicants submitted that they had standing to make the application because as trust and limited partnership unitholders, bondholders, and UFI holders they were the key and perhaps only real stakeholders in the Respondent entities. They further submitted that they were creditors or contingent creditors because they had or would have claims against the Respondents.

10 The Applicants argued that the statutory requirements for a *CCAA* initial order were met because the Respondents were insolvent because they were not meeting their obligations as they became due, as evidenced by non-payment of Ontario taxes, and the debt owed by the Respondents exceeded $5 million. Among other debt, the Applicants pointed to a judgment of approximately US $3.8 million that they said was registered on title of the US properties as evidence supporting a finding that the Respondents had at least $5 million in debt.

11 The Initial Order granted the Monitor expanded powers and took control of the Respondent entities away from management. An important consideration in granting the Initial Order pursuant to the *CCAA* rather than a receivership pursuant to the *Judicature Act*, RSA 2000, c J-2 or an injunction was the efficiency in enforcing the order given the seeming urgency. A *CCAA* stay order is immediately enforceable across the country without recognition proceedings in other provinces and it may be

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recognized and given effect in the US through proceedings under Chapter 15 of the *US Bankruptcy Code*. Both a receivership and an injunction would have required additional proceedings in an Ontario court that may not have been possible within the time available prior to sale of Angus Manor being completed.

B. Amended and Restated Initial Order

12 The Comeback Hearing took place before Justice Simard on November 21, 2024. The Respondents brought a cross-application to set aside the Initial Order. Justice Simard reserved his decision and gave oral reasons on November 25, 2024. Simard J decided some of the issues relevant to the Comeback Hearing and adjourned others to be heard later after the Respondents had provided information to the Monitor and the Monitor had provided a comprehensive report to the Court. He also adjourned the cross-application to set aside the Initial Order.

13 Before me at the continuation of the Comeback Hearing and the set-aside application, the parties adduced new evidence and offered new arguments on some of the issues decided by Justice Simard. I cannot revisit those issues. Though I discuss some of the new evidence and new arguments in these Reasons, I do not vary Justice Simard's decision. Indeed, in my view, the new evidence and arguments reinforce his conclusions.

14 Before Justice Simard, the Respondents were represented by litigation counsel who was retained after the Initial Order was granted. The Respondents submitted that the US LLCs had not been properly served with the Initial Order application. Justice Simard found that the defects in service were excused by the urgency of the application and that all the Respondents had proper notice of the Comeback Hearing. He went on to find at page 8 of the transcript of his November 25, 2024 oral decision:

> The two Texas LLCs are proper respondents because they are inextricably intertwined in the corporate and investment structure of the Windridge and Fossil Creek projects that were marketed to Canadian investors in Canada through Alberta and Ontario corporations, limited partnerships, and trusts.
>
> Despite the deficiencies in service of the application for the initial order, I find that I have jurisdiction over all of the existing respondents, including the two Texas LLCs.

15 Simard J later held at page 9 that, "I am satisfied by the evidence that all of the respondents are affiliated, and their businesses are inextricably intertwined with respect to the three projects. The respondents did not challenge that assertion."

16 The Respondents argued that the Applicants, being equity investors, did not have standing pursuant to the *CCAA* to apply for an Initial Order. Justice Simard dismissed this argument at page 8 saying: "there is no prohibition in the *CCAA* on investors applying for an initial order." He further concluded at page 9 that the "applicant investors are persons interested, as described in Section 11.02(1) of the *Act*; and as a result, I find that the applicant investors had standing to make the initial order application."

17 The Respondents disputed that they were insolvent. After reviewing the evidence concerning the debts of the Respondents and considering the Respondents' submissions, Simard J concluded at page 10 "based on the evidence currently before me, I am satisfied that the respondents are insolvent."

18 The Applicants identified two trusts governed by Texas law that were not covered by the Initial Order (the "Texas Trusts") and requested that Justice Simard extend the ARIO to the Texas Trusts and the trustee, Dirk Foo. Justice Simard denied the Applicants' request because they had insufficient information concerning the Texas Trusts and Mr. Foo, being an individual, cannot be "treated as a debtor company under the CCAA, or an affiliate of a debtor company."

19 Justice Simard directed the Respondents to provide information and records requested by the Monitor so that the Monitor could provide a comprehensive report to the Court. The information to be provided included corporate records, accounting records, investor records, contracts, title documents, other documents related to the real property, records of communications with investors concerning the sale of real property, and other material records. The Respondents were required to produce the requested records by December 6, 2024. The Monitor was directed to provide its comprehensive report by December 13, 2024.

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C. US Bankruptcy Code Chapter 15 Recognition Proceedings

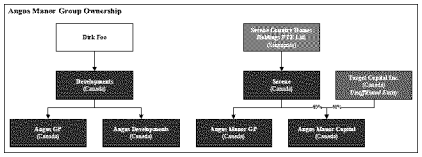
20 On December 20, 2024, a US Bankruptcy Judge of the US Bankruptcy Court, Northern District of Texas, Fort Worth Division issued an "Order Granting Recognition of Foreign Main Proceeding and Additional Relief." The US Bankruptcy Judge held that the Chapter 15 proceedings were properly commenced and that the *CCAA* proceeding in the Alberta Court of King's Bench should be recognized as a foreign main proceeding and a stay should extend to the Respondents and their property within the territorial jurisdiction of the US. The US Bankruptcy Judge further held that granting relief was "in the interest of the public and international comity, consistent with the public policy of the United States, and will not cause any hardship to any party in interest that is not outweighed by the benefits of the relief granted."

III. The Respondents' Business and the Applicants' Investments

A. The Respondents' Organizational Structure

21 All the relevant corporations are direct or indirect subsidiaries of Serene Country Homes Holdings PTE Ltd ("Serene Country"), a Singapore company, and are controlled by Dirk Foo. Below Serene Country sit three corporate groups that correspond to the three real estate development projects. One project, Angus Manor, is in Ontario and two projects, The Hills of Windridge ("Windridge") and The Trails of Fossil Creek ("Fossil Creek"), are in Texas. Several of the relevant corporations, limited partnerships, and trusts are Alberta entities. There are also Ontario, Texas, and Singapore entities that play important roles. Each of the Respondent corporate entities has different directors. The directors and trustees of the various Respondent entities include Grayson Ambrose, Dirk Foo, Allan Lind, and Joseph Attrux. Mr. Ambrose is a resident of Calgary, Mr. Foo and Mr. Lind reside in Singapore, and Mr. Attrux is identified in corporate filings as a resident of Texas. Justice Simard found, and I agree, that Alberta is an appropriate venue for these proceedings despite there being connections to other jurisdictions.

22 Angus Manor is a 167-acre residential development project located in Essa Township which is just southwest of Barrie, Ontario. The Angus Manor Group ownership is depicted on the chart below taken from the Monitor's Third Report. Angus Manor Park A2A GP Inc, shown below as Angus GP (Canada), is an Alberta corporation that was struck from the corporate registry on September 2, 2021. Angus GP (Canada) is the general partner of the Angus Manor Park A2A Limited Partnership ("Angus Manor LP") which is an Alberta limited partnership. Angus Manor A2A Capital Corp ("Angus Manor Capital") owned 100% of the units of Angus Manor LP and issued bonds (discussed below) to finance the development of the Angus Manor project. Angus Manor Park A2A Developments Inc, shown below as Angus Developments (Canada), is an Ontario corporation. Angus Developments (Canada) was the company responsible for developing the Angus Manor real estate project.



1

23 The Angus Manor lands were put on the market on August 15, 2024. The best offer was structured as a VTB bearing 3% interest for four years with an initial payment of $3 million and the balance of $11 million due in 2029. The Monitor concluded in its First Supplement to the Third Report that the proposed purchase price for the Angus Manor lands is fair. However, the Respondents proposed to use the whole $3 million initial payment to cover transaction fees and management fees. The Monitor expressed concern that "the VTB structure must be done in a way to protect the interest of the A2A Investors and be done so in a clear and transparent manner."

24 Windridge is a 415-acre residential development in the Dallas/Fort Worth area of Texas. The Windridge Group ownership depicted on the chart below is taken from the Monitor's Third Report. Hills of Windridge A2A GP Inc., shown below as Windridge GP (Canada), is an Ontario corporation. Windridge GP (Canada) is the general partner of Hills of Windridge A2A LP ("Windridge LP"), an Ontario limited partnership which is not shown on the chart. Investors own units in the Hills of Windridge

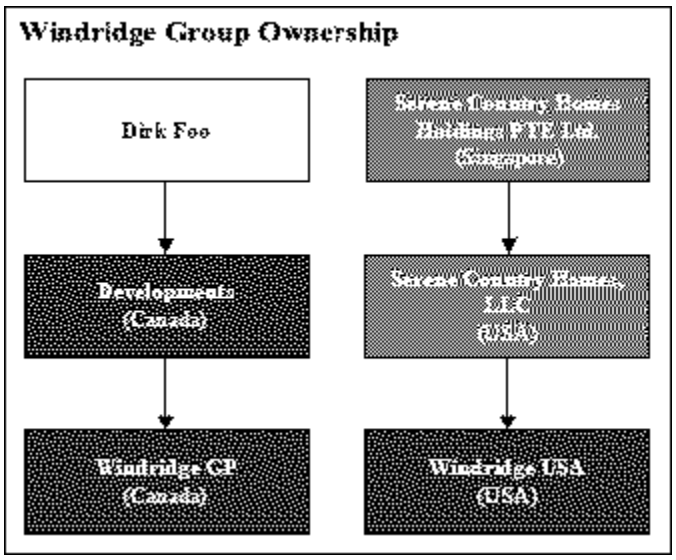
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A2A Trust ("Windridge Trust"), an Ontario trust, also not shown on the chart, which, in turn, owns the units of the Windridge LP. Windridge LP owns undivided factional interests ("UFIs") in the Windridge lands.

25 Hills of Windridge A2A Developments LLC ("Windridge LLC") referred to below as Windridge USA is a Texas entity. The Further Amended and Restated Confidential Offering Memorandum provided to investors described the role of Windridge LLC, which it called Windridge Developments, as follows:

> Windridge Developments was established for the sole purpose of acquiring and overseeing all aspects of the development of the Property. It is the vendor of the UFIs under the UFI Purchase Agreement and will have a significant amount of strategic input and operational and administrative responsibilities for the development of the Property, the sales of lots or homes thereon, pursuant to the terms of the Deed of Covenant.

26 Windridge LLC was the original owner of the Windridge lands. Windridge LLC sold UFIs in the Windridge lands to Windridge LP. The units of the Windridge LP are held by the Windridge Trust.



2

27 Records obtained by the Monitor indicate that Windridge LP transferred the UFIs to a different Windridge Trust, governed by Texas law ("Windridge Texas Trust") which now holds title to the Windridge lands. The trustee of Windridge Texas Trust is Dirk Foo. A small parcel of the Windridge lands was transferred by the Windridge Texas Trust to a new limited partnership, the general partner of which is Windridge LLC, for the purposes of effecting a sale to the Tarrant Regional Water District ("TRWD"). The small parcel was to have been expropriated if Windridge had not agreed to sell. The Monitor applied to extend the *CCAA* proceedings to the Windridge Texas Trust and Dirk Foo on the grounds that they are affiliates of the Respondents but the application was denied by Justice Simard.

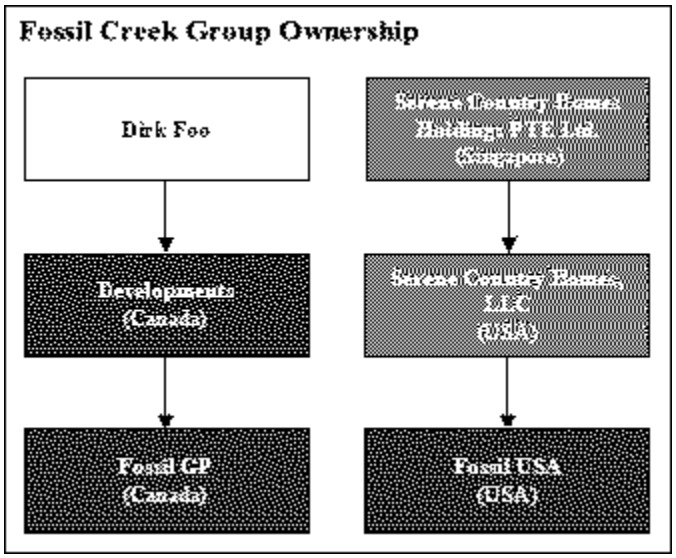
28 Fossil Creek is a 93-acre residential development with 487 single detached family homes located in Fort Worth, Texas. The Fossil Creek Group ownership depicted on the chart below is taken from the Monitor's Third Report. Fossil Creek A2A GP Inc., shown below as Fossil GP (Canada), is an Alberta corporation. Fossil GP (Canada) is the general partner of Fossil Creek A2A Limited Partnership ("Fossil Creek LP") which is an Alberta limited partnership. Investors own units in the Fossil Creek A2A Trust (the "Fossil Creek Trust"), an Alberta trust, also not shown on the chart, which, in turn, owns the units of the Fossil Creek LP.

29 Fossil Creek A2A Developments, LLC ("Fossil Creek LLC"), referred to in the chart below as Fossil USA, is a Texas entity. The Amendment to the Offering Memorandum for Fossil Creek Trust units described the role of Fossil Creek LLC, which it called Fossil Creek Developments, as follows:

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Fossil Creek Developments was established for the sole purpose of acquiring and overseeing all aspects of the development of the Property. It is the vendor of the UFIs under the UFI Purchase Agreement and will have a significant amount of strategic input and operational and administrative responsibilities for the development of the Property, the sales of lots or homes thereon, pursuant to the terms of the Deed of Covenant.

30 According to the Amendment to the Offering Memorandum, Fossil Creek LLC sold UFIs in the Fossil Creek lands to Fossil Creek LP.



3

31 Records obtained by the Monitor show that Fossil Creek LP transferred its UFIs to Fossil Creek Trust, a Texas trust ("Fossil Creek Texas Trust"). The trustee of Fossil Creek Texas Trust is Dirk Foo. The Fossil Creek Texas Trust transferred its interest in the Fossil Creek Lands to a new Texas limited partnership, the general partner of which was Fossil Creek LLC, in 2024, to facilitate the sale of the Fossil Creek lands to a third party. The Monitor applied to extend the *CCAA* proceedings to the Fossil Creek Texas Trust and Dirk Foo on the grounds that they are affiliates of the Respondents but the application was denied by Justice Simard.

B. The Applicants' Interests and Rights

i. The Securities, the Rights of the Applicants, and the Obligations and Conduct of the Respondents

32 Angus Manor LP sold limited partnership units to investors in 2015. The units were priced at $100 with a minimum investment of $5,000 required. Unitholders have no right to take an active part in the business of Angus Manor LP. Counsel for the Canadian Respondents explained that Angus GP "is vested with the authority to make virtually all decisions on behalf of the investors." He further described the investors as "passive participants." The only right that investors have in relation to the governance of the Angus Manor entities and project is the right to receive an annual report containing financial statements of Angus Manor LP each year. But the Respondents never provided investors with an annual report containing financial statements.

33 Angus Manor Capital sold bonds ("Bonds") in 2016 to investors for $1 each with a minimum investment of $6,300 required. Each bond bears a 5% annual fixed rate of interest. The interest that accrued from the date of purchase to September 30, 2021 was to be paid on September 30, 2021. A2A Capital failed to pay the interest accrued to September 30, 2021 to bondholders. Any interest accrued after September 30, 2021 is to be paid within six months of the Bonds being redeemed in full. The Maturity Date of the Bonds is September 30, 2026. Angus Manor Capital was required to file annual financial statements with securities regulators and make them reasonably available to each bondholder. No financial statements for Angus Manor

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Capital have been provided by the Respondents to the Monitor despite the Court's direction to do so. The inference that I draw from the non-production of Angus Manor Capital financial statements is that they were never prepared.

34 The Respondents argue that the Bonds are, in effect, equity instruments because the Confidential Offering Memorandum specified that the Bonds are "entitled to share in the Net Profits or Income" of Angus Manor LP and that the Bonds rank *pari passu* with other unsecured obligations of Angus Manor Capital. The peculiar structure of the Bonds was driven by the fact that limited partnership units are not RRSP and TFSA eligible. The Angus Manor group wanted to make investing in Angus Manor RRSP and TFSA eligible so that it was more attractive. The result is an interest-bearing security that Angus Manor Capital marketed as a bond but otherwise has the characteristics of equity. As a matter of consistency and fairness, the Respondents cannot style a security as a "bond" - a paradigm example of a debt instrument - to obtain certain attributes as a matter of tax law to assist in soliciting investment and then claim in the *CCAA* process that the same security is really equity. Be that as it may, I explain later in these Reasons, whether the bonds are debt instruments or equity is beside the point because Angus Manor Capital failed to make the September 30, 2021 interest payment making the bondholders creditors regardless of the nature of their security.

35 The Offshore Investors hold UFIs in the Angus Manor lands. Angus Manor UFI holders have the right to vote on the sale of all or any part of the Angus Manor lands. Some of the Angus Manor UFI holders were given proxies to vote on the Angus Manor transaction that was halted by the Initial Order.

36 Canadian Investors in Fossil Creek own units in the Fossil Creek Trust. The Fossil Creek A2A Trust Declaration provides that a meeting of Fossil Creek Trust investors is to be called within 18 months of the effective date of Fossil Creek A2A Trust Declaration and then a meeting is to occur at least every 15 months. 21-days prior to each meeting, the administrator of the Fossil Creek Trust is required to provide investors with annual financial statements. No financial statements for the Fossil Creek Trust (or any entities associated with the Fossil Creek project) have been provided to the Monitor despite the direction of the Court. The inference that I draw from non-production is that financial statements were never prepared.

37 Offshore Investors in Fossil Creek own UFIs which are governed by the Fossil Creek Deed of Covenant. The UFI holders do not have any rights to participate in the development of the Fossil Creek lands but the have the right to vote on the sale of all or any part of the Fossil Creek lands. Pursuant to the Fossil Creek Deed of Covenant, Fossil Creek LLC as "Facilitator" is required to maintain accurate books and records and make such books and records available for inspection by UFI holders at Fossil Creek LLC's office in Texas. The Fossil Creek Deed of Covenant provides that a Facilitator other than Fossil Creek LLC may be appointed. It is not clear whether a different Facilitator was appointed and, if so, what entity was appointed. No financial records for Fossil Creek were produced by the Respondents despite the direction of the Court. The inference that I draw from non-production is that financial records were not kept.

38 The Fossil Creek lands were sold in Fall 2024 by Trails of Fossil Creek Properties LP, a new limited partnership created to facilitate the sale. The general partner of Fossil Creek Properties LP is Fossil Creek LLC. The Monitor reports that, as of the date of the Monitor's Third Report, "no Offshore Investor has advised the Monitor or its consultants that it was asked to vote to approve the Fossil Creek Sale." Mr. Lind confirmed on cross-examination that he was unaware of approval for the sale being sought from UFI holders. According to Mr. Lind, the proceeds of the sale of the Fossil Creek lands are being held by a Texas company not party to these *CCAA* proceedings at the direction of Mr. Foo. The funds are apparently deposited at a branch of the Chase bank but Mr. Lind refused an undertaking request to disclose the location of the specific branch where the funds are deposited. The Monitor advised in its First Supplement to the Third Report that the sale of the Fossil Creek lands was made to a *bona fide* third-party purchaser at below the appraised value. The Monitor was "unable to comment on whether the sale was made improvidently."

39 The Canadian Investors in Windridge own units in the Windridge Trust. The Hills of Windridge A2A Trust Declaration provides that a meeting of Windridge Trust investors may be called by investors holding at least 25% of the units. The Windridge Trustees are required to provide investors with annual financial statements from time to time as required by applicable law and to prepare and maintain accounting records. No financial statements for the Windridge Trust (or any entities associated with

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the Windridge project) have been provided to the Monitor despite the direction of the Court. The inference that I draw from non-production is that financial statements were never prepared.

40 The Offshore Investors in Windridge own UFIs which are governed by the Windridge Deed of Covenant. The UFI holders do not have any rights to participate in the development of the Windridge lands but they have the right to vote on the sale of all or any part of the Windridge lands. Pursuant to the Windridge Deed of Covenant, Windridge LLC as "Facilitator" is required to maintain accurate books and records and make such books and records available for inspection by UFI holders at Windridge LLC's office in Texas. The Windridge Deed of Covenant provides that a Facilitator other than Windridge LLC may be appointed. It is not clear whether a different Facilitator was appointed and, if so, what entity was appointed. No financial records for Windridge were produced by the Respondents despite the direction of the Court. The inference that I draw from non-production is that financial records were not kept.

41 A small parcel of the Windridge lands was sold to TRWD. The Monitor reports that the Offshore Investors were not aware of the sale and, accordingly, it may be inferred that they did not vote on the sale. The Respondents provided no information to the Monitor concerning the location of the sale proceeds. Mr. Lind refused to answer an undertaking request concerning the location of the sale proceeds.

42 The Respondents submit that the Applicants' real issue is that the Respondents failed to communicate with investors. They contend that this is something that should be dealt with through a normal civil action rather than the *CCAA* process. I will return to this question later in these Reasons, but it is important to note that the Applicants' concerns go beyond the Respondents' poor communications. The Monitor concluded from its investigation, and I accept, that the Respondents are "either incapable of or unwilling to undertake the fiduciary responsibilities to act as a 'Facilitator' or 'Trustee' in the realization and distribution process when A2A Group projects are monetized." The Monitor further concluded that the Respondents have failed to:

(a) comply with basic requirements to keep and maintain accurate books and records;

(b) comply with basic reporting requirements to which the A2A Investors are entitled;

(c) maintain corporate registrations of key entities in the A2A Group; and

(d) fully account for the source and uses of funds of the A2A Group.

43 The evidence of the Applicants, which was not available to the Monitor at the time of the Third Report, shows that the Respondents have paid some Windridge and Fossil Creek investors and not others. The discrepancies cannot be explained on the grounds that the various investors own different classes of securities. All Canadian investors in Windridge own the same class of security but some have received payments and others have not. The same is the case for Fossil Creek. And among those who have received payments, the payments vary in ways that do not appear to be proportionate to the size of investment. The evidence of the Applicants is consistent with the Monitor's conclusion that the Respondents are incapable of meeting their responsibilities to investors. I conclude that the Respondents' dilatory recordkeeping and general disregard for investor rights mean that the Respondents will not be able (even if they were willing) to conduct a realization and distribution process that is fair to all investors.

ii. The (In)significance of Investor Contractual Rights

44 The Canadian Investors are "accredited investors" as that term is used in securities law. Accredited investors are required to have income or financial resources greater than prescribed thresholds. Net worth and income are used by securities law as a proxies for investor sophistication. Because the Applicants are accredited investors, the securities sold by the Respondents were exempt from the prospectus requirements of securities laws in Canada. The securities regulatory regime that applied to the Offshore Investors is not clear to the Court. The securities purchased by the investors were limited partnership units, trust units, bonds, and UFIs, so the Applicants do not enjoy the rights afforded to shareholders in corporate law nor do they have recourse to statutory remedies in corporate or securities law. The terms of the securities and the rights of the Applicants are set out in the offering memoranda for each security and other material agreements relevant to each project.

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45 A theme of the Respondents' written and oral submissions was that the Applicants have limited rights pursuant to the terms of their securities and did not bargain for the rights now afforded to them pursuant to the *CCAA*. The Respondents submit that the Applicants should be restricted to their contractual rights and nothing more. The Canadian Respondents assert that the Applicants "are effectively asking the Courts to give them rights they did not bargain for." The US LLCs submit that the "appropriate" thing for the Applicants to do is "commence litigation for breach of contract." There are several flaws in this line of reasoning.

46 The idea that the investors bargained for anything is incorrect even though Courts often speak of securityholders bargaining for rights. The word bargaining suggests that there was a negotiation between parties with the ability to engage in trade-offs. The rights that attached to the LP units, Trust units, Bonds, and UFIs in the present case were determined by the Respondents and then the securities were sold as "financial products" by agents who had no authority to vary their terms. The investors had a choice to buy the securities or not. They did not negotiate the terms of the securities. The legal rights that attach to the securities, in this sense, are no different than the terms any other standard form contract. I discuss this in greater detail in Colin Feasby, "Bondholders and Barbarians: BCE and the Supreme Court's New View on Directors' Duties" in Todd L. Archibald & Randall Scott Echlin, *The Annual Review of Civil Litigation* (Toronto: Carswell, 2009) 83 at 88-89.

47 Whether rights were bargained for or offered on a take it or leave it basis has legal significance in two ways. First, a lack of bargaining or unequal bargaining power affects the approach to contract interpretation: ***Jesuit Fathers of Upper Canada v Guardian Insurance Co of Canada*, 2006 SCC 21** at para 28 and ***Douez v Facebook, Inc*, 2017 SCC 33** at para 173 *per* McLachlin CJC and Côté J dissenting. Second, whether a contract is negotiated or a standard form determines the standard of review of contractual interpretation on appeal: ***Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37** at paras 28 & 46. The Respondents do not point to any language in the documents governing the securities that can be interpreted as preventing securityholders from using the *CCAA*. I reject the suggestion that there was a negotiation between the Applicants and Respondents that somehow prevents them from asserting their rights under a statute of general application like the *CCAA*. Nor does the fact that the Applicants only paid for certain contractual rights mean that statutory rights are not available to them if they satisfy the requirements of the statute.

IV. Are CCAA Proceedings Appropriate?

A. The Solvency of the Respondents

48 Justice Simard concluded that the Respondents were insolvent, but certain additional evidence that has come to light since his decision must be noted. Simard J's decision on the solvency of the Respondents turned, in part, on the fact that there was an unpaid $3.8 million judgment against the US LLCs in Texas. The Respondents submit that the Texas judgment should not be considered a liability because it is a default judgment and does not impede the Windridge and Fossil Creek projects. In addition, whether the Texas judgment can be considered turns on the status of the US LLCs as parties to this proceeding, an issue that will be dealt with in a later section of these Reasons.

49 The fact that the Texas judgment is a default judgment as opposed to a trial judgment is of no consequence. The US LLCs made a conscious decision not to defend the allegations against them. Perhaps that was because they had no money to defend the case, maybe it was because they knew the allegations to be true, or possibly there were other reasons. Whatever the reason, a default judgment is a liability in the same way as any other judgment. The US LLCs also quibbled in oral argument with the characterization of the Texas judgment as a finding of fraud. As I understand the objection, it is because the judgment specifically states that the judgment against other defendants is for fraud and misappropriation of funds but there is no similar statement regarding the US LLCs. To emphasize the fact that other defendants such as Joseph Attrux, a director of some of the Respondent entities, were expressly found liable for fraud whereas the US LLCs were only found jointly and severally liable "on all causes of action in the Plaintiffs' First Amended Petition" is to highlight a distinction without a difference.

50 The Monitor highlighted in its Third Report that Angus Manor had liabilities of $5,560,644 as of December 10, 2018 which is the most recent date for which information was provided by the Respondents. Similarly, Serene Country Homes (Canada) Inc

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("Serene Canada") is shown as having $5,329,059 in liabilities as of December 4, 2018, the most recent date for which financial information was provided by the Respondents. Other Respondents are also shown by the Third Report to have liabilities, though less than Angus Manor and Serene Canada. Given that the reason given for not preparing and providing more recent financial information is that the Respondents were facing financial challenges and there is no evidence of Angus Manor or Serene Canada receiving a cash injection since 2018, I infer that the current liabilities of Angus Manor and Serene Canada are equal to or greater than that stated by the Monitor as of December 2018. So even if the Texas judgment is not considered, the Respondents have liabilities of more than $5 million as required by the *CCAA*.

51 There is also considerable evidence that the Respondents cannot meet their liabilities as they come due. Mr. Lind, director and trustee of several of the Respondent entities, explained in his December 31, 2024 affidavit that the Respondents had experienced "financial challenges." He described how these financial challenges caused the Respondents to fail to meet their contractual obligations to the Respondents:

> One impact of these financial challenges was that there were limited funds available to pay accountants, maintain offices, or continue software subscriptions that the companies had utilized. Documents ended up spread over multiple places held by different accountants or law firms that we had not maintained contact with. In some cases, financial statements simply were not prepared, as funds were tight and most of the entities involved did not have operations beyond holding assets.

52 Mr. Lind further advised on cross-examination that records concerning Windridge and Fossil Creek were lost when the Respondents were locked out of their Fort Worth office by their landlord in 2018 and not permitted to retrieve their records. I infer from this evidence that the Respondents were not paying their rent as it came due. Mr. Lind also admitted on cross-examination that the Respondents were unable to produce certain information concerning UFIs because they failed to maintain their subscription to a software service that they used to keep track of land ownership interests because of financial constraints. The failure of the Respondents, a corporate group involved in land development, to maintain a software subscription that was essential to tracking land ownership interests is a further indication of their insolvency.

53 The continuing failure of Angus Manor Capital to pay the bondholders interest that had accrued to September 30, 2021 was not addressed in submissions before Justice Simard and, accordingly, was not noted in his reasons for decision. The failure to pay interest due to bondholders is evidence of insolvency.

54 The evidence that has come to light since Justice Simard's decision or was not brought to his attention supports his conclusion that the Respondents were insolvent. If I were required to consider the question afresh based on the evidence now before me, I would conclude that the Respondents are insolvent.

B. Equity and the Purposes of the CCAA

55 Perhaps the most important question raised by the Respondents is whether the Applicants' use of the *CCAA* is appropriate. The Respondents submit that the Applicants are equity investors who enjoy minimal contractual rights. The Applicants, according to the Respondents, are using the *CCAA* to acquire rights that they did not bargain for. Further, the Respondents submit that the Applicants are using the *CCAA* to obtain injunctive relief and to conduct an investigation rather than restructure or liquidate the Respondent entities.

56 The Respondents submit that Justice Simard agreed with their position. The Respondents place great emphasis on his observation that "there are limits to the [*CCAA*'s] flexibility. As its name suggests, the purpose of the *Act* is to assist insolvent companies in developing and seeking compromises and arrangements with their creditors. The continuation of a stay may not be appropriate if the purpose of the proceedings is not to further that fundamental purpose of the *Act*" [emphasis added]. Justice Simard's comments demonstrate that he recognized that the issue raised by the Respondents must be taken seriously. Indeed, he directed the Respondents to provide additional information to the Monitor so that the issue could be considered with the benefit of a more robust evidential record.

57 The Respondents conducted a survey of all *CCAA* filings since 2009. Their survey revealed that 94.1% of all *CCAA* proceedings were commenced by debtor companies, 4.5% were commenced by secured creditors, 0.5% were commenced by

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unsecured creditors, 0.5% were commenced by a receiver, 0.2% were commenced by an interim receiver, and 0.2% were commenced by a liquidator/monitor together with a debtor company. The Respondents submit that the absence of any *CCAA* proceedings being commenced by equity investors over the last 15 years is proof that equity investors cannot commence *CCAA* proceedings. The fact that equity investors have not commenced *CCAA* proceedings does not mean that it is impossible for them to do so, but it suggests that when presented with an application by equity investors to commence *CCAA* proceedings a Court should proceed with extra care.

58 The idea that equity investors may never commence *CCAA* proceedings sits uneasily with the fact that equity holders sometimes have significant economic interests in companies that are insolvent. This can be illustrated with the definition of insolvency typically used in the *CCAA* context which is found in the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*"), s 2:

> **insolvent person** means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

59 The *BIA* s 2 definition of insolvent person is not cumulative. A person (or company) may be insolvent if any of the three criteria are satisfied. A company may be insolvent where it is unable to meet its obligations as they become due even though the value of its assets exceeds its liabilities - this is sometimes called a liquidity crisis. Where there is a liquidity crisis, it is possible that equity holders will have the most significant economic stake in a debtor company. Normally, the board and management of a debtor company - who directly or indirectly represent the interests of equity (though fiduciary obligations are owed to the corporation as a whole) - will commence *CCAA* proceedings to deal with a liquidity crisis. And, in that sense, it may be said that most *CCAA* proceedings are commenced by representatives of equity. However, it is possible to envision circumstances where a debtor company's board or management fail to act in the face of insolvency as is arguably what has happened in the present case. The strength of the *CCAA* as a statutory framework for managing insolvency problems is its malleability. In my view, it would be unwise to constrain unanticipated future uses of the *CCAA* by stating categorically that equity investors may never commence *CCAA* proceedings.

60 The Respondents, in making the submission that equity investors cannot commence *CCAA* proceedings, also appear to be making a collateral attack on Justice Simard's decision that the Applicants have standing. Justice Simard questioned whether the Applicants were contingent creditors as they claimed without deciding the issue but went on to find that they nevertheless have standing pursuant to *CCAA* s 11 because they are interested persons. The Applicants emphasized in submissions before me (though not before Simard J) that the bondholders are not just equity investors or contingent creditors, they are proper creditors. The bondholders are creditors because the interest that was due to them on September 30, 2021 was not paid and remains outstanding. If the question of standing were presented today, it would not be necessary to determine whether equity investors or contingent creditors have standing because there are actual amounts due and owing to some of the Applicants.

61 Leaving aside that it is now obvious that some of the Applicants are proper creditors, Justice Simard's determination that the Applicants, as equity investors, have standing pursuant to *CCAA* s 11 is not determinative of whether the *CCAA* is being used properly. That is clear from his reasons. The relevant question is not whether, in the abstract, equity investors have standing; rather, it is whether these Applicants are using the *CCAA* consistent with its purposes.

62 So, what are the purposes of the *CCAA*? Chief Justice Wagner and Justice Moldaver, writing for the Court, explained what they considered to be the "overarching remedial objectives" of "Canada's insolvency statutes" in ***9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10** at paras 40-41:

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(a) providing for timely, efficient, and impartial resolution of a debtor's insolvency;

(b) preserving and maximizing the value of a debtor's assets;

(c) ensuring fair and equitable treatment of the claims against a debtor;

(d) protecting the public interest; and

(e) in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company.

63 Karakatsanis J, concurring, in ***Canada v Canada North Group Inc*, 2021 SCC 30** at para 137 held "the purpose of the *CCAA* is remedial; it provides a means for companies to avoid the devastating social and economic consequences of commercial bankruptcies" citing ***Century Services Inc v Canada (Attorney General)*, 2010 SCC 60** at paras 15 and 59. Wagner CJC and Moldaver J observed in ***Callidus Capital*** at para 41 that "the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor in an operational state - that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation either through a receivership or under the *BIA* regime." Later at para 42 they noted that "liquidating CCAAs" are "now commonplace."

64 The Applicants submit that the use of the *CCAA* in the present case is consistent with the purposes of the *CCAA*. The Applicants contend that the Monitor is necessary to preserve and maximize any value that remains in the Respondent entities because the Respondents have demonstrated that they are unable or unwilling to do so. They further assert that the Monitor can promote the fair and equitable treatment of investors by, among other things, administering a claims process. Absent the *CCAA* stay and Monitor's involvement there is the prospect of competing investor claims in multiple jurisdictions. I agree that the proposed use of the *CCAA* is the most efficient way to move forward and is the process most likely to result in the best return for stakeholders subject to my concerns about the Monitor's ability to bring the US assets into the *CCAA* process set out below in paras 68 and 88. The safeguard of a court-appointed monitor ensures that stakeholders have a transparent and responsive interlocutor, guarantees that stakeholders will be treated fairly, and will facilitate the administration of a fair claims process.

65 The Respondents submit that the *CCAA* should not be used to obtain injunctive relief or conduct an investigation. The Respondents' submission that the *CCAA* should not be used to obtain injunctive relief is just another way of making their argument that the Applicants should be limited to their contractual rights. I have discussed this argument elsewhere in these Reasons. The contention that a *CCAA* proceeding should not have an investigatory function is incorrect. *CCAA* s 23(1)(c) provides that among the duties and functions of a Monitor is to:

> make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings [emphasis added].

66 Recent cases confirm that it is appropriate for a Monitor to undertake an investigation, especially where there is suspected fraud or where debtor companies or their principals are not forthcoming with information and records to assist the Monitor perform its functions: ***Aquino v Aquino*, 2021 ONSC** at paras 17-18; ***Aquino v Bondfield Construction Co*, 2024 SCC 31** at paras 11-12; ***Arrangement relatif à Bloom Lake General***, 2021 QCCA 2946 at paras 76-85; and ***Original Traders Energy Ltd., (Re)*, 2024 ONSC 325** at para 84.

67 The Respondents submit that the present *CCAA* proceedings cannot achieve the purposes of the *CCAA*, at least with respect to Windridge and Fossil Creek, because the Texas Trusts and the trustee, Dirk Foo, are not subject to the ARIO. According to the Respondents, the *CCAA* proceedings are destined to fail because the Windridge lands and Fossil Creek lands and the bank accounts that contain the proceeds of such of those lands that have already been sold are beyond the reach of this Court. This objection is potentially fatal for the *CCAA* proceedings concerning Windridge and Fossil Creek because without control over the US assets, there is no prospect for recovery for stakeholders through the *CCAA* proceedings. Though the assets may prove to be beyond the reach of the Monitor, in my opinion, it is premature to conclude that the Monitor will fail and the *CCAA*

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proceedings must be terminated in respect of Windridge and Fossil Creek. Justice Simard's decision that this Court does not have jurisdiction over the Texas Trusts does not prevent the Monitor from taking other steps in Canada or legal action in the US, whether under the rubric of Chapter 15 or otherwise, to achieve its objectives. So far, the Monitor has not articulated a plan for gaining control of the remaining Windridge lands and the bank accounts that hold the proceeds of the sales of the Fossil Creek and Windridge lands. This is a critical point that I will return to in the Conclusion of these Reasons.

68 The Respondents say that neither the Applicants nor the Monitor have put forward a "germ of a plan" and, as such, there is no reasonable possibility of successfully restructuring the debtor companies: ***Re Inducon Development Corp*, 1991 CarswellOnt 219** at para 14; more recently, see ***Industrial Properties Reginal Limited v Copper Sands Land Corp*, 2018 SKCA 36** at para 20 and ***Delta 9 Cannabis Inc (Re)*, 2024 ABKB 657** at para 58. The Respondents are correct that the Applicants and the Monitor have not outlined a plan, but the present circumstances are unusual, and a contextual approach is warranted.

69 First, the Applicants must be held to a different standard than is normally the case when a *CCAA* process is commenced by a debtor company or a sophisticated secured creditor that possesses intimate knowledge of the debtor company. When a *CCAA* proceeding is commenced by a debtor company or sophisticated secured creditor, it follows that the Court expects there to be something of a plan even in the early stages. That cannot be the case where, as here, the Applicants had little knowledge of the inner workings of the Respondents because the Respondents were delinquent in their reporting obligations. For that reason, the Monitor's primary task in the early phase of these proceedings, as reflected in the ARIO, was to gather information from the Respondents. The Monitor was also admonished not to do more work than necessary which, it now says, caused it not to allocate resources to the development of a plan. To defeat the *CCAA* proceedings because the Applicants and the Monitor did not have enough information to articulate a plan at the Initial Order stage would reward the Respondents for their recalcitrance.

70 Second, it does not take much imagination to know what a plan in this case will look like at a high level. The debtor companies control real estate that, following their own business model, must be sold before money is returned to investors. Precisely how that is to be done and what steps must be taken prior to the sales are details that the Applicants and Monitor cannot be expected to know at this stage of the proceedings. The reality is that the Applicants' "germ of a plan" is the same as the Respondents'. The difference between the two is that the Applicants believe that the process of liquidating real estate assets and returning money to investors should be under the control of a professional, neutral, independent, competent ,and trustworthy steward (*i.e.* the Monitor, not management).

C. Do the Applicants Represent the Interests of Investors?

71 The Respondents submit that the Applicants do not represent the interests of most investors and that the *CCAA* proceedings are effectively conscripting the funds of all investors in pursuit of the interests of a minority of the investors. The Respondents are correct that, together, Fasken and Norton Rose do not have the support of the majority of investors. The Respondents ask, in effect, that the Court infer that a silent majority of investors supports management and opposes the *CCAA* proceedings. The Respondents produced many proxies supporting the Angus Manor sale transaction that was halted by the Initial Order. However, I do not consider the Angus Manor proxies to be an indication that investors oppose the *CCAA* proceedings, because they predate the Initial Order. The Respondents have adduced no evidence to show investor support after the Initial Order.

72 Fasken, counsel to the Canadian Investors, has been contacted by 120 investors who represent approximately CAD $2.85 million. Of those 120 Canadian Investors, 114 expressed support for the Monitor, two stated no opinion, and four were unsure or required more information to decide. An obvious difficulty in this case is that many of the investments were made a decade ago and there has been little communication with investors since. Some investors may have lost interest or given up and others may have changed their contact information. The response to Fasken suggests that those of the Canadian Investors who can be contacted and remain interested in their investment overwhelmingly support the *CCAA* proceedings.

73 Norton Rose, counsel to the Offshore Investors, has been contacted by 303 Offshore Investors representing US $8,910,462 and CAD $4,649,021 plus small amounts denominated in other currencies. Of those 303 Offshore Investors, 291 indicated their support for the Monitor and only five opposed the appointment of the Monitor with seven expressing no opinion. The Respondents' submission that Norton Rose does not represent the interests of most Offshore Investors is meritless. Norton Rose

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requested a list of the Offshore Investors that included contact information. Mr. Lind deposed that the information was controlled by a non-*CCAA* affiliate based in Singapore, not the Respondents, and could not be provided because of Singapore privacy law. Counsel for the Offshore Investors submitted, and I agree, that the Respondents could have requested their Singapore affiliate to notify Offshore Investors of the *CCAA* process and provide them with contact information for Norton Rose and the Monitor but they did not.

74 Of the investors who have made their views known, the vast majority support the *CCAA* process. To the extent that Fasken and Norton Rose are unable to contact investors to solicit their views, that is attributable one way or another to the conduct and choices of the Respondents. The inference that I draw from the facts set forth in this section is not that a silent majority opposes the *CCAA* process; to the contrary, I infer that if it was possible to contact and inform all investors, a strong majority would support the *CCAA* process.

V. Jurisdiction over US LLCs

75 Justice Simard, as noted earlier in these Reasons, concluded that this Court has jurisdiction over the US LLCs. The objection raised by the US LLCs before me is different. The US LLCs submit that because they are not doing business in Canada they do not fit within the *CCAA* s 2(1) definition of "company" and, as such, they cannot be subject to these *CCAA* proceedings. *CCAA* s 2(1) provides that:

> **company** means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust . . . [emphasis added]

76 Are the US LLCs doing business in Canada? Counsel conceded in oral argument that the US LLCs had done business in Canada during the capital raising phase when funds were solicited from Canadian investors but submitted that they had ceased to do business in Canada upon transferring the Fossil Creek lands and Windridge lands to the Texas Trusts. I agree that the US LLCs were not doing business in Canada at the time of the Initial Order, but that does not dispose of the issue.

77 The approach taken by leading insolvency judges to the *CCAA* definition of company has been flexible, consistent with the remedial purpose of the statute. Chief Justice Morawetz, citing a long list of authorities, observed in ***Pride Holdings Group Inc*, 2024 ONSC 1830** at para 30: "This Court has found it just and reasonable to extend the protection of the stay of proceedings to non-applicant limited partnerships and non-applicant affiliates where such parties are integrally and closely interrelated to the debtor companies' business in order to ensure that the purposes of the CCAA can be achieved." Morawetz J, as he then was, in ***Priszm Income Fund (Re)*, 2011 ONSC 2061** at paras 10 & 20 extended a *CCAA* stay order to "an unincorporated, limited purpose trust" whose function was to hold limited partnership units on the basis that it could be characterized as an "income trust" which is included in the *CCAA* definition of "company." This approach is very much in evidence in the Initial Order in the present case which applies to the debtor companies and affiliated entities including various limited partnerships and trusts.

78 When a debtor corporation is the applicant, courts have been willing to take jurisdiction over non-applicant affiliated foreign entities and extend a *CCAA* stay to those entities. Justice Osborne in ***BZAM Ltd. Plan of Arrangement*, 2024 ONSC 1645** found the applicants to be debtor companies and Ontario was determined to be the proper jurisdiction for the proceedings. Osborne J then considered the extension of the *CCAA* stay to direct and indirect foreign subsidiaries of the applicants based in Germany, the Netherlands, and Delaware. "None [of the non-applicants] carry on active business" (para 43), Justice Osborne observed, and thus cannot be said to have been doing business in Canada. Osborne J explained at para 42 that "[t]he court has authority to extend the stay to non-parties pursuant to ss 11 and 11.02(1) of the CCAA, which permits the court to make an initial order on any terms imposed." He concluded at para 44: "I am satisfied that the stay should be extended to these parties to prevent uncoordinated realization and enforcement attempts from being made in different jurisdictions, all of which would be counterproductive to the maximization and protection of value for stakeholders of the Applicants."

79 Where, as in the present case, the applicants are creditors and equity investors, a court should apply the same principles outlined for debtor corporation applicants by Osborne J in ***BZAM***. The US LLCs are analogous to the BZAM affiliates based

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in Europe and the US that did not conduct business in Canada. The inclusion of the US LLCs is appropriate and necessary because, as Simard J found, they are intextricably intertwined in the business of the debtor companies. Further, the inclusion of the US LLCs mitigates the risk of uncoordinated realization and enforcement and promotes the maximization and protection of value for stakeholders.

80 I cannot accept the Respondents' submission that there is no purpose in the US LLCs being subject to the *CCAA* process because they are, in effect, inactive. The assertion of inactivity is contrary to the statement in the relevant offering memoranda that the purpose of the US LLCs was "overseeing all aspects of the development of the [Windridge and Fossil Creek lands]." Further, the LLCs were used in 2024 to facilitate sales of Windridge and Fossil Creek lands. The Fossil Creek lands were sold to Bloomfield Homes LP in Fall 2024. Details are sketchy because the Respondents have provided only limited documentation concerning the sale to the Monitor. From the documentation that was provided, it is evident that Fossil Creek LLC was used to facilitate the sale of the Fossil Creek lands. Windridge LLC was also used to facilitate the sale of some of the Windridge lands to TRWD. This recent activity suggests that the Texas LLCs have ongoing relevance to the Respondents' business. Further, since the Texas LLCs are the ones that conducted business with the Texas Trusts, it is prudent to keep them under the *CCAA* umbrella so that the Monitor can use the Texas LLCs to further any legal steps that may be taken in Texas in respect of the Texas Trusts or Mr. Foo.

V. *CCAA* v Receivership

81 The Applicants' alternative remedy is the appointment of a receiver pursuant to *Judicature Act*, RSA 2000, c J-2, s 13(2). The test for the appointment of a receiver is whether it is just and convenient to do so: ***BG International Ltd v Canadian Superior Energy Inc*, 2009 ABCA 127** at para 17. For the same reasons that I have concluded that a *CCAA* proceeding is appropriate, I find that a receivership is just and convenient in the circumstances. The real question is which is the more appropriate procedure in the present circumstances.

82 Where a court is not satisfied that management should be displaced it may opt for *CCAA* proceedings instead of a receivership because in a typical *CCAA* proceeding management remains in control. That was obviously not a relevant consideration in choosing between a receivership and *CCAA* proceedings in the present case as I was satisfied that management should be unseated as reflected in the Initial Order. The Respondents point out that I characterized the effect of the Initial Order differently in my decision denying their request to extend time for seeking leave to appeal the Initial Order: ***A2A GP Inc (Re)*** at para 4. The sentence in my earlier decision about not unseating management was something that I meant to remove from the final version of the decision but failed to do so in my haste to get the parties a prompt answer over the last weekend before the holiday break. The error has now been corrected by way of a corrigendum.

83 Courts faced with the question of choosing between *CCAA* and receivership proceedings in the context of real estate development ventures often opt for a receivership: see, for example, ***Ashcroft Urban Developments Inc. (Re)*, 2024 ONSC 7192** and the discussion in Jeremy Opolsky, Jacob Babad, & Mike Noel, "Receivership versus CCAA in Real Property Development: Constructing a Framework for Analysis" (2020) 18 *Annual Review of Insolvency Law* 199. A Court's decision between *CCAA* and receivership proceedings often turns on a weighing of the prejudice and benefits to creditors.

84 The present case is different from the typical real estate development insolvency in an important way. There is no secured creditor that might be prejudiced by *CCAA* proceedings. The absence of a secured creditor also means that there is no party with security that provides the right to appoint a receiver and, accordingly, there is no party with standing to apply for the appointment of a receiver pursuant to the *BIA*. The only alternative in the present case is to apply pursuant to the *Judicature Act* as the Applicants have done.

85 A *BIA* receivership offers many of the same advantages as a *CCAA* proceeding. A *BIA* receiver or *CCAA* Monitor does not need to seek the assistance of courts in other provinces because the *BIA* and *CCAA* are federal statutes. Similarly, a *BIA* receiver and *CCAA* Monitor may be recognized and empowered to act in the US pursuant to Chapter 15 of the *US Bankruptcy Code*. A *Judicature Act* receiver, however, must commence proceedings in other provinces and in the US for recognition and to protect a debtor company's property. A *Judicature Act* receivership is a less efficient and effective tool than a *BIA* receivership or

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CCAA proceeding. And efficiency is an important consideration in the insolvency context where parties are seeking to preserve a diminishing pool of assets.

86 Where national and international coordination is required to preserve a debtor's assets and maximize recovery for creditors, a federal insolvency statute is usually preferable to a provincial statute like Alberta's *Judicature Act*. A *CCCA* proceeding is more appropriate in the present case than a *Judicature Act* receivership.

VI. Conclusion

87 The evidence now before the Court is significantly more robust than was available at the Initial Order application on November 14, 2024 or at the first phase of the Comeback Hearing on November 21, 2024. The additional evidence provided by both parties, together with the Monitor's investigation and analysis, reinforces my view that my decision to grant the Initial Order was correct and that *CCAA* proceedings are appropriate. The Respondents' application to set aside the Initial Order and ARIO is dismissed.

88 Though I have confirmed that the *CCAA* proceedings are appropriate, the evidence is clear that the Windridge lands, the proceeds of the small parcel of the Windridge lands sold to TRWD, and the proceeds of the sale of the Fossil Creek lands remain outside the reach of the *CCAA*. If those lands and proceeds cannot be brought under the control of the Monitor through the Chapter 15 proceedings or otherwise, then the *CCAA* proceedings are destined to fail in respect of the Windridge and Fossil Creek entities, including the US LLCs. The Monitor shall have 21 days from the date of these Reasons to provide a plan for gaining control of the Windridge lands and the proceeds of the sales of the Windridge lands and Fossil Creek lands to the Court. If a reasonable plan is not provided to the Court within 21 days, then the *CCAA* proceedings shall terminate in respect of the Windridge and Fossil Creek entities, including the US LLCs.

Application dismissed.

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2025 ABCA 147
Alberta Court of Appeal

Angus A2A GP Inc v. Alvarez & Marsal Canada Inc

2025 CarswellAlta 930, 2025 ABCA 147, [2025] A.W.L.D. 2163, [2025] A.W.L.D. 2164, [2025] A.W.L.D. 2165, 19 C.B.R. (7th) 217, 2025 A.C.W.S. 2227

Angus A2A GP Inc., Angus Manor Park A2A GP Inc., Angus Manor Park A2A Capital Corp., Angus Manor Park A2A Developments Inc., Hills of Windridge A2A GP Inc., Fossil Creek A2A GP Inc., Fossil Creek A2A Developments, LLC, A2A Developments Inc., Serene Country Homes (Canada) Inc. and A2A Capital Services Canada Inc. (Applicants) and Alvarez & Marsal Canada Inc., in its capacity as Monitor of the Applicants (Respondents)

Fossil Creek A2A Developments, LLC and Windridge A2A Developments, LLC (Respondents) and Alvarez & Marsal Canada Inc. (Applicant)

Fossil Creek A2A Developments, LLC and Windridge A2A Developments, LLC (Respondents) and Michael Edwards, Paul Lauzon, Isabelle Brousseau, Pat Wedlund, and Brian Richards (Applicants)

Fossil Creek A2A Developments, LLC and Windridge A2A Developments, LLC (Respondents) and Michael Edwards, Paul Lauzon, Isabelle Brousseau, Pat Wedlund, and Brian Richards (Applicants)

Fossil Creek A2A Developments, LLC and Windridge A2A Developments, LLC (Applicants) and Alvarez & Marsal Canada Inc., Michael Edwards, Paul Lauzon, Isabelle Brousseau, Pat Wedlund, and Brian Richards, the Canadian Investors and the Offshore Investors each as defined in the Initial Order granted November 14, 2024 (Respondents)

Fossil Creek A2A GP Inc., Hills of Windridge A2A GP Inc., Fossil Creek A2A Limited Partnership, Hills of Windridge A2A LP, Fossil Creek A2A Trust and Hills of Windridge A2A Trust (Applicants) and Alvarez & Marsal Canada Inc., Michael Edwards, Paul Lauzon, Isabelle Brousseau, Pat Wedlund, and Brian Richards, the Canadian Investors and the Offshore Investors each as defined in the Initial Order granted November 14, 2024 (Respondents)

Joshua B. Hawkes J.A.

Heard: March 6, 2025
Judgment: April 28, 2025
Docket: Calgary Appeal 2401-0350AC, 2401-0352AC, 2401-0353AC, 2501-0019AC, 2501-0050AC, 2501-0053AC

Proceedings: refusing leave to appeal *Angus A2A GP Inc (Re)* (2024), 2024 ABKB 769, 2024 CarswellAlta 3424, Colin C.J. Feasby J. (Alta. K.B.); and allowing leave to appeal *Angus A2A GP Inc (Re)* (2025), 2025 CarswellAlta 164, 2025 ABKB 51, Colin C.J. Feasby J. (Alta. K.B.)

Counsel: D. Jukes, for Angus A2A GP Inc., Angus Manor Park A2A GP Inc., Angus Manor Park A2A Capital Corp., Angus Manor Park A2A Development Inc., Hills of Windridge A2A GP Inc., Fossil Creek A2A GP Inc., Fossil Creek A2A Developments, LLC, A2A Developments Inc., Serene Country Homes (Canada) Inc., A2A Capital Services Canada Inc., Fossil Creek A2A Limited Partnership, Hills of Windridge A2A LP, Fossil Creek A2A Trust, and Hills of Windridge A2A Trust
J.L. Oliver, D. Marechal (no appearance), for Alvaraz & Marsal Canada Inc.
K.J. Meyer, L.R. Rollingson, C. Brown (student-at-law), for Fossil Creek A2A Developments, LLC, Windridge A2A Developments, LLC, Fossil Creek Developments, LLC, and A2A Developments, LLC
R. Gurofsky, K.M.G. Wong, for Canadian Investors, Michael Edwards, Paul Lauzon, Isabelle Brousseau, Pat Wedlund, and Brian Richardson

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H.A. Gorman, K.C., D. Stethem (no appearance), for Offshore Investors
K. Kashuba, for Interim Lender, Pillar Capital Corp.
J.L. Oliver, D. Marechal (no appearance), D. Jorgenson, N.E. Thompson (no appearance), for Monitor

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.6 Appeals
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Appeals
Canadian equity investors and creditors were granted initial order pursuant to Companies Creditors Arrangement Act with respect to respondent, related entities involved in real estate ventures in Ontario and Texas — Comeback hearing was held where certain orders were made and date for continuation of hearing was set — Debtors' application for extension of time to appeal initial order was dismissed — Certain debtors brought application for leave to appeal initial order, comeback decision, and other determinations — Application granted in part — Leave granted on issues of whether supervising justice err in concluding that Canadian investors came within scope of Act, and whether use of Act was proper, and subsidiary issue of whether certain members of debtor group were subject to Act — Extension of stay was properly considered — Decision to grant extension is discretionary and deference was owed — Appeal from initial order had not been filed in timely manner and was dismissed — Case represented unique use of Act by equity investors in circumstances.
Table of Authorities
Cases considered by *Joshua B. Hawkes J.A.*:
Akagi v. Synergy Group (2000) Inc. (2015), 2015 ONCA 368, 2015 CarswellOnt 7407, 25 C.B.R. (6th) 260, 125 O.R. (3d) 401, 334 O.A.C. 279, 74 C.P.C. (7th) 45 (Ont. C.A.) — considered
BMO Nesbitt Burns Inc. v. Bellatrix Exploration Ltd. (2020), 2020 ABCA 264, 2020 CarswellAlta 1262, 81 C.B.R. (6th) 161 (Alta. C.A.) — referred to
Canadian Overseas Petroleum Limited (Re) (2024), 2024 ABCA 190, 2024 CarswellAlta 1404, 13 C.B.R. (7th) 235 (Alta. C.A.) — referred to
Edgewater Casino Inc., Re (2009), 2009 BCCA 40, 2009 CarswellBC 213, 51 C.B.R. (5th) 1, 265 B.C.A.C. 274, 446 W.A.C. 274, *(*sub nom. *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.)* 308 D.L.R. (4th) 339 (B.C. C.A.) — referred to
Esfahani v. Samimi (2024), 2024 ABCA 16, 2024 CarswellAlta 100 (Alta. C.A.) — referred to
Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership (2018), 2018 BCCA 283, 2018 CarswellBC 1788, 61 C.B.R. (6th) 196 (B.C. C.A.) — referred to
Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — referred to
Repsol Canada Energy Partnership v. Delphi Energy Corp (2020), 2020 ABCA 364, 2020 CarswellAlta 1855 (Alta. C.A.) — referred to
Stelco Inc., Re (2005), 2005 CarswellOnt 6283, 15 C.B.R. (5th) 288, 204 O.A.C. 216, 78 O.R. (3d) 254 (Ont. C.A.) — referred to
9354-9186 Québec inc. v. Callidus Capital Corp. (2020), 2020 SCC 10, 2020 CSC 10, 2020 CarswellQue 3772, 2020 CarswellQue 3773, 78 C.B.R. (6th) 1, 444 D.L.R. (4th) 373, 1 B.L.R. (6th) 1, [2020] 1 S.C.R. 521 (S.C.C.) — referred to
Statutes considered:
Bankruptcy Code, 11 U.S.C.
Chapter 11 — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 3 — referred to

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s. 11 — referred to

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

s. 13 — referred to

s. 14(2) — referred to

Rules considered:

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

R. 11.25(2)(b) — referred to

R. 14.5(1)(b) — referred to

R. 14.5(1)(f) — referred to

Proceeding

Motion/Application for Leave to Appeal.

APPLICATION by debtors for leave to appeal judgments in insolvency proceedings reported at *Angus A2A GP Inc (Re)* (2024), 2024 ABKB 769, 2024 CarswellAlta 3424 (Alta. K.B.) and *Angus A2A GP Inc (Re)* (2025), 2025 ABKB 51, 2025 CarswellAlta 164 (Alta. K.B.).

***Joshua B. Hawkes J.A.*:**

Reasons for Decision

INTRODUCTION

1 The applicants seek leave to appeal several *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA*) orders from the court below, pursuant to section 13 of the *CCAA* and rule 14.5(1)(f) of the *Alberta Rules of Court*. For the reasons that follow, the applications are granted in part.

2 The facts and underlying procedural history are complex, necessitating more detailed reasons than would otherwise be appropriate on applications for leave to appeal. They are intended to explain the decision, and do not reflect any view of the strength of the grounds advanced, other than whether they pass the low threshold required and satisfy the other criteria.

BACKGROUND FACTS

3 A representative group of Canadian investors invested funds either directly or indirectly in several entities which managed three real estate development projects. One of the development projects, Angus Manor, is in Ontario (the Angus Manor Project). The other two development projects, Windridge and Fossil Creek, are in Texas (the Texas Projects being the Windridge Project and Fossil Creek Project). I refer to the entities relating to the Angus Manor Project as the Angus Manor Group and adopt similar wording with respect to the Fossil Creek Project and Windridge Project. The Canadian investors initiated the application under the *CCAA*.

4 The structure of the investments relating to all three development projects is complex. Three aspects of that structure are relevant:

a) The Canadian investors did not participate directly in the management, control or sale of the properties. They had rights to financial information, meetings, and opportunities to participate in the direction of the partnerships or trusts that held other interests, including direct interest in the land through Undivided Fractional Interests (UFIs). [1]

b) These investments were marketed to accredited investors in Canada without the need of a prospectus and facilitated through corporate entities registered in Alberta, Ontario, and Canada.

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c) Offshore investors purchased UFIs in the development lands directly and had the right to vote on the sale of those lands. The Initial Order, described below, appointed counsel to represent the offshore investors. While the interests of the offshore and Canadian investors are aligned, the Canadian investors are the applicants under the *CCAA*. [2]

PROCEEDINGS BELOW

The Initial Order

5 Canadian investors discovered from a Facebook post that the Angus Manor Group was proceeding with a sale of the Angus Manor Project. [3] The investors alleged they were neither informed of the sale nor contacted by the general partners to approve the sale. They brought a section 11.02 *CCAA* application before Justice Feasby on November 14, 2024, seeking an initial stay order (the Initial Order) to temporarily prohibit the sale of the Angus Manor Project alleging insolvency. They sought a stay against the entities involved in all three developments (the Angus Manor Group, and the Windridge and Fossil Creek Groups - collectively referred to as the A2A Group) alleging that they were debtor companies [4] or that they were integrally related to the debtor companies as affiliated entities. [5]

6 The Canadian investors asserted they had standing to bring the *CCAA* application before the court as either trust or limited partnership unitholders, bondholders, or UFI holders and as either creditors or contingent creditors with claims against the applicants. They brought the application in Alberta since several of the corporate entities used to solicit the investments are (or were prior to being struck) registered in Alberta. Others were registered in Ontario or federally. Only two of the entities were registered in Texas.

7 The applicants (including the Texas LLCs in the Windridge and Fossil Creek Groups) [6] received notice of the *CCAA* application on very short notice. They sought an adjournment of the hearing, but that request was denied. The Canadian investors did not obtain an order for service *ex juris*, pursuant to the rule 11.25(2)(b) of the *Alberta Rules of Court*, to serve the foreign entities prior to the hearing.

8 At the hearing, the primary complaint of the Canadian investors was "an almost total lack of communication from the A2A Group, and extremely derelict governance". The supervising justice granted the Initial Order, which prevented the sale of any of the properties for a ten-day period and appointed a Monitor with enhanced powers to oversee and exercise control over the A2A Group. He found the A2A Group collectively had more than $5 million in debt and the stay was necessary as the Angus Manor lands would otherwise be sold. He also considered, in the alternative to the *CCAA* proceedings, a receivership order or injunction, but found the *CCAA* process was more appropriate.

9 On December 20, 2024, the US Bankruptcy Court for the Northern District of Texas granted an order enforcing the Initial Order within the US.

The Amended and Restated Initial Order (the ARIO)

10 Prior to the expiration of the Initial Order, the Monitor sought an extension of the Initial Order. The Monitor also sought: (1) to add the Hills of Windridge A2A Trust and Fossil Creek A2A Trust (the US Trusts) and a trustee, Dirk Foo, to the order; (2) registration of the stay order onto title of the Angus Manor lands; (3) additional charges in favour of the Monitor (administrative and interim financing charges) against the UFI holders; and (4) removal of the trustees from the US Trusts and the Canadian Trusts.

11 The A2A Group sought to set aside or stay the Initial Order on the basis that: (1) service had not been properly effected at the Initial Order hearing; (2) the applicants were not insolvent and could not be subject to the *CCAA* proceedings; (3) the Angus Manor sale represented a fair market arm's-length transaction that should proceed; (4) the Canadian investors lacked standing to commence the proceedings; and (5) the outstanding stay was prejudicing a much larger group of investors. In the alternative, they sought an adjournment of the hearing.

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12 These applications were heard on November 21, 2024, with the decision reserved to November 25, 2024. The supervising justice acknowledged the *CCAA* proceeding was unusual, since the stay was not sought for the purpose of protecting a debtor company from creditors, nor was the proceeding commenced by creditors, but rather by investors who complained the applicants "have completely failed to communicate with them, and that their governance appears to be highly deficient". He found that although the Initial Order was effectively granted *ex parte*, the lack of service was excused by the urgency of the situation and effective notice had been provided for the purpose of the present ARIO hearing.

13 He found he had jurisdiction over all the applicants in this application, including the "two Texas LLCs . . . because they are inextricably intertwined in the corporate and investment structure of the Windridge and Fossil Creek projects that were marketed to Canadian investors in Canada through Alberta and Ontario corporations, limited partnerships, and trusts".

14 He also concluded:

> . . . there is no prohibition in the CCAA on investors applying for an initial order.
>
> . . .
>
> . . . applicant investors are persons interested, as described in Section 11.02(1) of the *Act*; and as a result, I find that the applicant investors had standing to make the initial order application.

15 The supervising justice held the *CCAA* applied to affiliates of the "debtor company" including the several applicants. He rejected the applicants' assertion that the outstanding bond liability of $1.3 million (in relation to the Angus Manor Project) was not a debt for the purposes of the *CCAA* and found if the sale of the Angus Manor lands went through, the bondholders would not be paid in full. He also found that a $3.8 million (USD) default judgment against Windridge A2A Developments, LLC in the US, which was registered against the Windridge Project, could be included in the overall debt calculation to arrive at the $5 million threshold required under section 3 of the *Act*. Ultimately, he found there were outstanding debts of at least $5 million and found the applicants constituted a "debtor company" or "affiliated company" under the *CCAA*.

16 However, the supervising justice was not satisfied he had enough evidence before him to decide the matter fully and granted a continuing stay "for a limited time, and only for a limited purpose". The purpose of the extension was to "allow the [A2A Group time] to provide the monitor with the necessary information to allow the monitor to create a comprehensive report for me and for the other stakeholders, so that we have a proper record, and I can properly decide whether continuation after that date is appropriate". He refused to add the US Trusts and trustee, Dirk Foo, as a party to the proceedings on the basis he had no authority to do so.

17 He authorized the Monitor to register the ARIO on title against the Angus Manor lands and granted the Monitor the authority to add other debtor companies or affiliate companies to the proceedings. Finally, he directed the applicants to provide the Monitor with financial information to prepare their report.

The Angus Extension Decision

18 The A2A Group subsequently appeared before the supervising justice on December 20, 2024, seeking an extension of time to appeal his Initial Order pursuant to section 14(2) of the *CCAA*. That application was denied. [7] He found the A2A Group did not express an intention to appeal the Initial Order. Their evidence only suggested an intention to set aside the Initial Order. They provided no explanation for the delay. The A2A Group's counsel instead made a strategic decision to seek to set aside, rather than to appeal, the Initial Order. He also found the extension application was moot since the A2A Group would be able to appeal the *Angus Comeback Decision* on January 17, 2025. [8]

19 Further, he found that granting the application would prejudice the stakeholders, since the appeal process would be duplicative on the issues raised in the set aside application, which would "deplete the assets of the debtor companies and in turn,

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potentially reduce the recovery of stakeholders". He also noted that an appeal of the *Angus Comeback Decision* would provide the Court of Appeal with "a more robust evidential record" than an appeal from the Initial Order. [9]

The Angus Comeback Decision

20 The A2A Group reappeared before the supervising justice on January 17, 2025, to deal with the remainder of the issues previously adjourned. The A2A Group argued the *CCAA* proceedings should be set aside. That application was also dismissed. [10] They also argued many of the same grounds raised in their current applications including: the "equity investors . . . have misused the *CCAA* to advance what should be conventional civil claims" and "the *CCAA* proceedings are destined to fail in relation to the US real estate projects because the Respondents' US real estate assets and bank accounts are beyond the reach of the *CCAA* proceedings". The Texas LLCs also contend that the court has no jurisdiction over them because they are not doing business in Canada and thus cannot be debtor companies or affiliated companies as defined by the *CCAA*". [11]

21 The supervising justice gave the Monitor 21 days from the date of the *Angus Comeback Decision* (January 29, 2025) to provide the court with a plan for gaining control of the Texas lands and proceeds. He ordered that if the plan was not provided in 21 days (i.e., February 19, 2025), the *CCAA* proceedings would terminate. He extended the stay period until March 4, 2025. At the hearing before me, Counsel advised that on March 5, 2025 the supervising justice approved the Monitor's plans to recover the sales proceeds from the Fossil Creek lands and a portion of the Windridge lands, pursuant to a Chapter 11 US Bankruptcy Code proceeding.

LEAVE TO APPEAL

22 The Angus Manor Group does not seek to challenge the *CCAA* proceedings below. The remaining entities from the A2A Group in this litigation take the following positions:

23 The Texas LLCs seek to appeal the Initial Order, ARIO, *Angus Extension Decision* and *Angus Comeback Decision*. The Windridge and Fossil Creek Groups seek to appeal the ARIO and *Angus Comeback Decision*.

24 The test for leave to appeal pursuant to section 13 of the *CCAA* is settled:

1. Whether the issue on appeal is of significance to the practice;

2. Whether the issue on appeal is of significance to the action itself;

3. Whether the appeal is *prima facie* meritorious; or on the other hand, whether it is frivolous; and

4. Whether the appeal will unduly hinder the progress of the action. [12]

25 Appellate courts are generally reluctant to intervene in *CCAA* proceedings. *CCAA* proceedings are dynamic processes where events are unfolding in real time, the situation is constantly changing, and the supervising justice is "steeped in the intricacies of the *CCAA* proceedings". [13] Therefore, appellate intervention is justified only where the "supervising [justice] erred in principle or exercised their discretion unreasonably". [14] As a result, leave tends to only be granted "sparingly". [15]

POSITION OF THE PARTIES

26 The Texas LLCs and Windridge and Fossil Creek Groups advance many of the same arguments in their respective leave applications. Principally, they advance the following grounds which I have consolidated and enumerated as follows:

1. Whether the applicants were denied procedural fairness in the proceedings below;

2. Whether the respondents are utilizing the *CCAA* process for an improper purpose inconsistent with the *Act*;

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3. If use of the *Act* is proper, whether the applicants can be subject to the *Act* as a "company", "debtor company", "affiliated debtor company" or otherwise;

4. If the Texas LLCs can be subject to the *Act* as a non-party, can relief be granted against them beyond a stay; and

5. If the applicants can be subject to the *Act* and relief beyond a stay can be granted against them, did the lower court nonetheless err in including the applicants in the proceedings.

27 The respondents assert the lower court made no error in providing the several interim orders it made under the *CCAA* process. They point out that a supervising justice under the *CCAA* has broad discretion under the *Act*, especially pursuant to section 11, and their decisions are entitled to deference.

REASONS

1. Angus Extension Decision

28 The Texas LLCs seek leave to appeal the *Angus Extension Decision* pursuant to rule 14.5(1)(b). The applicant must demonstrate that: (a) the proposed appeal raises a serious question of general importance; (b) the appeal has a reasonable chance of success; and (c) the resulting delay will not unduly hinder the progress of the action or cause undue prejudice to the parties. [16]

29 The Texas LLCs assert the supervising justice erred in refusing to grant their extension of time application. They assert he also erred in treating the factors to consider in granting an extension application as a "checklist" of factors which each had to be satisfied. They argue the applicants' express intention to set aside the Initial Order should also be construed as an intention to appeal the Initial Order. They also contend that they acted expeditiously to file the extension once they had obtained new counsel. Finally, they assert that the supervising justice erred in concluding a denial of the extension would not prejudice the applicants on the basis they had an upcoming set aside application (i.e., the comeback hearing). They argue remedies available at a set aside application and on appeal are uniquely different.

30 Contrary to the applicants' assertions, the supervising justice explicitly rejected a checklist of mandated criteria. He cited *Industrial Alliance Insurance and Financial Services Inc v Wedgemount Power Limited Partnership*, 2018 BCCA 283 at para 31, for the proposition that "the criteria are not a 'checklist' but instead 'are simply considerations that guide the exercise of judicial discretion'". He found that the applicants' decision to proceed with a set aside application and *not* file an appeal represented a strategic and deliberate decision by the applicants (represented by experienced counsel) to proceed with one of the avenues of relief available to them. [17]

31 The applicants have also not illustrated specifically what alternative remedies they would have sought on appeal that were unavailable to them on the set aside application that caused substantial prejudice to their interests.

32 Finally, as the supervising justice recognized, the decision to grant an extension is discretionary. Parliament intended, in drafting section 14(2) of the *CCAA* as it did, for that decision to be made by the judge who made the order. Therefore, deference is owed to that decision.

33 The applicants have not satisfied me that they would have a reasonable chance of success on appeal if leave was granted or that the appeal raises questions of general significance to the practice. Therefore, leave to appeal this application is dismissed.

2. Initial Order

34 As stated above, only the Texas LLCs applied for leave to appeal the Initial Order. The Texas LLCs filed their application on December 16, 2024, after the 21-day-period they had to file the application expired. Leave to extend the filing of that application was dismissed by the supervising justice, and I have denied leave to appeal that decision. That is dispositive of this aspect of the application.

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3. ARIO and Angus Comeback Decision

35 The applicants took the position that an appeal of all orders is necessary since the orders are inextricably linked with one another. Counsel referred me to a decision of the Ontario Court of Appeal, *Akagi v Synergy Group (2000) Inc*, 2015 ONCA 368. In that case, the court found a receivership process had been stretched beyond its proper limits and set aside all prior interim receivership orders granted in the court below. The decision does not indicate whether the appellant appealed all of the prior receivership orders or simply the latest order, which had the effect of striking all prior orders. I also note that leave may be granted against multiple *CCAA* orders in the same proceedings. [18]

CONCLUSION

36 All the parties to these applications and the supervising justice noted that this case represents a unique if not singular use of the *CCAA* by equity investors in these circumstances. [19] Further, no entity in the A2A Group has sought a stay in relation to the ongoing activities of the Monitor and related *CCAA* proceedings. That is a significant factor in the circumstances of this application.

37 As a result, I am satisfied that this issue meets the threshold for leave to appeal, and grant permission for the appeal of the following question to a panel of this Court:

> 1) Did the supervising justice err in concluding that the Canadian investors came within the scope of the *Companies' Creditors Arrangement Act*, and that use of the *Act* in these circumstances was proper either in the decision reported at 2025 ABKB 51 or in the earlier unreported decision on November 25, 2024?

38 Several of the other arguments advanced relate to the determination of threshold issues by the supervising justice that are necessarily incidental to the use of the *CCAA* in these circumstances. To ensure that the panel is not unduly constrained in consideration of the first question, I also grant leave on this subsidiary question:

> 2) Did the supervising justice err in concluding that entities within the A2A Group, including the Windridge and Fossil Creek Groups and the Texas LLCs, were subject to the *Companies' Creditors Arrangement Act* in his decision reported at 2025 ABKB 51, or in the earlier unreported decision on November 25, 2024?

39 Leave is otherwise denied. The issues identified in the remaining grounds advanced are either not sufficiently meritorious, reflect exercises of discretion unique to the unusual circumstances of this case, or would otherwise be of no significance beyond this case.

Application granted in part.

Footnotes

1 *Angus A2A GP Inc (Re)*, 2025 ABKB 51 at paras 8, 32-33, 36, 39 *(Angus Comeback Decision)*.

2 *Angus Comeback Decision* at paras 2, 35, 37, 40.

3 *Angus Comeback Decision* at para 8.

4 Angus A2A GP Inc., Angus Manor Park A2A GP Inc., Angus Manor Park A2A Capital Corp., Angus Manor Park A2A Developments Inc., Hills of Windridge A2A GP Inc., Windridge A2A Developments, LLC, Fossil Creek A2A GP Inc., Fossil Creek A2A Developments, LLC, A2A Developments Inc., Serene Country Homes (Canada) Inc., and A2A Capital Services Canada Inc.

5 Angus A2A Limited Partnership, Angus Manor A2A Limited Partnership, Hills of Windridge A2A LP**,** Hills of Windridge A2A Trust, Fossil Creek A2A Limited Partnership, and Fossil Creek A2A Trust.

6 Fossil Creek A2A Developments, LLC and Windridge A2A Developments, LLC.

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7 *Angus A2A GP Inc (Re)* 2024 ABKB 769 (*Angus Extension Decision)*.

8 *Angus Extension Decision* at paras 19-23.

9 *Angus Extension Decision* at paras 23-26.

10 *Angus Comeback Decision* at para 87.

11 *Angus Comeback Decision* at paras 3-5.

12 *BMO Nesbitt Burns Inc v Bellatrix Exploration Ltd*, 2020 ABCA 264 at para 7.

13 *Edgewater Casino Inc (Re),*2009 BCCA 40 at paras 20-21; *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 at paras 53-54.

14 *Callidus* at para 53; *Repsol Canada Energy Partnership v Delphi Energy Corp*, 2020 ABCA 364 at para 9; *Canadian Overseas Petroleum Limited (Re)*, 2024 ABCA 190 at para 16.

15 *Pacific National Lease Holding Corporation*, 1992 CanLII 427 (BC CA) at para 30; *Bellatrix* at para 8.

16 *Esfahani v Samimi*, 2024 ABCA 16 at para 4.

17 *Angus Extension Decision* at paras 10, 17-19.

18 *Stelco Inc, Re* 2005 CanLII 40140(ON CA) at paras 1, 14-15, 78 OR (3d) 254.

19 *Angus Comeback Decision* at paras 55-57.

End of Document

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KeyCite treatment
Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): The Cannabist Company Holdings Inc. et al | 2026 ONSC 1849, 2026 CarswellOnt 4767 | (Ont. S.C.J. [Commercial List], Mar 24, 2026)

2010 ONSC 222
Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc. / Publications Canwest Inc., Re

2010 CarswellOnt 212, 2010 ONSC 222, [2010] O.J. No. 188, 184 A.C.W.S. (3d) 684, 63 C.B.R. (5th) 115

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Pepall J.

Judgment: January 18, 2010
Docket: CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb, Duncan Ault for Applicant, LP Entities
Mario Forte for Special Committee of the Board of Directors
Andrew Kent, Hilary Clarke for Administrative Agent of the Senior Secured Lenders' Syndicate
Peter Griffin for Management Directors
Robin B. Schwill, Natalie Renner for Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.

Subject: Insolvency; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.c Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.7 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately $1.45 billion and would have been unable to continue operating business.
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by creditors
CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly

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insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately $1.45 billion and would have been unable to continue operating business — In circumstances, it was appropriate to allow CPI to file and present plan only to secured creditors.

Table of Authorities

Cases considered by *Pepall J.*:

Anvil Range Mining Corp., Re (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — considered

Anvil Range Mining Corp., Re (2003), 310 N.R. 200 (note), 2003 CarswellOnt 730, 2003 CarswellOnt 731, 180 O.A.C. 399 (note) (S.C.C.) — referred to

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

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

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

Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — followed

Philip Services Corp., Re (1999), 13 C.B.R. (4th) 159, 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]) — considered

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

Statutes considered:

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

Generally — referred to

s. 4 — considered

s. 5 — considered

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

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

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

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

s. 11.4(1) [en. 1997, c. 12, s. 124] — considered

s. 11.4(2) [en. 1997, c. 12, s. 124] — considered

s. 11.7(2) [en. 1997, c. 12, s. 124] — referred to

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

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

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 137(2) — considered

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APPLICATION by entity of company already protected under Companies' Creditors Arrangement Act for similar protection.

***Pepall J.*:**

Reasons for Decision

Introduction

1 Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a *Companies' Creditors Arrangement Act* [1] ("CCAA") proceeding on October 6, 2009. [2] Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

2 All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully later.

3 I granted the order requested with reasons to follow. These are my reasons.

4 I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

5 Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

6 Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

Background Facts

(i) Financial Difficulties

7 The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been

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seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

8 On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately $10 million in respect of its senior secured credit facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

9 The May 29, 2009, defaults under the senior secured credit facilities triggered defaults in respect of related foreign currency and interest rate swaps. The swap counterparties (the "Hedging Secured Creditors") demanded payment of $68.9 million. These unpaid amounts rank pari passu with amounts owing under the LP Secured Lenders' credit facilities.

10 On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately $953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary "breathing space" to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

11 The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately $644.9 million. This included consolidated current assets of $182.7 million and consolidated non-current assets of approximately $462.2 million. As at that date, the Limited Partnership had total consolidated liabilities of approximately $1.719 billion (increased from $1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of $1.612 billion and consolidated non-current liabilities of $107 million.

12 The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership's consolidated revenues decreased by $181.7 million or 15% to $1.021 billion as compared to $1.203 billion for the year ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of $66 million compared to consolidated net earnings of $143.5 million for fiscal 2008.

(ii) Indebtedness under the Credit Facilities

13 The indebtedness under the credit facilities of the LP Entities consists of the following.

> (a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable. [3] As at August 31, 2009, the amounts owing by the LP Entities totaled $953.4 million exclusive of interest. [4]
>
> (b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling $68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.

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(c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to $75 million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

(d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US $400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand immediate payment of all amounts outstanding under the notes as a result of events of default.

14 The LP Entities use a centralized cash management system at the Bank of Nova Scotia which they propose to continue. Obligations owed pursuant to the existing cash management arrangements are secured (the "Cash Management Creditor").

(iii) LP Entities' Response to Financial Difficulties

15 The LP Entities took a number of steps to address their circumstances with a view to improving cash flow and strengthening their balance sheet. Nonetheless, they began to experience significant tightening of credit from critical suppliers and other trade creditors. The LP Entities' debt totals approximately $1.45 billion and they do not have the liquidity required to make payment in respect of this indebtedness. They are clearly insolvent.

16 The board of directors of Canwest Global struck a special committee of directors (the "Special Committee") with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as Restructuring Advisor for the LP Entities (the "CRA"). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

17 Given their problems, throughout the summer and fall of 2009, the LP Entities have participated in difficult and complex negotiations with their lenders and other stakeholders to obtain forbearance and to work towards a consensual restructuring or recapitalization.

18 An ad hoc committee of the holders of the senior subordinated unsecured notes (the "Ad Hoc Committee") was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee's legal fees up to a maximum of $250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities' virtual data room which contains confidential information regarding the business and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

19 In the meantime and in order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities have been engaged in negotiations with the LP Senior Lenders, the result of which is this CCAA application.

(iv) The Support Agreement, the Secured Creditors' Plan and the Solicitation Process

20 Since August 31, 2009, the LP Entities and the LP administrative agent for the LP Secured Lenders have worked together to negotiate terms for a consensual, prearranged restructuring, recapitalization or reorganization of the business and affairs of the LP Entities as a going concern. This is referred to by the parties as the Support Transaction.

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21 As part of this Support Transaction, the LP Entities are seeking approval of a Support Agreement entered into by them and the administrative agent for the LP Secured Lenders. 48% of the LP Secured Lenders, the Hedging Secured Creditors, and the Cash Management Creditor (the "Secured Creditors") are party to the Support Agreement.

22 Three interrelated elements are contemplated by the Support Agreement and the Support Transaction: the credit acquisition, the Secured Creditors' plan (the "Plan"), and the sale and investor solicitation process which the parties refer to as SISP.

23 The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities' existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities' secured claims and would not affect or compromise any other claims against any of the LP Entities ("unaffected claims"). No holders of the unaffected claims would be entitled to vote on or receive any distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities' obligations under the LP secured claims calculated as of the date of closing less $25 million would be deemed to be satisfied following the closing of the Acquisition Agreement. LP secured claims in the amount of $25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

24 The Support Agreement contemplates that the Financial Advisor, namely RBC Dominion Securities Inc., under the supervision of the Monitor, will conduct the solicitation process. Completion of the credit acquisition process is subject to a successful bid arising from the solicitation process. In general terms, the objective of the solicitation process is to obtain a better offer (with some limitations described below) than that reflected in the credit acquisition. If none is obtained in that process, the LP Entities intend for the credit acquisition to proceed assuming approval of the Plan. Court sanction would also be required.

25 In more detailed terms, Phase I of the solicitation process is expected to last approximately 7 weeks and qualified interested parties may submit non-binding proposals to the Financial Advisor on or before February 26, 2010. Thereafter, the Monitor will assess the proposals to determine whether there is a reasonable prospect of obtaining a Superior Offer. This is in essence a cash offer that is equal to or higher than that represented by the credit acquisition. If there is such a prospect, the Monitor will recommend that the process continue into Phase II. If there is no such prospect, the Monitor will then determine whether there is a Superior Alternative Offer, that is, an offer that is not a Superior Offer but which might nonetheless receive approval from the Secured Creditors. If so, to proceed into Phase II, the Superior Alternative Offer must be supported by Secured Creditors holding more than at least 33.3% of the secured claims. If it is not so supported, the process would be terminated and the LP Entities would then apply for court sanction of the Plan.

26 Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase 1 process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

27 The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which

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would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

> The terms of the Support Agreement and SISP were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

28 It goes without saying that the Monitor, being a court appointed officer, may apply to the court for advice and directions and also owes reporting obligations to the court.

29 As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to $250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc., Re* [5] . On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

Proposed Monitor

30 The Applicants propose that FTI Consulting Canada Inc. serve as the Monitor. It currently serves as the Monitor in the CMI Entities' CCAA proceeding. It is desirable for FTI to act; it is qualified to act; and it has consented to act. It has not served in any of the incompatible capacities described in section 11.7(2) of the CCAA. The proposed Monitor has an enhanced role that is reflected in the order and which is acceptable.

Proposed Order

31 As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately $1.45 billion and would be unable to continue operating their businesses.

(a) Threshold Issues

32 The chief place of business of the Applicants is Ontario. They qualify as debtor companies under the CCAA. They are affiliated companies with total claims against them that far exceed $5 million. Demand for payment of the swap indebtedness has been made and the Applicants are in default under all of the other facilities outlined in these reasons. They do not have sufficient liquidity to satisfy their obligations. They are clearly insolvent.

(b) Limited Partnership

33 The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent

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jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Canwest Global Communications Corp., Re*[6] and *Lehndorff General Partner Ltd., Re*[7].

34 In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) Filing of the Secured Creditors' Plan

35 The LP Entities propose to present the Plan only to the Secured Creditors. Claims of unsecured creditors will not be addressed.

36 The CCAA seems to contemplate a single creditor-class plan. Sections 4 and 5 state:

> s.4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, it the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> s.5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

37 Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Philip Services Corp., Re*[8] : " There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to secured creditors or to unsecured creditors or to both groups."[9] Similarly, in *Anvil Range Mining Corp., Re*[10], the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors."[11]

38 Based on the foregoing, it is clear that a debtor has the statutory authority to present a plan to a single class of creditors. In *Anvil Range Mining Corp., Re*, the issue was raised in the context of the plan's sanction by the court and a consideration of whether the plan was fair and reasonable as it eliminated the opportunity for unsecured creditors to realize anything. The basis of the argument was that the motions judge had erred in not requiring a more complete and in depth valuation of the company's assets relative to the claims of the secured creditors.

39 In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

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40 In my view it is appropriate in the circumstances to authorize the LP Entities to file and present a Plan only to the Secured Creditors.

(D) DIP Financing

41 The Applicants seek approval of a DIP facility in the amount of $25 million which would be secured by a charge over all of the assets of the LP Entities and rank ahead of all other charges except the Administration Charge, and ahead of all other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.

42 Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Canwest Global Communications Corp., Re* [12] , I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive, it may be appropriate to consider other factors as well.

43 Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the $25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

44 Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

45 Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

46 Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

(e) Critical Suppliers

47 The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

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48 Section 11.4 of the CCAA addresses critical suppliers. It states:

> 11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

49 Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

50 Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

51 The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based online service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

52 The Applicants also seek a charge in the amount of $3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to

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rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order. [13] The LP Entities also request a $10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

53 In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

54 I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

> (a) the size and complexity of the businesses being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is an unwarranted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and
>
> (f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

55 There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

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(g) Directors and Officers

56 The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank pari passu with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Canwest Global Communications Corp., Re* [14] as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

57 Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

58 The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the "MIPs"). They seek a charge in the amount of $3 million to secure these obligations. It would be subsequent to the D & O charge.

59 The CCAA is silent on charges in support of Key Employee Retention Plans ("KERPs") but they have been approved in numerous CCAA proceedings. Most recently, in *Canwest Global Communications Corp., Re* [15] , I approved the KERP requested on the basis of the factors enumerated in *Grant Forest Products Inc., Re* [16] and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

60 The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

61 In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

62 In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

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(i) Confidential Information

63 The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts of Justice Act* [17] to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access in an important tenet of our system of justice.

64 The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v. Canada (Minister of Finance)* [18]. In that case, Iacobucci J. stated that an order should only be granted when: (i) it is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (ii) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

65 In *Canwest Global Communications Corp., Re* [19] I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Canwest Global Communications Corp., Re* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

66 For all of these reasons, I was prepared to grant the order requested.

Application granted.

Footnotes

1 R.S.C. 1985, c. C. 36, as amended.

2 On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

3 Subject to certain assumptions and qualifications.

4 Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently $382,889,000 in principal in Canadian dollars is outstanding along with $458,042,000 in principal in American dollars.

5 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]).

6 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) at para. 29.

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7 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).

8 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]).

9 Ibid at para. 16.

10 (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6,2003) [2003 CarswellOnt 730 (S.C.C.)].

11 Ibid at para. 34.

12 Supra, note 7 at paras. 31-35.

13 This exception also applies to the other charges granted.

14 Supra note 7 at paras. 44-48.

15 Supra note 7.

16 [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]).

17 R.S.O. 1990, c. C.43, as amended.

18 [2002] 2 S.C.R. 522 (S.C.C.).

19 Supra, note 7 at para. 52.

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Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 620, 2015 ONSC 303, [2015] O.J. No. 247, 22 C.B.R. (6th) 323, 248 A.C.W.S. (3d) 753

In the Matter of the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC.

Morawetz R.S.J.

Heard: January 15, 2015
Judgment: January 16, 2015
Docket: CV-15-10832-00CL

Counsel: Tracy Sandler, Jeremy Dacks for Applicants, Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC
Jay Swartz for Target Corporation
Alan Mark, Melaney Wagner, Jesse Mighton for Proposed Monitor, Alvarez and Marsal Canada ULC ("Alvarez")
Terry O'Sullivan for Honourable J. Ground, Trustee of the Proposed Employee Trust
Susan Philpott for Proposed Employee Representative Counsel, for Employees of the Applicants

Subject: Insolvency; Property
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Proceedings subject to stay
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.d Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Miscellaneous
Applicant group of companies were involved in Canadian operations of U.S. retailer T Co. — Canadian operations suffered significant loss in every quarter — T Co. decided to stop funding Canadian operations — Applicants sought to wind down Canadian operations and applied for relief under Companies' Creditors Arrangement Act (CCAA) — Application granted — Initial order granted — Stay of proceedings granted — Stay extended to certain limited partnerships, which were related to or carried on operations integral to applicants' business — Stay of proceedings extended to rights of third party tenants against

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landlords that arose out of insolvency — Stay extended to T Co. and its U.S. subsidiaries in relation to claims derivative of claims against Canadian operations.

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

Applicant group of companies were involved in Canadian operations of U.S. retailer T Co. — Canadian operations suffered significant loss in every quarter — T Co. decided to stop funding Canadian operations — Applicants sought to wind down Canadian operations and applied for relief under Companies' Creditors Arrangement Act (CCAA) — Application granted — Initial order granted — Stay of proceedings granted — It was appropriate to grant broad relief to ensure status quo was maintained — Applicants were all insolvent — Although there was no prospect restructured "going concern" solution would result, use of CCAA protection was appropriate in circumstances — Creation of employee trust to cover payments to employees was approved — Key employee retention program (KERP) and charge as security for KERP payments were approved — Appointment of Employee Representative Counsel was approved — DIP Lenders' Charge and DIP Facility were approved — Administration charge and Directors' and Officers' charge approved.

Table of Authorities

Cases considered by *Morawetz R.S.J.*:

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

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115, 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) — followed

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

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

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 1330 (Ont. S.C.J. [Commercial List]) — considered

Nortel Networks Corp., Re (2009), 53 C.B.R. (5th) 196, 75 C.C.P.B. 206, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) — referred to

Priszm Income Fund, Re (2011), 2011 ONSC 2061, 2011 CarswellOnt 2258, 75 C.B.R. (5th) 213 (Ont. S.C.J.) — considered

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

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

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

Stelco Inc., Re (2004), 338 N.R. 196 (note), 2004 CarswellOnt 5200, 2004 CarswellOnt 5201 (S.C.C.) — referred to

T. Eaton Co., Re (1997), 1997 CarswellOnt 1914, 46 C.B.R. (3d) 293 (Ont. Gen. Div.) — considered

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — considered

U.S. Steel Canada Inc., Re (2014), 2014 ONSC 6145, 2014 CarswellOnt 16465 (Ont. S.C.J.) — considered

Statutes considered:

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

Generally — referred to

s. 2 "insolvent person" — considered

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

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Generally — referred to

s. 11 — considered

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

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

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

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

s. 11.7(1) [en. 1997, c. 12, s. 124] — considered

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

s. 36 — considered

Rules considered:

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

Generally — referred to

Words and phrases considered:

insolvent

"Insolvent" is not expressly defined in the [*Companies' Creditors Arrangement Act* (CCAA)]. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act* . . . or if it is "insolvent" as described in Stelco Inc. (Re), [2004] O.J. No. 1257, [Stelco], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring".

APPLICATION for relief under *Companies' Creditors Arrangement Act*.

***Morawetz R.S.J.*:**

1 Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

2 TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

3 In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

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4 Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

5 After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

6 Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

7 The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

> a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;
>
> b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;
>
> c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and
>
> d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

8 The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the "breathing room" required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

9 TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. ("NE1"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

10 TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC's employees are not represented by a union, and there is no registered pension plan for employees.

11 The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

12 A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy,

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Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 - 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

13 TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

14 In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation's Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

15 TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than $2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

16 TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

17 Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

18 Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately $5.408 billion and total liabilities of approximately $5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

19 Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately $2.5 billon. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of $62 million since November 1, 2014.

20 NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of $4 billion. TCC owed NE1 approximately $3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

21 As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately $1.632 billion and total liabilities of approximately $1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately $1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. $89 million to Target Corporation under a Demand Promissory Note.

22 TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

23 Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

24 Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined

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that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

25 On this initial hearing, the issues are as follows:

a) Does this court have jurisdiction to grant the CCAA relief requested?

a) Should the stay be extended to the Partnerships?

b) Should the stay be extended to "Co-tenants" and rights of third party tenants?

c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?

d) Should the Court approve protections for employees?

e) Is it appropriate to allow payment of certain pre-filing amounts?

f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;

g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?

h) Should the court exercise its discretion to approve the Court-ordered charges?

26 "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc., Re*, [2004] O.J. No. 1257 (Ont. S.C.J. [Commercial List]), [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903 (Ont. C.A.), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336 (S.C.C.), where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm Income Fund, Re*, [2011] O.J. No. 1491 (Ont. S.C.J.), 2011 and *Canwest Global Communications Corp., Re*, [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]) [*Canwest*].

27 Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "BIA") or under the test developed by Farley J. in *Stelco*.

28 I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the "breathing space" afforded by a stay of proceedings or other available relief under the CCAA.

29 I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.

30 In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations

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are in Ontario; 2 of TCC's 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC's operations work in Ontario.

31 The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) ("*Century Services*") that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

32 Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.

33 The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

34 In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

35 The required audited financial statements are contained in the record.

36 The required cash flow statements are contained in the record.

37 Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

38 Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

39 The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

40 I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

41 Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

42 It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *Priszm Income Fund, Re*, 2011 ONSC 2061 (Ont. S.C.J.); *Canwest Publishing Inc./*

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Publications Canwest Inc., Re, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) ("*Canwest Publishing*") and *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) ("*Canwest Global*").

43 In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

44 The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

45 The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *T. Eaton Co., Re*, 1997 CarswellOnt 1914 (Ont. Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

46 In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

47 The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

48 I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

49 The Applicants also request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

50 I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

51 With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

52 Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

53 In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of $70 million.

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54 The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

55 In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

56 The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of $6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

57 The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Nortel Networks Corp., Re*, 2009 CarswellOnt 1330 (Ont. S.C.J. [Commercial List]) [*Nortel Networks (KERP)]*, and *Grant Forest Products Inc., Re*, 2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List]). In *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145 (Ont. S.C.J.), I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

58 In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

59 Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

60 The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

61 I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Nortel Networks Corp., Re*, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

(i) the vulnerability and resources of the groups sought to be represented;

(ii) the social benefit to be derived from the representation of the groups;

(iii) the avoidance of multiplicity of legal retainers; and

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(iv) the balance of convenience and whether it is fair and just to creditors of the estate.

62 The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

63 Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

64 The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

a) Logistics and supply chain providers;

b) Providers of credit, debt and gift card processing related services; and

c) Other suppliers up to a maximum aggregate amount of $10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

65 In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

66 In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

67 TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. $175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr. Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

68 The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court-ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

69 The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

70 The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

71 Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. $175 million and the DIP Facility is approved.

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72 Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCCA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

73 With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of $6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

74 In *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]), Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

a. The size and complexity of the business being restructured;

b. The proposed role of the beneficiaries of the charge;

c. Whether there is an unwarranted duplication of roles;

d. Whether the quantum of the proposed Charge appears to be fair and reasonable;

e. The position of the secured creditors likely to be affected by the Charge; and

f. The position of the Monitor.

75 Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

76 The Applicants seek a Directors' and Officers' charge in the amount of up to $64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

77 Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

78 I accept the submissions of counsel to the Applicants that the requested Directors' Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors' Charge is granted.

79 In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

80 The stay of proceedings is in effect until February 13, 2015.

81 A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

82 The comeback hearing is to be a "true" comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

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83 Finally, a copy of Lazard's engagement letter (the "Lazard Engagement Letter") is attached as Confidential Appendix "A" to the Monitor's pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

84 Having considered the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 211 D.L.R. (4th) 193, [2002] 2 S.C.R. 522 (S.C.C.), I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix "A" to the Monitor's pre-filing report.

85 The Initial Order has been signed in the form presented.

Application granted.

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2021 ONSC 1793
Ontario Superior Court of Justice [Commercial List]

Re Just Energy Corp.

2021 CarswellOnt 3724, 2021 ONSC 1793, 331 A.C.W.S. (3d) 418

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGYMASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUSTENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT. (Applicants)

Koehnen J.

Heard: March 9, 2021
Judgment: March 9, 2021
Docket: CV-21-00658423-00CL

Counsel: Marc Wasserman, Michael De Lellis, Jeremy Dacks, Shawn Irving, Waleed Malik, David Rosenblatt, Justine Erickson, for Applicants
Robert Thornton, Rebecca Kennedy, Rachel Bengino, Puya Fesharaki, Paul Bishop, Jim Robinson, for Proposed Monitor
Scott Bomhof, for Term Loan Lenders
Heather Meredith, James D. Gage, for Credit Facility Lenders
Ryan Jacobs, Jane Dietrich, Michael Wunder, for DIP Lender
Howard Gorman, for Shell
Robert Kennedy, Kenneth Kraft, for BP
Paul Bishop, Jim Robinson — Proposed Monitor
Brian Schartz, Mary Kogut Brawley (US counsel), for Applicants
Chad Nichols, David Botter (U.S. counsel), for DIP Lender
Kelli Norfleet (U.S. counsel), for BP

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.a Grant and length of stay

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Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.d Miscellaneous
Judges and courts
XVI Jurisdiction
XVI.11 Jurisdiction of court over own process
XVI.11.c Sealing files

Headnote

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

Applicant bought electricity and natural gas from power generators and re-sold it to consumer and commercial customers — Unusually intense winter storms in Texas led to breakdown of equipment used to generate and transmit electricity, which led Texas regulators to impose radical and immediate price increases for power applicant bought — Amounts regulators imposed must be paid within two days, failing which applicant could lose its licence and its customers, and price increases imposed serious, temporary liquidity crisis upon applicant — It appeared that price increases may have been imposed in error by computer program, and applicant was appealing price increases and was seeking rebates from Texas regulators, but that process had not been completed — Applicant applied for initial order under the Companies' Creditors Arrangement Act (CCAA) for period of 10 days with debtor in possession (DIP) financing of $125 million and stay of regulatory action — Application granted — Circumstances facing applicant were precisely sort for which CCAA was appropriate, namely, sudden, unexpected liquidity crisis, brought on by action of others, which actions may still be rescinded — Without stay applicant faced almost certain bankruptcy with loss of approximately 1,000 jobs and possibility that good part of debt it owed would not be repaid — Those catastrophic consequences may be avoidable if applicant succeeded in its appeal of Texas price increases and if all players were given adequate time to find solutions in more orderly fashion than weather crisis allowed them to — Ontario was centre of main interest (COMI) for CCAA proceeding as its registered office was in Toronto, and no other evidentiary factors displaced presumption of registered office being COMI — Applicant met insolvency requirements of CCAA as its liabilities exceeded $5 million, its liabilities exceeded value of its assets, it would imminently cease to be able to meet its obligations as they became due, and it would run out of liquidity soon — Proposed DIP financing was approved as although amount was high, it was necessary for applicant to remain viable, and its secured creditors did not oppose DIP — Commodity suppliers and ISO service providers who signed qualified service agreements would benefit from charge — Administrative, financial advisor and directors and officers charges were granted as applicant's business was large and complex, and no CCAA proceeding could advance without monitor or counsel, and addition of financial advisor appeared to be prudent step — Bonus payments were not approved on initial order.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — General principles

Applicant bought electricity and natural gas from power generators and re-sold it to consumer and commercial customers — Unusually intense winter storms in Texas led to breakdown of equipment used to generate and transmit electricity, which led Texas regulators to impose radical and immediate price increases for power applicant bought — Amounts regulators imposed must be paid within two days, failing which applicant could lose its licence and its customers, and price increases imposed serious, temporary liquidity crisis upon applicant — It appeared that price increases may have been imposed in error by computer program, and applicant was appealing price increases and was seeking rebates from Texas regulators, but that process had not been completed — Applicant applied for initial order under the Companies' Creditors Arrangement Act (CCAA) for period of 10 days with debtor in possession (DIP) financing of $125 million and stay of regulatory action — Application granted — Applicant was acting in good faith and with diligence — Granting 10-day stay against regulatory conduct was consistent with remedial purpose of CCAA to avoid social and economic losses resulting from liquidation of insolvent company — CCAA automatically stayed enforcement of any payments of money ordered by regulator, but it did not automatically stay other steps that regulator may take against regulated entity — Court may stay such other steps if it was of view that failure to stay those other steps meant that viable compromise or arrangement could not be made, as long as additional stay was not contrary to public interest — It was appropriate to stay exercise of other regulatory powers against applicant for at least interim 10- day period — It would be unjust to take regulatory steps that might shut down entire business when financial concerns that prompted

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those steps may turn out to be unjustified if Texas regulators adjusted some or all of price increases imposed during storm — Foreign regulator was not "regulatory body" within plain meaning of s. 11.1(1) of CCAA, it did not benefit from same exemption from stay as Canadian regulator, and foreign regulator was presumptively subject to stay with respect to matters that fell within jurisdiction of Canadian CCAA court — Set off rights of banks which may allow them to sweep accounts were stayed, as that would give them preferred position over other creditors and deprive applicant of working capital, which was contrary to remedial purposes of CCAA — On its face CCAA applied to corporations, but where operations of partnerships were integral and closely related to applicant, court had jurisdiction to extend protection of stay to partnerships to ensure purposes of CCAA could be achieved — It would be illusory here to grant stay in favour of applicant's corporate entities but not extend its benefit to its partnership entities, and non-corporate entities were captured by stay Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s 11.1(1).

Judges and courts --- Jurisdiction — Jurisdiction of court over own process — Sealing files

Applicant bought electricity and natural gas from power generators and re-sold it to consumer and commercial customers — Unusually intense winter storms in Texas led to breakdown of equipment used to generate and transmit electricity, which led Texas regulators to impose radical and immediate price increases for power applicant bought — Amounts regulators imposed must be paid within two days, failing which applicant could lose its licence and its customers, and price increases imposed serious, temporary liquidity crisis upon applicant — It appeared that price increases may have been imposed in error by computer program, and applicant was appealing price increases and was seeking rebates from Texas regulators, but that process had not been completed — Applicant applied for initial order under the Companies' Creditors Arrangement Act (CCAA) for period of 10 days with debtor in possession (DIP) financing of $125 million and stay of regulatory action — Application granted — Applicant met test for sealing order — Materials contained commercially sensitive information and/or personal information — Order was necessary to prevent serious risk to important personal or commercial interest, and benefits of sealing order outweighed rights of others to fair determination of issues — No one advanced any need to see information that was proposed to be sealed, and there was no need for anyone to access such information in order to assert their rights fully within proceeding.

Table of Authorities

Cases considered by *Koehnen J.*:

AbitibiBowater inc., Re (2009), 2009 CarswellQue 9964, 58 C.B.R. (5th) 62, 2009 QCCS 6453 (C.S. Que.) — considered

Air Canada, Re (2003), 2003 CarswellOnt 4016, 45 C.B.R. (4th) 13, 39 B.L.R. (3d) 153 (Ont. S.C.J. [Commercial List]) — referred to

Canwest Publishing Inc. / Publications Canwest Inc., Re (2010), 2010 ONSC 222, 2010 CarswellOnt 212, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) — referred to

Clover Leaf Holdings Company, Re (2019), 2019 ONSC 6966, 2019 CarswellOnt 20001, 75 C.B.R. (6th) 124 (Ont. S.C.J. [Commercial List]) — referred to

Laurentian University of Sudbury (2021), 2021 ONSC 659, 2021 CarswellOnt 1224, 87 C.B.R. (6th) 278 (Ont. S.C.J.) — referred to

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

Lydian International Limited (Re) (2019), 2019 ONSC 7473, 2019 CarswellOnt 21645, 75 C.B.R. (6th) 314 (Ont. S.C.J. [Commercial List]) — considered

Massachusetts Elephant & Castle Group Inc., Re (2011), 2011 ONSC 4201, 2011 CarswellOnt 6610, 81 C.B.R. (5th) 102 (Ont. S.C.J.) — referred to

Miniso International Hong Kong Limited v. Migu Investments Inc. (2019), 2019 BCSC 1234, 2019 CarswellBC 2208, 71 C.B.R. (6th) 250 (B.C. S.C.) — referred to

Mountain Equipment Co-Operative (Re) (2020), 2020 BCSC 1586, 2020 CarswellBC 2639, 83 C.B.R. (6th) 272 (B.C. S.C.) — referred to

Nortel Networks Corp., Re (2010), 2010 ONSC 1304, 2010 CarswellOnt 1597, 65 C.B.R. (5th) 231 (Ont. S.C.J. [Commercial List]) — referred to

North American Tungsten Corp. v. Global Tungsten and Powders Corp. (2015), 2015 BCCA 390, 2015 CarswellBC 2629, 76 C.P.C. (7th) 1, 377 B.C.A.C. 6, 648 W.A.C. 6, 32 C.B.R. (6th) 175 (B.C. C.A.) — considered

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North American Tungsten Corp., Re (2015), 2015 BCSC 1382, 2015 CarswellBC 2287, 28 C.B.R. (6th) 147 (B.C. S.C.) — referred to

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 625, 6 C.B.R. (4th) 314, 96 O.T.C. 272 (Ont. Gen. Div. [Commercial List]) — considered

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

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

Target Canada Co., Re (2015), 2015 ONSC 303, 2015 CarswellOnt 620, 22 C.B.R. (6th) 323 (Ont. S.C.J.) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, 2010 CSC 60 (S.C.C.) — followed

4519922 Canada Inc., Re (2015), 2015 ONSC 124, 2015 CarswellOnt 178, 22 C.B.R. (6th) 44 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C.

Chapter 15 — referred to

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

Generally — referred to

s. 2 "insolvent person" — referred to

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

Generally — referred to

s. 192 — referred to

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

Generally — considered

s. 2(1) "debtor company" (a) — referred to

s. 3(1) — pursuant to

s. 11 — pursuant to

s. 11.1(1) "regulatory body" [en. 1997, c. 12, s. 124] — considered

s. 11.1(2) [en. 1997, c. 12, s. 124] — referred to

s. 11.1(3) [en. 1997, c. 12, s. 124] — pursuant to

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

s. 11.2(4) [en. 2005, c. 47, s. 128] — referred to

s. 11.2(5) [en. 2005, c. 47, s. 128] — considered

s. 21 — considered

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s. 34(1) — referred to

s. 34(7) — referred to

s. 34(8) — referred to

s. 34(9) — referred to

s. 45(2) — referred to

APPLICATION by company for initial order under *Companies' Creditors Arrangement Act* and for stay of regulatory action.

***Koehnen J.*:**

Overview

1 The applicant, Just Energy Group Inc. ("Just Energy") seeks protection under *the Companies' Creditors Arrangement Act*, (the "*CCAA*") [1] by way of an initial order. Just Energy is the ultimate parent of the Just Energy group of companies and limited partnerships.

2 Just Energy buys electricity and natural gas from power generators and re-sells it to consumer and commercial customers, usually under long term, fixed price contracts.

3 Unusually intense winter storms in Texas led to a breakdown of equipment used to generate and transmit electricity. This led Texas regulators to impose radical and immediate price increases for the power Just Energy buys. The amounts the regulator imposes must be paid within 2 days, failing which Just Energy could lose its licence and have its customers distributed among other distributors.

4 Those price increases have imposed a serious, temporary liquidity crisis upon Just Energy and others in its position. That liquidity crisis prompts the *CCAA* application. It appears that the price increases may have been imposed by a computer program that misunderstood the data it received as indicating a shortage of power that could be corrected by price increases. Price increase could not lead to more power being generated because the energy shortage was caused by the freezing and consequent breakdown of generating and transmission equipment. Price increases could not remedy that.

5 Just Energy is appealing the price increases and is seeking rebates from the Texas regulator. That process has not been completed.

6 The issue before me today is whether to grant *CCAA* protection for an initial period of 10 days. It is complicated by the fact that Just Energy also seeks a stay of regulatory action in Canada and the United States and seeks what at first blush, is an unusually large amount of debtor in possession financing (the "DIP") of $125 million for the initial 10 day period.

7 For the reasons set out below, I grant the stay and the DIP. It strikes me that the circumstances facing Just Energy are precisely the sort for which the *CCAA* is appropriate: a sudden, unexpected liquidity crisis, brought on by the action of others, which actions may still be rescinded. Without a stay, Just Energy faces almost certain bankruptcy with a loss of approximately 1,000 jobs and the possibility that a good part of the debt it owes will not be repaid. Those catastrophic consequences may be avoidable if Just Energy succeeds in its appeals of the Texas price increases and if all players are given adequate time to find solutions in a more orderly fashion than the weather crisis allowed them to.

8 A number of critical parties were given notice of today's hearing. Just Energy had consulted widely with them before the hearing. These parties included secured creditors, banks, unsecured term lenders and essential suppliers. Some, including banks and some of the term lenders wish to "reserve their rights" to the comeback hearing. The DIP lender, and two important suppliers (Shell and BP) expressed concern about the reservation of rights. While those who are "reserving their rights" are

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of course free to do so, as a practical matter, they will be hard-pressed to undo rights that I am affording today in the initial order when the recipients of those rights will be relying on them to their detriment over the next 10 days and when the parties "reserving their rights" have not opposed the relief I am granting.

I Background to the Liquidity Crisis

9 Just Energy Group Inc. ("Just Energy") is incorporated under the *Canada Business Corporations Act*. Its shares are publicly traded on the Toronto Stock Exchange and the New York Stock Exchange. Its registered office is in Toronto, Ontario. Just Energy is primarily a holding company that directly or indirectly owns the other companies in the Just Energy Group, including operating subsidiaries.

10 At the risk of oversimplifying, it sells energy to customers under long-term fixed-price contracts and then purchases energy in the market to fulfil those contracts. It has over 950,000 customers, for the most part in Canada and the United States, approximately 979 full-time employees and debts estimated at $1.25 billion.

11 In recent years Just Energy has suffered challenges that it has sought to remedy by way of a recapitalization through a plan of arrangement under section 192 of the *CBCA* which was approved by this court on September 2, 2020.

12 Just Energy's largest market in the United States is in the state of Texas.

13 Just Energy faces a sudden and unexpected liquidity crisis as a result of an extreme winter storm that hit Texas on February 12, 2021. The storm caused a surge in demand for electrical power. In response, natural gas prices jumped from US $3.00 to over US $150/mmBTU on February 12.

14 The demand for power was exacerbated by the fact that much of the Texas electrical grid began to shut down because it was not equipped to deal with cold weather. As a result, critical components necessary for the generation and transmission of electricity froze thereby increasing demand even further on the limited resources that remained available. By the early morning hours of February 15, 2021, the stress on the electrical grid was so great that it came within minutes of a catastrophic failure.

15 In response, the Electric Reliability Council of Texas ("ERCOT") which is responsible for managing the Texas electrical grid ordered transmission operators to implement deep cuts in the form of rotating outages to avoid a complete collapse of the grid.

16 In an apparent effort to stimulate more power production, ERCOT's regulator, the Texas Public Utility Commission ("PUCT") increased the real-time settlement price of power from approximately US $1,200 per megawatt hour to US $9,000 per megawatt hour. It appears that this price was set by a computer program that was supposed to adjust prices to help match supply and demand. The increase in price to $9,000 per megawatt hour did not, however, increase supply because supply was blocked by frozen equipment. The price remained at $9,000 MWh for four days. The real time settlement price did not reach $9,000 even for a single 15 minute interval in all of 2020.

17 In addition, Just Energy pays ERCOT a fee referred to as the Reliability Deployment Ancillary Service Imbalance Revenue Neutrality. It ranges between U.S. $0 to U.S. $23,500 per day. Between June 2015 and February 16, 2021, Just Energy paid approximately $504,000 in respect of this charge. For February 17, 18 and 19, 2021, the aggregate charge was over U.S. $53 million.

18 ERCOT and PUCT have issued additional invoices of US $55 billion to wholesale energy purchasers as a result of the storm. Just Energy's share of that is approximately $250 million.

19 These additional fees pose a severe liquidity challenge for Just Energy because it is required to pay them within two days of being imposed. Although Just Energy has a means to dispute ERCOT's invoices, it must pay them before it can initiate the dispute resolution process. ERCOT has already barred two electricity sellers from the Texas power market for failing to make timely payments arising out of the storm.

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20 There is considerable controversy surrounding these fees. PUCT and ERCOT have been subject to severe criticism for their actions. The chair of PUCT and several of ERCOT's board members have resigned. The board of ERCOT terminated the employment of its CEO.

21 Others in the Texas electrical market have also suffered. The largest power generation and transmission cooperative in Texas, Brazos Electric Power Cooperative, filed for Chapter 11 bankruptcy protection on March 1, 2021.

22 Although Just Energy hedges for weather risks, its hedging and pricing models did not, however, take into account the extraordinary power demands caused by the storm and the unprecedented fees that ERCOT and PUCT imposed during and after the storm. By way of example, Just Energy's weather hedges contemplate a 50% increase in power usage above average consumption for the month of February. During the storm, usage was 200% above the previous week.

23 As a result of the additional payments it has had to make to date because of the storm, Just Energy's liquidity facilities are down to approximately $2.9 million. By the end of day on March 9, 2021 it will have to pay ERCOT an additional US $96.24 million.

24 On March 22, 2021 Just Energy expects to have to pay $250,000,000 to counterparties for purchases at inflated prices during the storm and its aftermath. Sudden and unexpected obligations of that magnitude have a cascading effect on Just Energy's financial stability.

25 In response to the dramatically increased charges by ERCOT, companies that have issued surety bonds in Just Energy's favour have demanded $30 million in additional collateral of which $10 million remains outstanding. Just Energy was obligated to provide additional collateral because the bonding companies had threatened to cancel their surety bonds if Just Energy did not do so. The cancellation of the bonds may have resulted in the revocation of licenses necessary for the Just Energy group to carry on business in certain jurisdictions.

26 On March 8, 2021, the Just Energy group received another invoice from ERCOT for US $30.92 million, of which U.S. $23.89 million will be due by March 10, 2021.

27 While Just Energy had sufficient liquidity to pay the obligations that it expected, it does not have enough liquidity to pay the additional fees charged by ERCOT, PUCT and creditors who have demanded more stringent terms in response to the ERCOT and PUCT fees. If Just Energy does not pay the fees to ERCOT, the latter can simply transfer all of the Just Energy Group's customers in Texas to another service provider. That would be devastating to Just Energy's business.

28 In addition to the foregoing financial stresses, at least three provincial regulators have expressed concern about Just Energy's viability. Two regulators made inquiries as a result of media reports arising from Just Energy's disclosure about its storm related financial challenges. The third inquiry was prompted by a formal petition by another market participant who seeks to prevent the Just Energy operating entity in Manitoba from selling to new customers.

II. General Principles

29 At a high level, this is precisely the sort of situation that the *CCAA* is designed for.

30 The policy underlying the *CCAA* is that the best commercial outcomes are achieved when stays of proceedings provide debtors with breathing space during which solvency is restored or a reorganization of liabilities is explored. The *CCAA* offers a flexible mechanism to make it more responsive to the commercial needs of complex reorganizations. The overriding object is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating the business. [2]

31 This will be a complex restructuring. It involves balancing the interests of various types of debt including secured debt, unsecured term loans, working capital provided by service providers, trade debt to commodities providers, ongoing obligations

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to customers, just shy of 1000 employees all overlaid with varying regulatory requirements of several different Canadian provinces and American states.

32 Today's application invites me to make a number of rulings on a variety of discretionary issues. The Supreme Court of Canada provided guidance about whether and how to exercise that discretionary authority in *Century Services Inc. v. Canada (Attorney General)*, [3] It described the guiding principles as follows:

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

33 Three principles emerge from this passage: good faith, diligence and appropriateness. There is no suggestion that Just Energy is not proceeding in good faith or with diligence. I will return to the issue of appropriateness in my review of the individual forms of relief.

34 Today I am being asked for a 10 day stay of proceedings, including a stay of proceedings by regulatory authorities. Such relief is appropriate in the circumstances of this case.

35 To have Just Energy fail would cause severe hardship to 979 employees and their families and cause losses of up to $1.25 billion for creditors all because

> (i) Just Energy is being forced to pay unprecedented fees that ERCOT and PUCT imposed,
>
> (ii) which fees Just Energy is challenging,
>
> (iii) which fees are highly controversial,
>
> (iv) and which fees were imposed in circumstances where ERCOT's and PUCT's overall management of the crisis has led to the departure of their CEOs and the resignation of several of their board members.

36 In granting the relief I ask myself, as the Supreme Court of Canada did in *Century Services* whether granting a stay will usefully further efforts to achieve the remedial purpose of the *CCAA*. If I apply that principle to the circumstances before me today, the question becomes whether a 10 day stay will avoid the social and economic losses resulting from the liquidation of Just Energy and give participants a chance to achieve common ground while treating all stakeholders as advantageously and fairly as the circumstances permit.

37 I am satisfied that it does. This is precisely the sort of situation that demands breathing space for all actors involved, including regulators, to begin to sort things out in a calmer, more rational, orderly fashion than has been possible to date.

38 I underscore that in making these comments I am not intending to criticize the Texas regulators. Whether there is anything to be criticized in their conduct or whether their imposition of dramatically higher fees is appropriate will be for another day and another forum. I frame the issue in this way only to demonstrate that there is a genuine issue about the circumstances giving rise to Just Energy's liquidity crisis and a genuine issue about how best to sort out that crisis. Working out those issues in a manner that is as advantageous and fair to all stakeholders as the circumstances permit requires the calm deliberation and reflection that a *CCAA* stay will afford.

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III. Specific Issues

39 This application requires me to address the following specific issues:

A. Is Ontario the Centre of Main Interest?

B. Does Just Energy meet the insolvency requirements of the *CCAA*?

C. Should the DIP be approved?

D. Should the regulatory actions be stayed?

E. Should suppliers' charges and pre-filing payments be authorized?

F. Should set off rights be stayed?

G. Should administrative and directors and officers charges be granted?

H. Should noncorporate entities be captured by the stay?

I. Should third-quarter bonuses be paid?

J. Should a sealing order be granted?

A. Is Ontario the Centre of Main Interest?

40 Just Energy has operations primarily in Canada and the United States. It has advised that it intends to commence a recognition proceeding under chapter 15 of the *US Bankruptcy Code* in Texas. This will ensure that actions taken in relation to US entities and US property or by US regulators are overseen by the US courts.

41 The presence of significant business activities in the United States and the intention to commence a chapter 15 proceeding, engages the principle of the Centre of Main Interest or COMI.

42 Section 45 (2) of the *CCAA* provides that, in the absence of proof to the contrary, a debtor company's registered office is deemed to be its centre of main interest.

43 The registered office of Just Energy is located in Toronto.

44 Other evidentiary factors can displace the presumption of the registered office being the COMI. These include the location of the debtor's headquarters or head office functions, location of the debtor's management and the location that significant creditors recognize as being the centre of the company's operations. [4]

45 Here, the parent company, Just Energy Group Inc. is a CBCA corporation. Although it has offices in Mississauga and Houston, its registered office is in Toronto. Its common shares are listed on the Toronto Stock Exchange and the New York Stock Exchange. Just Energy is primarily a holding company although it is also the primary debtor or guarantor on substantially all of the obligations of its subsidiaries, including licenses granted by regulators to members of the Just Energy group. Just Energy has a number of subsidiaries throughout Canada, the United States and India. It has 333 Employees in Canada, 381 in the United States and 265 in India.

46 The following additional factors point to Canada as the COMI:

a. During the recent *CCAA* plan of arrangement which was recognized under Chapter 15 of the US Bankruptcy Code, Canada was recognized as the COMI for the Just Energy group.

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b. The operations of the Just Energy group are directed in part from its head office in Toronto. In particular, decisions relating to the Just Energy's primary business (buying, selling and hedging energy) are primarily made in Canada.

c. All other members of the Just Energy group report to Just Energy.

d. Just Energy Corp. (a Canadian subsidiary) acts as a centralized entity providing operational and administrative functions for the Just Energy group as a whole. These functions are performed by Canadian Just Energy employees and include, among other things:

i. most enterprise-wide IT services;

ii. enterprise-wide support for finance functions, including working capital management, credit management (including credit checks for customers), payment processing, financial reconciliations, managing business expenses, insurance, and taxation;

iii. oversight for the legal, regulatory, and compliance functions across the entire Just Energy Group;

iv. certain enterprise-wide HR functions, such as designing in-house learning and development programs;

v. financial planning and analysis services, including customer enrollment, billing, customer service, and load forecasting;

vi. supply planning services, including creating demand models which predict the amount of energy that each entity needs to purchase from suppliers and determining the proper distributor and pipeline necessary to get the gas to the end-consumer; and

vii. internal audit services.

47 In the foregoing circumstances I am satisfied Canada is the appropriate COMI.

B. Does Just Energy Meet the Insolvency Requirements?

48 There is no doubt that Just Energy meets the threshold required by s. 3(1) of the *CCAA* that it be a company with liabilities in excess of $5,000,000.

49 A company must be "insolvent" to obtain protection under the *CCAA*. [5] Although the *CCAA* does not define "insolvent," the definition of insolvent under the *Bankruptcy and Insolvency Act* ("*BIA*") [6] is usually referred to meet this criteria. [7] Section 2 of the BIA defines "insolvent person" as meaning (i) one who is unable to meet his obligations as they generally become due, (ii) who has ceased paying current obligations in the ordinary course or

(iii) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

50 In addition, Ontario courts have also held that a financially troubled Corporation that is "reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring" should also be considered to be insolvent for purposes of seeking *CCAA* protection. [8]

51 I am satisfied from the affidavit of Michael Carter sworn March 9, 2021 that the liabilities of Just Energy exceed the value of its assets, that it will imminently cease to be able to meet its obligations as they become due, and will run out of liquidity in very short order.

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C. Should a Priming DIP be Approved?

52 Section 11.2(1) of the *CCAA* authorizes the court to approve debtor-in-possession financing (the "DIP") that primes existing debt.

53 However, section 11.2 (5) provides that, on an initial application:

> (5) .... no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

54 In other words, I have no jurisdiction to authorize a priming DIP except for that amount of debt and on those terms as are required to see the debtor through the next 10 days.

55 The object is to put those measures in place that are necessary to avoid an immediate liquidation and thereby improve the ability of all players to participate in a more orderly resolution of the company's affairs. [9] The objective is to preserve the status quo the company for those 10 days but to go no further. [10]

56 As Morawetz J. (as he then was) pointed out in para. 27 of *Lydian International Limited*, [11] a 10 day stay allows a number of other steps to occur including notification of parties who could not be consulted before the initial application as well as further consultations with key stakeholders.

57 This is a material limitation on the court's jurisdiction on an initial application. It is a recent amendment introduced by Parliament which restricts the powers the court had previously. Before the amendment, initial applications were granted for a period of 30 days. That length of time often required more substantial DIPS which had the potential to prejudice other creditors without giving those creditors a meaningful opportunity to make submissions to the court. The 10 day rule is designed to correct that issue. I take that as a direct message from Parliament that is meant to be enforced seriously.

58 Even before the amendment limiting initial orders to 10 days, the policy of courts was to limit DIP financing in initial orders to what was required to meet the company's "urgent needs over the sorting out period." [12] As Farley J. Noted in Re Royal Oak Mines Inc.

> ... the object should be to "keep the lights [of the company] on" and enable it to keep up with appropriate preventative maintenance measures, but the Initial Order itself should approach that objective in a judicious and cautious matter. [13]

59 Several *CCAA* courts have approved interim financing as part of the initial order since the 10 day rule came into effect. [14]

60 The distinguishing factor in this case is that even the 10 day DIP that Just Energy requests is large. It seeks a DIP of $125,000,000 almost all of which will be drawn in the initial 10 day period. Interest accrues at 13% annually. There is a 1% commitment fee and 1% origination fee.

61 Section 11.2(4) of the *CCAA* lists some of the factors the Court should consider when deciding whether to approve DIP financing. These include:

> (a) The period during which the Applicants are expected to be subject to the *CCAA* proceeding;
>
> (b) How the company's business and financial affairs are to be managed during the proceedings;
>
> (c) Whether the company's management has the confidence of its major creditors;
>
> (d) Whether the loan would enhance the prospects of a viable compromise or arrangement;

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(e) The nature and value of the company's property;

(f) Whether any creditor would be materially prejudiced as a result of the DIP charge; and

(g) The Monitor's pre-filing report (if any).

62 In *Re AbitibiBowater Inc*, [15] Gascon J.S.C., as he then was, described the analysis as having the court satisfy itself that the benefits of DIP financing to all creditors, shareholders and employees outweigh the potential prejudice to some creditors.

63 Although the amount of the DIP for the initial 10 day stay is high, it is nevertheless necessary to "keep the lights on." Just Energy is required to pay ERCOT US $96.24 million by the end of today (March 9, 2021) or risk losing its licences. It will have to pay a further $54 million by March 14, 2021. Texas represents approximately 47% of Just Energy's margin. Without its Texas licenses, Just Energy would likely collapse.

64 Just Energy's secured creditors do not oppose the DIP. Although they wish to "reserve their rights" on the comeback hearing, I take that to mean that they may wish to make arguments about the existence or the terms of the DIP from the comeback hearing onward. As noted earlier, they would be hard-pressed to challenge any priority given to the DIP for advances during the 10 day period the absence of any opposition today.

65 The DIP lender is a consortium of Just Energy's largest unsecured lenders. For unsecured lenders to offer a DIP of that size to cover a 10 day stay suggests that they believe their prospects for recovery on their unsecured loan are better with a significant 10 day DIP than without.

66 The loan clearly enhances the prospects of a viable compromise or arrangement. Without the loan, Just Energy cannot continue. Regulators will quickly take steps to suspended licenses. Even with the stay of regulatory proceedings, it would be difficult to allow Just Energy to continue to operate if it has no working capital and no means of purchasing power to sell to customers.

67 Just Energy's business is capital-intensive. It requires the expenditure of large amounts of money to buy power and the subsequent receipt of large amounts from the sale of power. That requires substantial liquidity.

68 In addition, the regulated nature of Just Energy's business can lead to unforeseen liquidity demands that may need to be satisfied to ensure the Applicants' ability to operate as a going concern. The added charges by PUCT and ERCOT are prime examples of that. Those charges must be paid within as short a period as 2 business days. While those charges may ultimately be reversed through the dispute resolution process and while additional collateral that has been required may ultimately be released, those steps will take time to work out. Even if the charges are not reversed, it may well be possible to absorb those price shocks if given the time. Financing Just Energy at least through an interim period allows for greater insight into those possibilities.

69 I am also mindful of the need to keep essential suppliers and regulators comfortable. Even though I am staying provincial regulatory proceedings, I do that knowing that I am treading on public policy territory that Parliament and provincial legislatures have chosen to ascribe to specialized bodies with specialized knowledge. A larger 10 day DIP decreases the risk that I am harming the public policy objectives they have been mandated to pursue than would a smaller DIP.

70 The Monitor points out that, after netting out cash receipts and expenditures, approximately $33,000,000 of the DIP will remain at the end of day 10. One could see that as grounds to pare back the DIP by an equivalent amount I do not think it would be appropriate to do. As noted, the Just Energy business is unpredictable. It requires large amount of liquidity and liquidity buffers to take into account unexpected charges from regulators. The regulators who impose those charges do so to protect other interests. As a result, they cannot simply be dismissed. It strikes me that providing a business of this sort with a buffer is appropriate. The Monitor recommends allowing the buffer to continue. None of the other stakeholders object.

71 In the foregoing circumstances, I am satisfied that the DIP should be approved as requested.

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D. Should Regulatory Actions be Stayed?

72 Just Energy is subject to a wide variety of provincial and state regulators in Canada and the United States. By way of example, in Canada five different provincial regulators have issued licenses to 16 different Just Energy entities allowing them to sell gas and electricity. Power cannot be sold to new customers or delivered to existing customers without these licenses.

73 Concerns about a licensee's solvency can lead provincial regulators to suspend or cancel licenses or impose more onerous terms on license holders. Such steps can include prohibitions on sales to new customers, termination of the ability to sell to existing customers and the forced transfer of customers to other suppliers. This would cause a licensee to instantly lose revenue streams and threaten their long-term viability. Regulators have the power to impose such terms in extremely short order.

74 The filing of this *CCAA* application could lead to such adverse steps by regulators.

75 As part of the proposed Initial Order, the Applicants seek to stay provincial and foreign regulators from, among other things, terminating the licenses granted to any Just Energy entity.

76 With the benefit of the DIP Facility, the Applicants intend to continue paying amounts owing to their contractual counterparties (primarily utilities) in the ordinary course. Just Energy is concerned that even if it continues making such payments, regulators may still try to terminate its licenses or impose other conditions.

77 In my view it is appropriate to stay the conduct of provincial regulators in Canada.

78 Section 11.1 of the *CCAA* provides:

> 11.1 (1) In this section, regulatory body means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.
>
> (2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.
>
> (3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion
>
> > (a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and
> >
> > (b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

79 More plainly put, the *CCAA* automatically stays enforcement of any payments of money ordered by the regulator. It does not, however, automatically stay other steps that a regulator may take against a regulated entity. The court may nevertheless stay such other steps if it is of the view that the failure to stay those other steps means that a viable compromise or arrangement could not be made, provided that the additional stay is not contrary to the public interest.

80 In the circumstances of this case, it is, in my view, appropriate to stay the exercise of other regulatory powers against Just Energy at least for the interim 10 day period.

81 As noted earlier, Just Energy's liquidity crisis arises because of controversial steps taken by PUCT and ERCOT which steps Just Energy is in the process of challenging.

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82 It would appear to me to be unjust to take regulatory steps that might shut down entire business when the financial concerns that prompt those steps may turn out to be unjustified if PUCT and ERCOT adjust some or all of the price increases they imposed during the storm. Even if PUCT and ERCOT are unable or unwilling to adjust their price increases, it may be appropriate for regulators to consider whether Just Energy should be shut down because of a temporary liquidity crisis and whether Just Energy should be given a window of opportunity to work out its liquidity crunch. That will obviously need to be measured against the objectives the regulator was created to further. It strikes me, however, that the circumstances of this case warrant at least a 10 day period to allow all parties to assess the issue with the benefit of more reflection than the instant application of a regulatory policy may afford.

83 One of the primary goals of regulators is to ensure that providers of electrical power are paid and that customers receive electrical power on competitive business terms. A stay does not offend these policy objectives. The goal of the stay and the financing associated with it is to be able to continue to pay providers of power to Just Energy and to continue to service Just Energy customers according to their existing contracts. The DIP financing and the charge in favour of essential suppliers will ensure that this remains the case.

84 Section 11.1 (3) of the *CCAA* allows the court to stay action by regulators on notice to the regulator. Regulators have not been given notice of today's hearing. I am nevertheless inclined to grant the relief sought.

85 Providing notice would have potentially allowed regulators to cancel or suspend Just Energy's licenses before the hearing occurred. If such suspensions or cancellations were ultimately set aside, they would still have caused substantial disruption to the marketplace as a whole and to Just Energy in particular. Just one of the many regulators to whom Just Energy is subject could cause material disruption.

86 Cancellation or suspension of licenses would, for example, mean that upstream suppliers of gas and electricity to Just Energy would have their contracts terminated. Any new power supplier to whom Just Energy's customers would be transferred would have their own source of power supply. That would create more market disruption than would a stay.

87 In this light, the granting a 10 day stay against regulatory conduct is consistent with the remedial purpose of the *CCAA* which is to avoid social and economic losses resulting from the liquidation of an insolvent company. To permit the immediate termination of Just Energy's licenses would not avoid social and economic losses but amplify them by extending them beyond Just Energy to its upstream suppliers.

88 I am also mindful of the admonition of the Supreme Court of Canada in *Century Services* to the effect that general language in the *CCAA* should not be read as being restricted by the availability of more specific orders. Although the *CCAA* contains specific provisions relating to regulatory stays which require notice to the regulator, the general power to make such orders as are appropriate should not, in my view, be restricted by the notice requirement when the relief sought relates only to a 10 day temporary stay, when providing notice could undermine the entire scheme of the *CCAA* and when there are adequate financing mechanisms in place to ensure that the regulators' policy objectives are not undermined during the 10 day period.

89 A foreign regulator is not a "regulatory body" within the plain meaning of section 11.1(1) of the *CCAA*. As such, foreign regulators do not benefit from the same exemption from the stay as a Canadian regulator. A foreign regulator is therefore presumptively subject to the Stay, with respect to matters that fall within the jurisdiction of the Canadian *CCAA* Court. Canadian courts have held that a foreign regulator is precluded by the stay from taking steps in Canada in relation to matters that are within the *CCAA* court's jurisdiction. [16]

90 This result is consistent with the language of the model CCAA order which stays, among other things, all rights and remedies of any "governmental body or agency"

91 Whether and to what extent the stay should apply to American regulators will be for an American court to determine. To give effect to that stay in the United States, Just Energy intends to commence chapter 15 proceedings immediately for such a determination.

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E. Should Supplier Charges and Prefiling Payments be Authorized?

92 Just Energy seeks a charge in favour of what it has referred to as commodity suppliers and ISO Service Providers. Commodity suppliers are those who provide gas and electricity to Just Energy. ISO Service Providers are often commodity suppliers as well but also provide additional services to Just Energy such as working capital and credit support. By way of example, as noted earlier, ERCOT sends invoices to service providers like Just Energy. Those invoices must be paid within two days. In certain cases, Just Energy uses and ISO Service Provider to act as the front facing entity to the regulator. In those cases, ERCOT sends its invoice to the ISO Service Provider who is obliged to pay within two days. The ISO Service Provider then looks to Just Energy for payment but gives Just Energy extended time to pay, say for example 30 days. In effect, the ISO Service Provider is providing Just Energy with working capital and liquidity.

93 Just Energy has received advice to the effect that these arrangements amount to Eligible Financial Contracts under the *CCAA*. This poses a challenge because Eligible Financial Contracts are not subject to the prohibition on the exercise of termination rights under the *CCAA*. [17] Since the parties to Eligible Financial Contracts cannot be prevented from terminating, Just Energy is of the view that counterparties to those contracts must be given incentives to continue to provide power supply and financial services. The proposed incentive takes the form of a charge in favour of those counterparties that continue to provide commodities or services to Just Energy.

94 Shell and BP, the two largest commodity and ISO Service Providers, have already entered into such arrangements. The proposed order would allow any other commodity provider or ISO Service Provider to enter into a similar arrangement with Just Energy and benefit from a similar charge.

95 No one has challenged that analysis for today's purposes and no one opposes the proposed charges. Given the possibility of mischief in the absence of such charges and given that the relief today is sought for only 10 days, in my view it would be preferable to offer the protection of the charges as requested.

96 I note that in certain circumstances, the court can compel commodity and service providers to continue supplying a *CCAA* debtor. I am, however, somewhat reluctant to use those provisions given that the suppliers and service providers in question are part of a highly regulated, interwoven industry. Compelling a supplier in such an industry to continue to provide supply or services may well infringe on the regulators' objective of maintaining a financially sound electrical market. Given the urgency with which the application arose, it is preferable to provide financial incentives to such parties and not risk imperiling the financial stability of other regulated actors by forcing them to supply.

97 This court has already observed in the past that the availability of critical supplier provisions under the *CCAA* does not oust the court's jurisdiction under section 11 to make any other order it considers appropriate. [18]

98 The proposed charges would rank either *pari passu* with the DIP or immediately below it, depending on the nature of the transaction. Although Just Energy's secured creditors were present at today's hearing, they did not object to the proposed charges.

99 Certain prefiling obligations such as tax arrears could result in directors of Just Energy being held personally liable. The company seeks authorization to make prefiling payments with that sort of critical character that are integral to its ability to operate. In the absence of any objection, that relief is granted.

F. Should Set off Rights to Be Stayed?

100 As part of the stay, Just Energy seeks an order precluding financial institutions from exercising any "sweep" remedies under their arrangements with Just Energy.

101 The concern is that the financial institutions would empty Just Energy's accounts by reason of a claim to a right of set off. Exercise of such rights would effectively undermine any reorganization by depriving Just Energy of working capital and thereby impairing its business.

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102 Although s. 21 of the *CCAA* preserves rights of set-off, the Court may defer the exercise of those rights. Section 21 does not exempt set-off rights from the stay. This differs from other provisions of the *CCAA*, which provide that certain rights are immune from the stay. [19] As Savage J.A. of the British Columbia Court of Appeal observed, the broad discretion accorded to the *CCAA* Court to make orders in furtherance of the objectives of the statute must, as a matter of logic, extend to set-off. [20]

103 Allowing banks to exercise a self-help remedy of sweeping the accounts by claiming set-off would in effect give them a preferred position over other creditors and deprive Just Energy of working capital. That would be contrary to the remedial purpose of the *CCAA* because it would ultimately shut down Just Energy and allow the banks to advantage themselves to the detriment of others in the process.

104 Just Energy had consulted widely with various stakeholder groups had before today's hearing. Those included the banks with sweep rights, at least some of home were represented at today's hearing and did not object.

105 In the foregoing circumstances it is appropriate to at least temporarily stay the exercise of any rights of set-off by the banks.

G. Should Administrative and D & O Charges be Granted?

106 The Applicants propose that an Administration Charge for the first ten days be set at $2.2 million.

107 The largest expenditures in the administration charge involve the retainer of counsel in Canada and the United States for Just Energy and the retainer of the Monitor and its counsel.

108 In addition, the company seeks a financial advisor charge of $1.8 million to retain BMO Nesbitt Burns as a financial advisor to assist in exploring potential alternative transactions.

109 The directors and officers charge sought is in the amount of $30 million.

110 The Monitor estimates that director liabilities in the United States for sales taxes, wages, source deductions and accrued vacation come to approximately $13.1 million. Director and officer exposure in Canada may be as high as $5.8 million.

111 While insurance with an aggregate limit of $38.5 million is in place, the complexity of the overall enterprise creates the risk that it might not provide sufficient coverage against the potential liability that the directors and officers could incur in relation to this *CCAA* proceeding.

112 In determining whether to approve administration charges, the Court will consider: (a) the size and complexity of the businesses under *CCAA* protection; (b) the proposed role of the beneficiaries of the charge; (c) whether there is an unwarranted duplication of roles; (d) whether the quantum of the proposed charge is fair and reasonable; (e) the position of secured creditors likely to be affected by the charge; and (f) the position of the Monitor. [21]

113 The Just Energy business is large and complex. The proposed beneficiaries are essential to the success of the *CCAA*. No *CCAA* proceeding can advance without a Monitor or counsel. The addition of a financial advisor would appear to be a prudent step given the complexity of the business. Monetizing or restructuring all or portions of the Just Energy business is substantially more complicated than a sale of hard assets. It would appear to make good sense to have a financial advisor involved. The Monitor agrees to the appointment of a financial advisor. I infer from the Monitor's agreement that Nesbitt Burns will bring to the table a skill set or attributes that the Monitor either does not have or cannot exercise given its role as Monitor.

H. Should Noncorporate Entities Be Captured by The Stay?

114 Many of the gas and electricity licences pursuant to which the Just Energy group conducts business in Canada are granted to limited partnerships.

115 On its face, the *CCAA* applies to corporations, not partnerships. [22]

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116 Where, however, the operations of partnerships are integral and closely related to the operations of the *CCAA* debtor, it is well-established that the Court has jurisdiction to extend the protection of the stay to partnerships in order to ensure that the purposes of the *CCAA* can be achieved. Relief of that sort has been granted on several occasions.[23]

117 Here, it would be illusory to grant a stay in favour of the Just Energy corporate entities but not extend its benefit to the partnership entities. That would defeat the entire purpose of the exercise. As a result, is appropriate to extend *CCAA* protection to the Just Energy partnership entities.

I. Should Third Quarter Bonuses be Paid?

118 The applicant seeks approval from the initial order for payment of third Quarter bonuses for fiscal 2021 on April 2, 2021. The bonuses were approved by the Compensation Committee on February 9, 2021 after it was reported that the third quarter base EBITDA result was $55.785 million compared to a target of $42 million.

119 The Compensation Committee approved and asked the Board to approve a third-quarter bonus pool in the amount of $3.23 million. The Board approved the bonus on February 10, 2021.

120 I am disinclined to approve the bonus payment on an initial order. The relief on the initial order is limited to the amount to keep the company afloat for 10 days. The bonus does not fit into that category. Even on the applicant's view of events, the bonuses are not payable until April 2, 2021. That is well after the comeback date.

121 In addition, the Monitor has not yet had an opportunity to review and comment on the employee bonus and intends to do so in a further report to the court.

122 Whether bonuses should or should not be paid will depend on a variety of factors that are not in the evidence before me. By way of example, I would want a better understanding of whether the beneficiaries of the bonuses are also intended beneficiaries of the key employee retention plan that Just Energy will be asking for on the comeback date. In addition, I will want a better sense of who the recipients of the bonuses are. If they are relatively modest income earners for whom the bonus is a key source of income, such as, for example, retail sales people, I would probably be inclined to pay the bonuses without question. If, however, they are high income earners, the intended beneficiaries of the KERP, or if they are executives who make decisions about risk allocation, what Just Energy should insure against, to what extent it should hedge against weather risks and so on, I would want a more granular understanding about why the bonuses should be paid.

J. Should a Sealing order be Granted?

123 Just Energy requests a sealing order in relation to the BMO Engagement Letter and the summary of the KERP, both of which are attached as confidential exhibits to the affidavit of Michael Carter sworn March 9, 2021.

124 I am satisfied that the applicants have met the test established by the Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance)*[24] The materials contain commercially sensitive information and/or personal information (in the case of the KERP). The order is necessary to prevent a serious risk to an important personal or commercial interest and the benefits of a sealing order outweigh the rights of others to a fair determination of the issues. No one advanced any need to see the information that is proposed to be sealed nor can I see any need for anyone to access such information in order to assert their rights fully within this proceeding.

Disposition

125 In view of the foregoing, I granted an initial order in the form requested with the exception of authorization for bonus payments which will be addressed at the comeback hearing.

126 The order will in effect provide that:

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(a) Ontario is the Centre of Main Interest for the *CCAA* proceeding.

(b) Just Energy meets the insolvency requirements of the *CCAA*.

(c) The proposed DIP financing is approved.

(d) Any regulatory actions should be stayed.

(e) Commodity suppliers and ISO Service Providers who sign qualified service agreements will benefit from a charge.

(f) Set off rights of banks which may allow them to sweep accounts will be stayed.

(g) The administrative, financial advisor and directors and officers charges are granted.

(h) Noncorporate entities will be captured by the stay.

(i) A sealing order will be granted.

127 The comeback date for the continuation of any CCAA relief is set for 10 AM on Friday, March 19, 2021.

Application granted.

Footnotes

1 R.C.C. 1985, c. c-36, as amended

2 *Century Services Inc. v. Canada (Attorney General)* 2010 SCC 60 at paras. 14-15.

3 Century Services Inc. v. Canada (Attorney General), 2010 SCC 60 (CanLII), [2010] 3 SCR 379

4 *Re Massachusetts Elephant & Castle Group*, 2011 ONSC 4201

5 *CCAA* s. 2(1)(a) definition of a debtor company.

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

7 *Laurentian University of Sudbury*, 2021 ONSC 659

8 *Laurentian University*2021 ONSC 659 at para. 32; *Stelco Inc., Re*2004 CanLII 24933at para. 26.

9 *Re Lydian International Limited* 2019 ONSC 7473 at para. 25.

10 *Lydian* at para. 26

11 2019 ONSC 7473.

12 *Royal Oak Mines Inc., Re*. (1999), 1999 CanLII 14840 (ON SC), (1999)6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) ((Ct. J. (Gen. Div.)) at para 24.

13 *Re Royal Oak Mines Inc*. (1999), 1999 CanLII 14840 (ON SC), 6 C.B.R. (4th) 314 ((Ct. J. (Gen. Div.)) at para 24.

14 *Re Clover Leaf Holdings Company* 2019 ONSC 6966 at para. 21; *Miniso International Hong Kong Limited v. Migu Investments Inc.,*2019 BCSC 1234, at para. 90; *Re Mountain Equipment Co-Operative* 2020 BCSC 1586, at para. 2.

15 *Re AbitibiBowater Inc,*2009 QCCS 6453 at para 16.

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16 *Nortel Networks Corp., Re* 2010 ONSC 1304 at para. 41 and 42.

17 *CCAA* s. 34 (1), (7), (8) and (9).

18 Re CanWest Publishing Inc., 2010 ONSC 222 at para. 50.

19 *North American Tungsten Corp. (Re)* 2015 BCSC 1382 at para. 28; leave to appeal to BCCA refused, 2015 BCCA 390 [*Tungsten* (Leave)], leave to appeal decision affirmed by Review Panel of the BCCA.

20 *Tungsten* (Leave), above at para. 12-16; see also *Air Canada (Re)* 2003 CarswellOnt 4016 at para. 25.

21 *Canwest* 2010, at para 54. *Target*, at paras 74 and 75; *Lydian*, paras 43 to 54; *Laurentian*, at paras. 48 to 59.

22 *CCAA*, s. 2, definition of "Debtor company."

23 See, for example, *Lehndorff General Partner Ltd., Re*. 199317 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) (Ont. Gen. Div. [Commercial List]), at para. 21; *Re Target Canada Co.,*2015 ONSC 303 at paras 42 and 43; *4519922 Canada Inc., Re,*2015 ONSC 124 at para. 37.

24 Sierra Club of Canada v Canada (Minister of Finance), 2002 SCC 41 at para 53; see also Target above at paras 28-30; Laurentian University, above at paras. 60 to 64.

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2002 SKQB 161
Saskatchewan Court of Queen's Bench

Oblats de Marie Immaculee du Manitoba, Re

2002 CarswellSask 287, 2002 SKQB 161, 113 A.C.W.S. (3d) 566, 34 C.B.R. (4th) 76

In the Matter of an Application by Les Oblats de Marie Immaculee du Manitoba, Pursuant to the Companies' Creditor Arrangement Act, R.S.C. 1985, c. C-36, as Amended

Zarzeczny J.

Judgment: April 18, 2002
Docket: Regina Q.B.G. 865/02

Counsel: *James S. Ehmann*, for Applicant, Les Oblats de Marie Immaculee du Manitoba

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

Related Abridgment Classifications

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.7 Miscellaneous

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Religious order was constituted by Manitoba statute and was given power to act as manager of temporal affairs of Roman Catholic Church in province — Religious order was also extra-provincially registered in Saskatchewan — Religious order was defendant to hundreds of lawsuits brought against it in Manitoba, Saskatchewan and Northern Ontario respecting activities of certain of its members acting in various capacities at residential schools run by order in those provinces — Majority of claims to date had been brought in Saskatchewan and chief business of order over last two years was management and defence of these claims — Religious order brought application in Saskatchewan pursuant to s. 11 of Companies' Creditors Arrangement Act for order granting stay of proceedings against it and authorizing it to file formal plan of compromise or arrangement — Application dismissed — Saskatchewan court was without jurisdiction to issue orders applied for — Section 9(1) of Act required that application be made to court in Manitoba — Head office of order was in Winnipeg, Manitoba — Most if not all of order's assets were located in Winnipeg or administered out of order's offices in Winnipeg — Most if not all of existing members of order, including retired members living in order's retirement home, resided in Manitoba — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 9, 9(1), 11.

Table of Authorities

Cases considered by *Zarzeczny J.*:

Prince Edward Island Development Agency v. Perfection Foods Ltd., 29 C.B.R. (3d) 137, 124 Nfld. & P.E.I.R. 142, 384 A.P.R. 142, 1994 CarswellPEI 9 (P.E.I. C.A.) — referred to

Royal Bank v. Perfection Foods Ltd., 90 Nfld. & P.E.I.R. 302, 280 A.P.R. 302, 1991 CarswellPEI 116 (P.E.I. T.D.) — considered

Statutes considered:

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

Generally — referred to

s. 9 — considered

s. 9(1) — considered

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s. 11(1) — pursuant to

s. 11.7(1) [en. 1997, c. 12, s. 124] — referred to

Les Oblats de Marie Immaculée du Manitoba Incorporation Act, R.S.M. 1990, c. 131

Generally — referred to

s. 2(1) — considered

s. 2(4) — considered

s. 2(6) — considered

APPLICATION by religious order pursuant to s. 11 of *Companies' Creditors Arrangement Act* for order granting stay of proceedings against it and authorizing it to file formal plan of compromise or arrangement.

***Zarzeczny J.*:**

1 The Applicant, Les Oblats De Marie Immaculee Du Manitoba ("LOMI"), apply *ex parte* pursuant to s. 11(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as am. (the "*CCAA*") for an order granting a stay of any and all proceedings against or in respect of the Applicant and authorizing the Applicant to file with this Court a formal plan of compromise or arrangement. A draft order has been filed indicating that the relief and orders applied for are intended to subsist for an interim period of thirty days only, after which it is intended that a notice of motion for further orders will be presented for the Court's consideration. The motion is intended to be served upon identified interested parties and their solicitors.

2 The material in support of the application consists only of two affidavits, one filed by Father James Fiori of Winnipeg, Manitoba, the Provincial Superior of LOMI and the affidavit of Clark Sullivan, a chartered accountant of Edmonton, Alberta, representing the firm of Sullivan & Associates Inc. proposed as Monitor of the property and assets of LOMI pursuant to s. 11.7(1) of the *CCAA*.

3 The affidavit of Father Fiori deposes that LOMI was initially constituted a body corporate by an Act of the Manitoba legislature in 1873. Most recently, the Manitoba legislature enacted *Les Oblats de Marie Immaculée du Manitoba Incorporation Act*, R.S.M. 1990, c. 131, to replace the 1873 legislation. The "business" of LOMI is set out in s. 2 which recognizes the objects and powers of LOMI in part as follows:

> 2(1) The corporation shall have power to act as manager of the temporal affairs of the Roman Catholic Church in any parish in the Province of Manitoba; the establishing and carrying on of missions; the erection, maintenance and conduct of schools, colleges, churches, orphanages and hospitals; the promotion of the spiritual education and other interests of the Roman Catholic Church; the conducting, taking charge of, holding and managing property, both real, personal and mixed, which may at any time or in any manner come to or vest in or which may heretofore have vested in the said corporation for any purpose whatever, by purchase, gift, grant, devise or otherwise, to take, buy, hold, purchase and receive by gift, grant, devise or otherwise any property, either real, personal or mixed, and to mortgage, pledge, sell or dispose of the same or any part thereof.

4 Section 2(4) of that Act provides as follows:

> 2(4) **The head office of the corporation shall be at the City of Winnipeg, or such other place in the Province of Manitoba** as may from time to time be determined by the by-laws of the corporation.
>
> [Emphasis added]

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5 Subsection 2(6) provides that persons of Roman Catholic faith who are members of the religious order known as La Congrégation des Missionnaires Oblats de Marie Immaculée and by decision of the supreme authority of the Order, are associated to Les Révérends Péres Oblats in the Province of Manitoba, constitute the members of LOMI.

6 Father Fiori's affidavit deposes that LOMI has been extra-provincially registered in Saskatchewan although no further information or particulars are provided with respect to this registration nor with respect to any registered, functional or operating office in Saskatchewan. The affidavit does not depose to any activity presently being carried out by LOMI or any of its members in Saskatchewan, nor is there any indication that any members of LOMI are actively involved in this province.

7 LOMI is either a defendant or third party to hundreds, perhaps soon to be thousands, of law suits which have been initiated in Saskatchewan, Manitoba and Northern Ontario respecting the activity of certain members of LOMI acting in various capacities at residential schools in these provinces. By far, the largest number of claims initiated (presently 1,742) are in Saskatchewan, although there are 479 plaintiffs in Manitoba and 167 in Northern Ontario. Paragraph 13 of Father Fiori's affidavit deposes in part:

> ... I do verily believe that there may be a significant number of further IRS lawsuits commenced in Manitoba.

These circumstances prompt Father Fiori to depose in paragraph 8 of his affidavit:

> Over the course of the last two years, the chief business of LOMI has been the management and defence of IRS [Indian Residential School] claims in Saskatchewan.

8 The members of LOMI are missionary Catholic priests and brothers. The current membership, for which LOMI has financial responsibility, stands at 58 men, 39 of whom are more than 70 years of age and most of whom reside at a retirement home owned and operated by LOMI in Winnipeg, Manitoba. (Father Fiori affidavit, para. 5).

9 An examination of the financial statements and analysis tendered as exhibits "E" and "F" to Father Fiori's affidavit establish that the principal assets of LOMI consist of financial investments as well as capital assets. The latter includes real property with a realizable estimated value slightly in excess of $2,000,000.00. Although Father Fiori's affidavit does not further particularize the nature and location of either the investment or capital assets, it is fair to assume, in respect of the latter, that they would include the retirement home known as Casa Bonita owned and operated by LOMI (see para. 5 of the affidavit), and located in Winnipeg, Manitoba. Additionally, although Father Fiori's affidavit does not specify it, it is a clear inference to be drawn that the head office of LOMI (as its incorporating legislation mandates) is in Manitoba as appear to be LOMI's administrative offices.

10 This analysis of the materials and information supplied upon and in support of this *ex parte* application is set out with a view to the provisions and application of s. 9 of the *CCAA* dealing, as it does, with the subject headed "Jurisdiction of court to receive applications".

11 Section 9(1) of the *CCAA* provides:

> 9.(1) Any application under this Act may be made to the court that has jurisdiction **in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated**. [Emphasis added]

12 The material makes it abundantly clear that the head office of LOMI is in Winnipeg, Manitoba as mandated by its incorporating legislation. Nothing in the affidavit materials filed suggests otherwise. It is also clear that most of the assets (if not all of the assets) tangible and intangible of LOMI are located in Winnipeg or administered out of the offices of LOMI in Winnipeg, Manitoba. It is equally clear that the existing members of LOMI, including retired members who have a very real interest in and will be very much affected by this application (and for whose benefit it may well be taken) all, or for the most part, reside in Manitoba. The materials filed depose to no assets being located in Saskatchewan, no members presently being or operating in Saskatchewan, nor to any of LOMI's members being actively engaged in the pursuit of its "business" as broadly

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defined by s. 2(1) of the *Les Oblats De Marie Immaculée Du Manitoba Incorporation Act* in this province. If it is otherwise, the materials do not reveal it.

13 The proper interpretation and application of s. 9 of the *CCAA* was considered in the case of *Royal Bank v. Perfection Foods Ltd.* (1991), 90 Nfld. & P.E.I.R. 302 (P.E.I. T.D.). At p. 311 MacDonald C.J.T.D. observes in part as follows at para. 44:

> [44] In my opinion, the "head office" of the companies means its registered head office. The situation here is identical to the facts in *Re Smith Transportation Co. Ltd.*, [1928] 2 D.L.R. 508, 10 C.B.R. 48, 62 O.L.R. 203. As to a company's "chief place of business", I was not cited any cases where this term has been explored. Determining a chief place of business is a question of fact and those facts concerning the companies and the businesses they conduct must be considered. The number of employees, the goods being sold, the length of time each aspect of the business has been carried on and the location where that has been done, the income and expenses of the company and its allocation between different aspects of the company are, I am sure, a few of the considerations to be dealt with.

At paras. 45 and 46 he observes and concludes as follows:

> [45] The respondents have stated that because the *C.C.A.A.* is a federal statue weight must be given to making orders applicable on a wider basis than that of a single province. I do not give weight to that submission for the reason that s. 9 of the *Act* makes it clear that provincial jurisdiction is of prime importance.
>
> [46] It is for the respondents to establish that the sought after order under the *C.C.A.A.* is within jurisdiction. I do not believe that they have laid before me sufficient facts to establish that the affected companies come within the jurisdiction of this province....

14 The judgment of Macdonald C.J.T.D. was appealed (1994), 29 C.B.R. (3d) 137 (P.E.I. C.A.). for circumstances and upon grounds unrelated to the present issue before the Court.

15 Accordingly, in view of the plain and ordinary meaning and interpretation of s. 9 of the *CCAA*, I have concluded that this Court in Saskatchewan is without jurisdiction to issue the orders applied for. Based upon the materials presently before this Court, it appears clear that this application, or any other made under the *CCAA*, must appropriately be made to the Court of Queen's Bench in Manitoba. The application must be dismissed for lack of jurisdiction.

Application dismissed.

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1991 CarswellPEI 116
Prince Edward Island Supreme Court (Trial Division)

Royal Bank v. Perfection Foods Ltd.

1991 CarswellPEI 116, 280 A.P.R. 302, 90 Nfld. & P.E.I.R. 302

Royal Bank of Canada, Prince Edward Island Development Agency, Prince Edward Island Opportunities Fund Limited, New Brunswick Milk Marketing Board and Prince Edward Island Milk Marketing Board, Applicants and Perfection Foods Limited, Perfection Dairy Group Limited, Ideal Dairy Limited, Perfection Des Iles Inc., McKay's Dairy Ltd., Perfection Dairy Foods Limited, Milk Properties Limited, 031706 N.B. Ltd., Shediac Dairy (1968) Ltd., McKay's Dairy Shoppes Ltd., Perfection Group Trust, Respondents

MacDonald C.J.T.D.

Heard: January 17, 1991
Heard: January 18, 1991
Judgment: January 22, 1991
Docket: GSC-10428

Counsel: *Maureen M. Gregory* for Applicant Royal Bank.
Alan K. Scales, Q.C. and *Shawn A. Murphy* for Applicants PEI Development Agency and Opportunity Fund Inc.
J. Gordon MacKay for Applicants New Brunswick Milk Marketing Board and PEI Milk Marketing Board.
M. Jane Ralling and *Alex MacFarlane* for Respondents.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.d Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Effect of arrangement
Headnote
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Effect of arrangement
Companies' Creditors Arrangements Act, R.S.C. 1985, c. C-36.
A group of companies was in financial trouble. Group sought and obtained financial assistance from provincial development agencies. Group continued to lose money and obtained an ex parte order placing group under protection of the Act. Development agencies claimed that as a result of share transfers, group no longer controlled certain companies, resulting in a loss to creditors. Several creditors, including development agencies, applied to have the order set aside or varied. Held, the application was dismissed in part. The share transfers were bona fide transactions made as part of an effort to reorganize the group so that the companies involved would recover financially. The transactions were not made with any intent to harm group's creditors.
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act
Receiver not warranted — Companies' Creditors Arrangements Act, R.S.C. 1985, c. C-36.
A group of companies was in financial trouble. Group sought and obtained financial assistance from provincial development agencies. Group continued to lose money and obtained an ex parte order placing group under protection of the Act. Several

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creditors, including development agencies, applied to have the order set aside or varied. Held, the application was dismissed in part. The appointment of a receiver was not warranted. Group continued to operate and the appointment of a receiver would only delay the determination of whether an arrangement could be put forth and agreed upon.

Secured creditor not overturning order placing group of companies under Act's protection where unable to show security presently affected — "Chief place of business" — "Head office" -- Companies' Creditors Arrangements Act, R.S.C. 1985, c. C-36.

A group of companies was in financial trouble. When group continued to lose money it obtained an ex parte order placing group under the protection of the Act. The Act gave a provincial Court jurisdiction over a company when that company's office or chief place of business was within that province. Several creditors, including bank, applied to have the order set aside or varied. Held, the application was dismissed in part. The legislation was enacted to prevent the discontinuance of companies and loss of jobs, to protect investors and to see that in so doing secured creditors did not suffer any major losses. Bank's security had not yet begun to erode so there was no reason to set the order aside. "Head office" meant the registered head office. The "chief place of business" was a question of fact depending on a number of factors. Provincial jurisdiction was of primary importance. The ex parte order therefore did not affect the New Brunswick companies in the group.

***MacDonald, C.J.*:**

1 On January 9, 1991, I granted an *ex parte* order placing the respondent companies under the protection of the *Companies' Creditor Arrangement Act*, R.S.C. 1985, c. C-36. Since that time, the various applicants have filed motions requesting various forms of relief. The relief sought has ranged from a request that I set aside my order to a variation of all or parts of my order. In dealing with these motions, it will become necessary to refer to each separately.

The Facts

2 I will deal briefly with the background facts that initially brought this matter before the Court. Perfection Foods Limited ("Perfection") found itself in financial difficulties in 1990. As a result of its difficulties, it sought further financial assistance from the Prince Edward Island Development Agency ("PEIDA"). As a result of negotiations, an agreement was reached between Perfection; Perfection Dairy Group Limited, which is the shareholder of Perfection; and Jack Simmonds and John Simmonds, shareholders of Perfection Dairy Group Limited; and PEIDA. Under this agreement, Perfection agreed to certain management changes whereby William H. Richardson was appointed Chief Executive Officer of Perfection for the period of September 18, 1990 to January 11, 1991. He was also given full authority to manage all Perfection subsidiaries ("Perfection Group") and to make whatever decisions he deemed to be in the best interests of the companies.

3 The Perfection Group produces and distributes fluid milk, ice cream, evaporated milk, sweetened condensed milk and cheese. The Perfection Group is the largest operation of its kind in the Maritime provinces, having annual sales of $75 million. Its operation extends to New Brunswick, Nova Scotia and the Magdalen Islands in Quebec. Immediately upon assuming office, Mr. Richardson commenced to put into effect cost cutting measures and other management practices to improve the position of the Perfection Group. In an affidavit of January 9, 1991, on the *ex parte* motion, Mr. Richardson stated that the Perfection Group continues to lose money, however, his projections showed that the Perfection Group could show a profit by the end of 1991.

4 On January 4, 1991, PEIDA demanded repayment of the sum of $627,680.58 by February 1, 1991. Additionally, certain other secured creditors commenced to make demands upon Perfection in early January. In order to prevent any movement against the Perfection Group, the application for protection under the *Companies' Creditors Arrangement Act* was made. I will address further facts as they pertain to each motion.

The Law

5 The *Companies' Creditors Arrangement Act* is designed to protect companies in financial hardship while attempts are made to alleviate their difficulties and submit a proposal of compromise or arrangement. The British Columbia Court of Appeal in *Quintette Coal Ltd. v. Nippon Steel Corp.*, an unreported decision of November 16, 1990, quoted from an article by Stanley E. Edwards (1947) 25 C.B.R. 587 at p. 592 as follows:

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> It is important in applying the C.C.A.A. to keep in mind its purpose and several fundamental principles which may serve to accomplish that purpose. Its object, as one Ontario judge has stated in a number of cases, is to keep a company going despite insolvency. Hon. C.H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation, through reorganization, to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little. The trade connections associated with the system and held by the management may also be valuable. In the case of a large company it is probable that no buyer can be found who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often a sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders.

6 The legislation is to prevent discontinuance of companies, to prevent loss of jobs, to protect investors and, hopefully, in doing so seeing that secured creditors will not suffer any major losses. Under the legislation, the Court is allowed to make orders that will maintain the status quo until such time as the company is ordered to make an arrangement with its creditors.

7 Referring again to the decision of the British Columbia Court of Appeal in *Quintette*, the court stated that the courts have tended to avoid a microscopic parsing of the words and phrases of s. 11 of the *C.C.A.A.* in favour of a broader "purposes" approach. At page 18 of the decision, Gibbs, J.A. for the court stated:

> 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....

8 I next turn to the separate motions that are before me.

Royal Bank of Canada ("the Bank")

9 The Royal Bank asks that my order of January 9th be set aside in its entirety. The bank is a secured creditor in the sum of approximately $7,000,000. This seven million includes a revolving line of credit with an overall maximum approved level of $4,000,000, subject to a limitation as determined by a margin formula. Currently the outstanding amount is $3,919,000. It is with the latter amount that the bank is most concerned.

10 As security for its loans, the bank holds a general assignment under s. 178 of the *Bank Act* from Perfection which secures all inventory and packaging goods. It also has a general assignment of book debts. The bank also hold guarantees from various companies of the Perfection Group and a guarantee from the Prince Edward Island Development Agency for $3,000,000.

11 The bank's concerns fall under three areas. First, the bank states that if the *ex parte* order is continued its security will be eroded. Its security for the four million line of credit is covered by so-called "quick assets", which are inventory and accounts receivable. The bank points out that because of legislation that came into effect on January 1st of this year and because of the present situation with Perfection, the company's supply of milk has drastically decreased. The loss of the milk supply will mean less production, less sales, less receipts and less inventory. To continue to operate, the bank states, Perfection will have to resort to inventory and accounts receivable.

12 These are justifiable concerns of the bank. However, there was no evidence placed before me that the bank's security has as yet begun to erode. The bank stated that it had requested from Perfection up to date information but had not received anything since December 31, 1990. Counsel for Perfection indicated that it was difficult to obtain the status of the accounts receivable or inventory and that status of the inventory had always been given on a month end basis. Information on the accounts receivable will be ready on January 22nd.

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13 Dealing with the prejudice that may befall a creditor, Wachowich, J. in *Meridian Developments Inc. v. Toronto Dominion Bank*, [1984] 5 W.W.R. 215 stated at p. 219:

> This order is in accord with the general aim of the Companies' Creditors Arrangement Act. The intention was to prevent any manoeuvres for positioning among creditors during the interim period which would give the aggressive creditor an advantage to the prejudice of others who were less aggressive, and would further undermine the financial position of the company, making it less likely that the eventual arrangement would succeed.

14 In *Icor Oil and Gas Co. Ltd. et al v. Canadian Imperial Bank of Commerce* (1989), 102 A.R. 161, Marshall, J. of the Alberta Queens Bench dealt with a similar situation in which it was being alleged by the Canadian Imperial Bank of Commerce that the continued operation of the company was being financed by the accounts receivable that had been assigned to the Bank of Commerce.

15 In *Icor*, Marshall, J. pointed out that the order must in its effect balance as far as possible the interests of the creditors and the company while permitting the company a period of time to be resuscitated and reorganize its affairs. Marshall, J. recognized that his order under the *C.C.A.A.* could result in some hardship to the Bank of Commerce. The greater immediate goal was the preservation of the company for the future benefit of all creditors. I am of the same opinion. It is still not evident that the bank's security will deteriorate. The first indication will be on January 22nd when the status of the accounts receivable will be reported upon. The position of the bank under this particular agreement is not convincing at this time.

16 Secondly, the bank stated that the order should be set aside because it lacked clarity as to how it will affect the bank. If, in fact, the bank is unclear as to how the order pertains to it such can be cleared up and the order varied.

17 Finally, the bank states that the order should be set aside due to the failure of the respondents to make full disclosure on the *ex parte* application. Sufficient information was before me to allow the respondents to qualify under the *C.C.A.A*. The fact that Mr. Richardson has now filed a more extensive affidavit does not mean that there was an attempt to hide anything from the Court on the *ex parte* application and I do not find that any attempt was so made.

18 In the alternative, the bank asks for the appointment of an interim receiver and manager under Rule 41 of the *Civil Procedure Rules* or s. 34 of the *Supreme Court Act*, R.S.P.E.I. 1988, Cap. S-10. To appoint a receiver at this point in time would not be warranted. The company continues to operate and to have a receiver take over would only mean further delay in determining whether or not an arrangement can be put forth and agreed upon. Mr. Richardson has been named as Chief Executive Officer of Perfection pursuant to an agreement between Perfection, PEIDA and the Government of Prince Edward Island. He has now been in that position for some four months and is well aware of the problems of Perfection. His initial contract ran to January 11, 1991 and it has since been renewed by Perfection. Mr. Richardson states that he considers himself as carrying out the functions of a court appointed monitor. I do not see any serious challenge from the applicants as to his impartiality. Any concerns that the applicants may have may be addressed in a varied order.

19 I dismiss the bank's motion to strike out the *ex parte* order and the motion to appoint a receiver.

Prince Edward Island Development Agency ("PEIDA") Prince Edward Island Opportunities Fund Inc. ("PEIOFI")

20 I next turn to the motions made on behalf of the above two applicants. The main request under their motion is an order pursuant to the *Frauds on Creditors Act*, R.S.P.E.I. 1988, Cap. F-15 setting aside the following transfers:

(a) the transfer of the shares in Perfection Dairy Foods Limited from Perfection to McKay's Dairy Ltd.;

(b) the transfer of shares in 031706 N.B. Ltd. from Perfection to McKay's Dairy Ltd.;

(c) the transfer of shares in McKay's Dairy Ltd. from Perfection to Perfection Group Trust;

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(d) the purchase from Jack Simmonds and Donald Simmonds of all the common and preferred shares in Perfection Properties Ltd.

21 The manner in which these transactions occurred is set forth by Mr. Richardson as follows: After his appointment, he had various meetings with various parties in the Maritimes who were interested in purchasing or investing in certain companies of the Perfection Group. Mr. Richardson came to the conclusion that in order to attract new investors or purchasers, it would be necessary to streamline the operations of the Perfection Group of companies. He decided that the companies that operated principally in New Brunswick should be integrated together with one company. On December 31, 1990, the transfers in (a) and (b) above were effected along with the transfer of Milk Properties Ltd. (formerly Perfection Properties Ltd.). The consideration for the transfer of (a) and (b) was based on the net book value of the companies as of December 31st.

22 The applicants state that as a result of transfers (a) and (b) the two companies are no longer wholly owned subsidiaries of Perfection, thereby placing these shares entirely out of the reach of the secured and unsecured creditors of Perfection and deprives Perfection of its distribution network in Nova Scotia and New Brunswick. There is no question that Perfection no longer has any control over the transferred companies.

23 The applicants put great emphasis on the fact that the valuation was based on net book value, which resulted in no monetary consideration. In his affidavit of January 16th, Mr. Richardson indicates some confusion as to why the net book valuation was used. In any event, he also states that Mr. Jack-Mulligan, an experienced chartered accountant, stated that net book value is not an unusual or unreasonable pricing mechanism by which to value the shares.

24 On the matter of alleged fraudulent conveyance of shares, s. 2(1) of the *Frauds on Creditors Act* states that a transfer shall be void if it is made with an "... intent to defeat, hinder, delay or prejudice" a creditor.

25 In the *Royal Bank of Canada v. Kirkpatrick and Kirkpatrick* (1975), 20 N.S.R. (2d) 458, Cowan C.J.T.D. at p. 368 stated:

> With regard to the burden of proof that the transfer of the property in question was made with intent to defeat, hinder, delay or prejudice the plaintiff creditor, it is clear that, if the effect of the transfer might be expected to be, and has, in fact, been to defeat, hinder, delay or prejudice the creditor, the Court will attribute the fraudulent intentions to the settlor.

26 A further account of what is meant by a fraudulent conveyance is found in *Hayden et al v. Monteith et al* (1987), 42 D.L.R. (4th) 721 (N.B.C.A.). There the court stated the question is not whether valuable consideration was advanced in return for security but whether *bona fide* conveyances were given for *bona fide* advances of money.

27 From time to time certain "badges of fraud" have been mentioned as evidence of bad faith. These indicators include secrecy, continuance of possession, some benefit retained under the settlement to the settlor, and gross excess of value of property over the price paid.

28 In looking at the facts of the present transfers, it was in my opinion a *bona fide* transaction. Mr. Richardson was only doing what he had set out to do, that is, to reorganize the Perfection Group so that the companies could be put on a firm footing. While it may be said that Richardson was not at the time acting under an order made pursuant to the *C.C.A.A.*, I find nothing to indicate that he was doing anything other than making a *bona fide* transaction. It was not a transaction that would reasonably arouse suspicion once the facts were known.

29 The question of valuable consideration must also be dealt with. I have already indicated the problem the applicants have with the lack of consideration and the valuation method that was used. The term valuable consideration may mean an approximate or adequate consideration. The adequacy of consideration is an element to be considered in deciding whether fraud exists. Here it is admitted that there was no consideration due to the fact that the net book value was used to determine what consideration might be paid. Further, there was no credible evidence produced that the net book value method of valuing the shares was not acceptable. The evidence is that the shares transferred were valueless.

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30 Neither do I find that the transfer was made with an intent to defeat, hinder, delay or prejudice the creditors of Perfection. The intent was to aid the Perfection Group of companies to stay in existence. It must be remembered that, pursuant to the agreement made by Perfection, Perfection Dairy Group Limited, the Simmonds' and PEIDA, Richardson was to be given full authority by Perfection to manage the affairs of Perfection.

31 The applicants further stated that the transfer of the shares had the effect of giving a preference to Burns Fry Inc. The latter company had given a loan to Perfection when Perfection had purchased the shares of McKay's Dairy Ltd. and, as security, Burns Fry Inc. received a pledge on the shares of McKay's Dairy Ltd. and Shediac Dairy (1968) Limited. If the shares that were transferred to McKay's Dairy Ltd., namely, Perfection Dairy Foods Limited and 031706 N.B. Ltd., have a value then Burns Fry Inc. might benefit. However, I once again refer to the fact that the value of the shares transferred was nil and, if the shares did have a value, I am unaware of their value. The applicants state that there was an intent to give Burns Fry Inc. an unjust preference. I am unable to make such a finding. There is no evidence whatsoever that there was any reason, purpose or intent in giving Burns Fry Inc. a preference.

32 I dismiss the motion to set aside the transfers to McKay's Dairy Ltd. As further facts become known, the opportunity for the applicants to again bring forth their motion will be present.

33 The third transfer that is sought to be set aside, (c), is the transfer of McKay's Dairy Ltd. shares from Perfection to Perfection Group Trust. This trust was created by Richardson to purchase the outstanding shares of McKay's and its related subsidiaries. The sole trustee is John A. Simmonds. The purchase was for fair market value, to be determined by Coopers & Lybrand Limited. The purchase was paid for by a non-interest bearing promissory note executed by the Trust in favour of Perfection. The note is payable five business days after the Trustee notifies Perfection of its intention to assign the Agreement of Purchase and Sale to an interested purchaser or on demand by Perfection from and including April 1, 1991.

34 Again referring to the affidavit of Richardson of January 16th, he states that the transfer of the shares was undertaken with a view to make "the internal structure of the Perfection Group more cohesive and divisible along regional lines between Prince Edward Island and New Brunswick....". I do not believe the transaction was made with any intent to hinder, delay, defeat or prejudice any creditor. The shares are not beyond the reach of Perfection and if the shares could be sold at fair market value Perfection would receive that value.

35 I would not set aside this transfer. It was a legitimate transaction for the benefit of Perfection.

36 The final transaction that the applicant seeks to set aside, (d), is the purchase by McKay's from Jack Simmonds and Donald Simmonds of all the common and preferred shares in Perfection Properties Limited. This transaction took place on December 31st, 1990. The consideration was their net book value, plus accumulated depreciation and $20,000. The applicants state that the transfer was in direct contravention of the agreement entered into between Perfection, Perfection Dairy Group Limited, Jack Simmonds and John Simmonds and PEIDA. In that agreement, it was stated that all assets that were covered by Perfection Dairy Group Limited or by any party to the agreement would be immediately transferred to Perfection.

First, according to the organization chart filed by the applicants, Perfection Properties Limited, prior to December 31, 1990, was owned by the Perfection Group Limited. Perfection Group Limited was not a party to the aforesaid agreement. There was nothing that required Perfection Group Limited to transfer its shares in Perfection Properties Limited to Perfection.

Secondly, even if the transfer of the shares of Perfection Properties Limited was to be made to Perfection, there is nothing in the agreement preventing the ultimate transfer to McKay's. Since these were the only objections to this transaction, I do not find any weight to the submission.

The final part of the applicants' motion is to appoint Ernst & Young Inc. as a court monitor. I have already dealt with such an appointment under the Royal Bank motion and I dismiss such a submission.

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37 While I have not found any evidence to suggest that I should allow any part of the applicants' motion, at this time I will not dismiss the motion outright but allow it to stand so that I may retain jurisdiction over the matters.

New Brunswick Milk Marketing Board ("NBMMB")

38 This applicant states that my *ex parte* order should be amended to declare that it does not apply to McKay's or to Perfection Dairy Foods Limited or to their creditors. These latter companies are ones that operate in the Province of New Brunswick. In effect, the applicant is asking for clarification of my *ex parte* order as to whether or not it applies to New Brunswick.

39 Section 9 of the *C.C.A.A.* reads:

> 9 (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.
>
> (2) The powers conferred by this Act on a court may, subject to appeal as provided for in this Act, be exercised by a single judge thereof, and those powers may be exercised in chambers during term or in vacation.

40 As can be seen, the Court has jurisdiction if the head office or chief place of business is located within the Province. Here the registered head office of the companies is in New Brunswick and that is the province where the produce of the companies is sold. On the other hand, all of the business of the companies is conducted through the Perfection office in Charlottetown.

41 In my opinion, the "head office" of the companies means its registered head office. The situation here is identical to the facts in *Re Smith Transportation Co. Ltd.* (1928), 60 O.L.A. 203. As to a company's "chief place of business", I was not cited any cases where this term has been explored. Determining a chief place of business is a question of fact and those facts concerning the companies and the businesses they conduct must be considered. The number of employees, the goods being sold, the length of time each aspect of the business has been carried on and the location where that has been done, the income and expenses of the company and its allocation between different aspects of the company are, I am sure, a few of the considerations to be dealt with.

42 The respondents have stated that because the *C.C.A.A.* is a federal statute weight must be given to making orders applicable on a wider basis than that of a single province. I do not give weight to that submission for the reason that s. 9 of the *Act* makes it clear that provincial jurisdiction is of prime importance.

43 It is for the respondents to establish that the sought after order under the *C.C.C.A.* is within jurisdiction. I do not believe that they have laid before me sufficient facts to establish that the affected companies come within the jurisdiction of this province. Accordingly, any order of this Court in this matter will not affect McKay's or Perfection Dairy Foods Limited.

Prince Edward Island Milk Marketing Board ("the Board")

44 The Board asks that my *ex parte* order be varied to allow the applicant to halt milk deliveries to Perfection in the event Perfection defaults on payment to the applicant for milk sold to Perfection or if Perfection fails to provide the Board with security acceptable to the Board. The applicant concedes to the *ex parte* order.

45 In the *Quintette* case, the Court of Appeal of British Columbia stated:

> ...It would be a reasonable expectation that it would be extremely unlikely that the power would be exercised where the result would be to enforce the continued supply of goods and services to the debtor company without payment for current deliveries, whereas it would not be unlikely when the result would be to enforce payment for goods thereafter taken from or services thereafter received from the debtor company, as is the case here. In cases not involving the supply or receipt of goods or services, no doubt judicial exercise of the discretion would produce a result appropriate to the circumstances.

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46 It seems reasonable that the Board should be paid for ongoing milk supplies that it sells to Perfection, especially in view of the fact that the weekly sales amount to in excess of $100,000. I am inclined to make such an order as part of a varied order. However, before doing so, I would require further evidence as to the effect such an order would have on Perfection and whether or not Perfection could make such a payment at the time. The question of security can be dealt with later.

47 In accordance with the result of my decision, I would ask the parties to make suggestions that might be included in a varied order.

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KeyCite treatment
Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): The Cannabist Company Holdings Inc. et al | 2026 ONSC 2063, 2026 CarswellOnt 5311 | (Ont. S.C.J. [Commercial List], Apr 2, 2026)

2024 ONSC 1645
Ontario Superior Court of Justice [Commercial List]

BZAM Ltd. Plan of Arrangement

2024 CarswellOnt 3802, 2024 ONSC 1645, 2024 A.C.W.S. 923

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 BZAM LTD., BZAM HOLDINGS INC., BZAM MANAGEMENT INC., BZAM CANNABIS CORP., FOLIUM LIFE SCIENCE INC., 102172093 SASKATCHEWAN LTD., THE GREEN ORGANIC DUTCHMAN LTD., MEDICAN ORGANIC INC., HIGH ROAD HOLDING CORP., AND FINAL BELL CORP.

BZAM Ltd. et al. (Applicants)

Peter J. Osborne J.

Heard: February 28, 2024
Judgment: February 28, 2024
Docket: CV-24-00715773-00CL

Counsel: Sean Zweig, Mike Shakra, Andrew Froh, Jamie Ernst, for Applicants
Harvey Chaiton, for Stone Pine Capital
Joseph Bellissimo, Natalie Levine, for Cortland Credit Lending Corporation
Philip Yang, Maria Konyukhova, Jeff Rosenberg, Kamran Hamidi, for FTI as Proposed Monitor

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.a Grant and length of stay
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant and length of stay
Terms including appointment of monitor, charges, debtor in possession financing, and treatment of cannabis licenses.
Table of Authorities
Cases considered by *Peter J. Osborne J.*:
Canwest Publishing Inc. / Publications Canwest Inc., Re (2010), 2010 ONSC 222, 2010 CarswellOnt 212, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) — referred to
Cline Mining Corp., Re (2014), 2014 ONSC 6998, 2014 CarswellOnt 18943, 22 C.B.R. (6th) 278 (Ont. S.C.J.) — referred to
Comark Inc., Re (2015), 2015 ONSC 2010, 2015 CarswellOnt 20810 (Ont. S.C.J.) — referred to
In the Matter of the Companies' Creditors Arrangement Act (2023), 2023 ONSC 753, 2023 CarswellOnt 1528 (Ont. S.C.J. [Commercial List]) — referred to

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Lydian International Limited (Re) (2019), 2019 ONSC 7473, 2019 CarswellOnt 21645, 75 C.B.R. (6th) 314 (Ont. S.C.J. [Commercial List]) — referred to
MJardin Group, Inc. (Re) (2022), 2022 ONSC 3338, 2022 CarswellOnt 7797 (Ont. S.C.J.) — referred to
MPX International Corporation (2022), 2022 ONSC 4348, 2022 CarswellOnt 11589, 1 C.B.R. (7th) 251 (Ont. S.C.J.) — referred to
Performance Sports Group Ltd., Re (2016), 2016 ONSC 6800, 2016 CarswellOnt 17492, 41 C.B.R. (6th) 245 (Ont. S.C.J. [Commercial List]) — referred to
Sino-Forest Corp., Re (2012), 2012 ONSC 2063, 2012 CarswellOnt 4117 (Ont. S.C.J. [Commercial List]) — referred to
Tantalus Labs Ltd. (Re) (2023), 2023 BCSC 1450, 2023 CarswellBC 2465, 9 C.B.R. (7th) 169 (B.C. S.C.) — considered
Target Canada Co., Re (2015), 2015 ONSC 303, 2015 CarswellOnt 620, 22 C.B.R. (6th) 323 (Ont. S.C.J.) — referred to

Statutes considered:

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

Generally — referred to

s. 2 "insolvent person" — referred to

s. 2 "trustee" — referred to

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

Generally — referred to

s. 2(1) "debtor company" — referred to

s. 9(1) — referred to

s. 11 — considered

s. 11.001 [en. 2019, c. 29, s. 136] — referred to

s. 11.02(1) [en. 2005, c. 47, s. 128] — referred to

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

s. 11.2(4) [en. 2005, c. 47, s. 128] — referred to

s. 11.2(5) [en. 2005, c. 47, s. 128] — referred to

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

s. 11.7(2) [en. 1997, c. 12, s. 124] — referred to

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

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

APPLICATION by debtor for initial order in insolvency proceedings.

***Peter J. Osborne J.*:**

ENDORSEMENT

1 This is an Application for relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (the "CCAA") by BZAM Ltd. ("BZAM"), BZAM Holdings Inc., BZAM Management Inc., BZAM Cannabis Corp., Folium Life Science Inc., 102172093 Saskatchewan Ltd., The Green Organic Dutchman Ltd. ("TGOD"), Medican Organic Inc., High Road Holding Corp., and Final Bell Corp. (collectively, the "Applicants" or the "Companies").

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2 Following the hearing, I granted the initial order with reasons to follow. These are those reasons.

3 In particular, the Applicants seek:

a. a declaration that they are companies to which the CCAA applies;

b. the appointment of FTI Consulting Canada Inc. ("FTI") as Monitor;

c. the approval for TGOD to borrow up to a principal amount of $2,400,000 by way of a debtor-in-possession ("DIP") credit facility (the "DIP Loan") to finance critical working capital requirements for the Applicants over the next 10 days;

d. a stay in effect for an initial period of not more than 10 days;

e. the extension of the benefit of the stay to the Non-Applicant Stay Parties (as defined in the materials) and their respective directors and officers;

f. relief from certain securities reporting obligations until further order of this Court; and

g. approval of the Administration Charge, the DIP Lender's Charge, the Edmonton Property Charge and the Directors' Charge (each as defined in the motion materials) in the priorities as set out in the motion materials.

4 BZAM is the ultimate parent company to several entities in the cannabis industry in Canada (collectively, the "Company"). It is a reporting issuer listed on the Canadian Securities Exchange, and its shares trade in the United States on the OTCQX.

5 The Company engages in the production, cultivation, processing and distribution of cannabis and cannabis related products.

6 The Applicants are insolvent. One of their cannabis licences is set to expire imminently. Absent protection under the CCAA, as well as access to the proposed DIP financing, the Applicants lack sufficient cash to meet their obligations as they come due, their liabilities exceed the value of their assets, and they will be forced to immediately cease operations.

7 The Applicants seek protection from their creditors while they continue as a going concern to allow time to explore various restructuring options and possibilities for the benefit of stakeholders. Those options will likely include, it is submitted, a Court-supervised sale and investor solicitation process ("SISP").

8 The relief sought by the Applicants today is fully supported by the senior secured creditor, the subordinate creditor, and is recommended by the Proposed Monitor. The Applicants submit that it is also limited to what is reasonably necessary to allow them to maintain the status quo and continue operations during the initial 10 day stay of proceedings.

9 With this context in mind, the issues on this Application are:

a. does the Court have jurisdiction to grant the relief requested under the CCAA and should a stay of proceedings be granted?

b. should the Court approve the DIP Loan?

c. should FTI be appointed as Monitor?

d. should the benefit of the stay be extended to the Non-Applicant Stay Parties?

e. should relief from the securities reporting obligation be granted? and

f. should the Charges be approved, and approved in the proposed priority?

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Jurisdiction

10 The Applicants rely on the Affidavit of Matthew Milich sworn February 28, 2024 together with the exhibits thereto, and the Pre-filing Report of the Proposed Monitor dated February 28, 2024. Defined terms in this Endorsement have the meaning given to them in the Application materials unless otherwise indicated.

11 Each of the Applicants is incorporated under Canadian corporate statute. All of the non-BZAM Applicants are wholly-owned, directly or indirectly, by BZAM except for Folium Life and BZAM Cannabis, in respect of which BZAM Holdings is the majority shareholder as to 80% and 80.3%, respectively.

12 Five of the Applicants are licenced with Health Canada and operate cannabis facilities in Ontario, Alberta and British Columbia. 102 Saskatchewan leases a retail store in Saskatchewan.

13 The majority of the Company's business is conducted out of Ontario. Two cannabis facilities of the Applicants, including its largest facility, are located in Ontario and approximately 256 of the 441 employees of the Applicants are employed in Ontario.

14 The Company's senior secured creditor, Cortland Credit Lending Corp. ("Cortland") is also headquartered in Toronto.

15 The majority of BZAM's directors reside in Ontario, and its Chief Financial Officer and Chief Executive Officer divide their time between the Company's offices in Ontario and British Columbia.

16 The Non-Applicant Stay Parties include four directly or indirectly wholly-owned subsidiaries of BZAM: 9430-6347 Québec Inc. ("943 Québec), a company incorporated under the QBCA; (ii) The Green Organic Beverage Corp. ("Green Organic"), a company based in Delaware; (iii) TGOD Europe B.V. ("TGOD Europe"), a company based in the Netherlands; and (iv) The Green Organic Dutchman Germany GmbH ("TGOD Germany"), a company based in Germany.

17 943 Québec is a licensed entity with Health Canada operating out of a leased facility in Québec.

18 The evidence satisfies me that the Applicants are unable to meet their obligations as they become due. They have accrued payables in the ordinary course of business that they cannot meet and are unable to pay amounts owed to secured parties.

19 As at January 1, 2024, the Company had total consolidated assets with a book value of approximately $95,711,080 and liabilities with a book value of approximately $112,873,839. The Applicants anticipate having on hand only approximately $1,848,000 in cash at the close of business today, with the result that they face an urgent liquidity crisis.

20 Secured financing has been provided by Cortland pursuant to a credit agreement entered into on March 31, 2020 between Cortland as Agent for the Lenders and TGOD as borrower. It has been amended and restated including as recently as January 8, 2024 (as amended, the "Credit Agreement").

21 Pursuant to the Credit Agreement, Cortland provided TGOD with an interest-bearing revolving credit facility totaling $34 million. The guarantors under the Credit Agreement are TGOD, BZAM, Medican Organic, BZAM Holdings, BZAM Management, BZAM Cannabis, Folium Life, High Road and BZAM Labs (together, in such capacity, the "Cortland Obligors").

22 As of February 28, 2024, approximately $31,919,208.84 of principal is owing together with interest of an additional $362,916.21.

23 In addition, BZAM has entered into six (6) promissory notes (the "Stone Pine Promissory Notes") with Stone Pine Capital Ltd. ("Stone Pine"), an entity controlled by BZAM's largest shareholder and current Chairman. The Stone Pine Promissory Notes were all amended on January 4, 2024, to each be payable upon demand, provided that Stone Pine shall not be permitted to make a demand until the later of either: (i) the maturity date of the Cortland Credit Agreement; and (ii) March 31, 2025.

24 Contemporaneously with the execution of the Stone Pine Promissory Notes, BZAM and Stone Pine entered into general security agreements (the "Stone Pine GSAs") under which Stone Pine was granted security over all present and after-acquired

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property, assets and undertakings of BZAM. Additionally, BZAM, Stone Pine and Cortland entered into subordination and postponement agreements to subordinate the amounts loaned under the Stone Pine Promissory Notes to the amounts loaned under the Credit Agreement with Cortland.

25 As of February 28, 2024, approximately $8,515,000 of principal is owing to Stone Pine, and approximately an additional $509,755 of interest accrued month-to-date for a total amount owing of $9,024,755.67. The Stone Pine Promissory Notes each carry an interest rate of 8% or 10% per annum, with interest being calculated monthly and payable on the last day of each month. No interest has ever been paid on the Stone Pine Promissory Notes.

26 BZAM Cannabis entered into a $5 million loan from private lenders that is secured against the Edmonton Facility pursuant to a commitment letter dated May 19, 2021 as well as a general security agreement over all of the property of BZAM Cannabis and a corporate guarantee from BZAM Management.

27 In addition to the above, the Applicants have a number of unsecured obligations including a promissory note issued by BZAM to Final Bell Holdings International Inc. dated January 5, 2024 in the amount of $8 million and employee liabilities including monthly aggregate payroll obligations of approximately $2,344,764 related to both salaried and hourly employees. The Applicants also owe $1,103,860 in accrued and unpaid vacation pay and another $702,000 in unpaid bonuses.

28 The Applicants had accounts payable and accrued liabilities as at January 31, 2024 of approximately $28,211,004, and CRA liabilities as at February 15, 2024 of approximately $4,440,000 in excise tax arrears, $2,650,000 in sales tax arrears, and a modest amount in respect of unremitted payroll deductions. BZAM Management and TGOD have entered into payment plans with the CRA in respect of their excise and/or sales tax arrears.

29 It is clear that the current cash position of the Applicants is not sufficient to meet their obligations as they come due, particularly relating to ongoing and future payroll obligations and the cash required to maintain business operations while preventing the expiry of valuable (and required) cannabis licences.

30 The CCAA applies in respect of a "debtor company or affiliated debtor companies" whose liabilities exceed $5 million. The term "debtor company" is defined as "any company that: (a) is bankrupt or insolvent [...]", and the term "company" is defined as "any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province [...]".

31 The CCAA also specifies companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company. Each of the Applicants is a "company" within the meaning of the CCAA as each was incorporated under Canadian provincial or federal laws. All of the Applicants other than BZAM are direct or indirect subsidiaries of BZAM. Accordingly, the Applicants are all affiliated companies.

32 Each of the Applicants is a "debtor company" as defined in the CCAA. The insolvency of a debtor company is assessed as of the time of filing the CCAA application. Courts have taken guidance from the definition of "insolvent person" in subsection 2(1) of the *Bankruptcy and Insolvency Act*, which, in relevant part, provides that an "insolvent person" is a person:

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

33 A company is also insolvent for the purposes of the CCAA "if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring".

34 The Applicants collectively have over $53,500,000 in debt and only approximately $1,848,000 of cash on hand. Absent the Stay of Proceedings and the approval of the DIP Loan, the Applicants will be unable to meet their obligations as they come due. As such, the Applicants are affiliated debtor companies to which the CCAA applies.

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35 I am also satisfied that Ontario is the chief place of business of the Applicants, and as such this Application is properly made to this Court.

36 Section 9(1) of the CCAA provides that an application for a stay under the CCAA may be made to the court that has jurisdiction in the province in which the head office or chief place of business of the company in Canada is situated.

37 In *Nordstrom Canada Retail, Inc.*, this Court found that the company's "chief place of business" was Ontario despite the fact that Nordstrom Canada Retail was incorporated and had significant business operations in British Columbia. In determining whether the court had jurisdiction over the proceedings, this Court considered multiple factors, including the location of the company's assets, employees and sales.

38 The Court found that there was sufficient evidence establishing Ontario as the proper jurisdiction based on the following: 8 of the 13 Nordstrom Canada retail stores are located in Ontario, while approximately 1,450 out of Nordstrom Canada's 2,500 full and part-time employees work in Ontario. Further, during fiscal year 2022, store sales in Ontario totalled $220 million, compared to $148 million in British Columbia and $77 million in Alberta.

39 The same analysis can be applied here. Approximately 58% of the employees of the Applicants are situated in Ontario. While the Applicants have two cannabis facilities in each of Ontario and British Columbia, the largest facility of the Company is in Hamilton, Ontario. The Company maintains corporate offices in both Ontario and British Columbia and a majority of the BZAM directors reside in Ontario. In addition, the principal place of business of the senior secured lender, Cortland, is Ontario.

Stay of Proceedings

40 Section 11.02(1) of the CCAA provides that the Court may order a stay of proceedings on an initial CCAA application for a period of not more than 10 days. Section 11.001 of the CCAA provides that relief granted on an initial CCAA application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that initial 10-day period.

41 A stay of proceedings is clearly necessary here if any form of restructuring process is to be successful. The relief sought today is limited to what is reasonably necessary.

Non-Applicant Stay Parties

42 I am also satisfied that the stay should apply to the Non-Applicant Stay Parties. The court has authority to extend the stay to non-parties pursuant to ss. 11 and 11.02(1) of the CCAA, which permits the court to make an initial order on any terms imposed. In determining whether a stay should be extended to non-parties, courts have considered numerous factors, including whether the subsidiaries of applicants had guaranteed secured loans of the applicants, whether the non-applicants were deeply integrated into the business operations of the applicants, and whether the claims against the non-applicants were derivative of the primary liability of the applicants: See *MPX International Corporation* 2022 ONSC 4348 ("*MPX*") at para. 52, *Lydian International Limited, (Re),*2019 ONSC 7473 at para. 39; *Sino-Forest Corporation (Re)*, 2012 ONSC 2063 at paras. 5, 18, and 31; at paras. 28-29; and *Target Canada Co.,*2015 ONSC 303 ("*Target*") at paras. 49-50.

43 All of the Non-Applicant Stay Parties here are highly integrated into the business as wholly-owned subsidiaries (direct or indirect) of BZAM, or in the case of 943 Québec, as a soon to be acquired company. None carry on active business. The three entities other than 943 Québec also have tax attributes which could be beneficial to the objective of maximizing value for stakeholders.

44 I am satisfied that the stay should be extended to these parties to prevent uncoordinated realization and enforcement attempts from being made in different jurisdictions, all of which would be counterproductive to the maximization and protection of value for stakeholders of the Applicants.

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45 Moreover, the Applicants advise that they intend to seek approval of a SISP in this proceeding which will include the Non-Applicant Stay Parties with the result that the stay should apply to them to give comfort to potential bidders that enforcement actions against those parties will be stayed while a sales process is being conducted.

Regulatory Stay of Licences

46 CCAA courts have granted regulatory stays over licences where, absent such a stay, the applicable regulators were likely to suspend or cancel licences due to the commencement of the CCAA proceeding. Other courts have observed that permitting the immediate termination of the licenses of a debtor company would not avoid social and economic losses but rather would amplify them. See: *Re Just Energy* Corp., at para. 87; *Abbey Resources Corp., Re, (29 July 2021) Saskatoon Q.B. No. 733 of 2021 (SKQB); Original Traders Energy Ltd. et al., (30 January 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00693758-00CL* (Initial Order) at para. 19.

47 Canadian courts have also granted stays to prevent the Canada Revenue Agency from seeking to enforce its rights through regulatory actions related to an excise licence for a cannabis company during the period in which it was under protection in an insolvency regime: *Tantalus Labs Ltd., Re* 2023 BCSC 1450 ("*Tantalus*")and *Aleafa Health Inc.* SISP Approval Order August 22, 2023 [CV-23-00703350-00CL].

48 In *Tantalus*, the British Colombia Supreme Court granted an order as part of the BIA proposal maintaining the status quo of a cannabis excise licence during the course of the proposal proceeding. It did so, rejecting the submission of the CRA, which had submitted that a ministerial decision to not renew a licence could not be the subject of a stay under the *BIA*. The same principles apply to a CCAA proceeding.

49 The cannabis licences of the Applicants are among their most valuable assets. Just as importantly, they are required to permit the Applicants to continue operating their underlying business. The expiry or cancellation of licences will suspend or terminate completely the operation and delivery of products by the Applicants with the result that the ability of the Applicants to restructure or continue as a going concern business will in all probability be eliminated.

Appointment of FTI as Monitor

50 The Applicants propose to have FTI appointed as the Monitor. FTI is a "trustee" within the meaning of subsection 2(1) of the BIA, is established and qualified, and has consented to act as Monitor. The involvement of FTI as the court-appointed Monitor will lend stability and assurance to the Applicants' stakeholders. FTI is not subject to any of the restrictions set out in s. 11.7(2) of the CCAA.

51 I am satisfied that FTI should be appointed as Monitor in these CCAA Proceedings.

The DIP

52 Pursuant to a DIP facility agreement dated February 28, 2024 (the "DIP Agreement"), Cortland, as proposed DIP Lender, has agreed to provide TGOD as borrower with a super priority, non-revolving credit facility up to a maximum principal amount not to exceed the lesser of $41 million and the Revolving Facility Limit (as defined in the Second ARCA) plus $7 million, subject to certain conditions. Each of the Applicants is a guarantor under the DIP Agreement.

53 The DIP Loan has a commitment fee of $98,000 and bears interest at the greater of the Toronto-Dominion Bank's floating annual rate of interest plus 8.05% per annum and 12% per annum (an interest rate that I observe is the same as that set out in the Second ARCA).

54 The DIP Loan is conditional on the granting of the DIP Charge.

55 The amount of the DIP Loan to be funded during the initial stay period of 10 days (up to $2,400,000) is only that portion necessary to ensure the continued operation of the business of the Applicants in the ordinary course for that period of time

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such that I am satisfied it is appropriate that it be approved at this time pursuant to s. 11.2(5) of the CCAA, as was approved in *Mjardin Group, Inc., (Re),*2022 ONSC 3338 at para. 31.

56 While the DIP Agreement contemplates what the Applicants describe as a "creeping-roll up" structure pursuant to which all post-filing receipts by the Applicants will be applied to repay pre-filing obligations owing to Cortland, it is important to note that the DIP Charge does not secure any obligation that existed prior to the granting of the Initial Order. This Court has previously approved DIP facilities that use receipts from operations post-filing to repay pre-filing amounts, pursuant to the jurisdiction found in s. 11.2(1). The emphasis is on preserving the pre-filing status quo, so as to uphold the relative pre-stay priority position of each secured creditor: *Comark Inc., (Re)*, 2015 ONSC 2010 at paras. 40-41; and *Performance Sports Group Ltd.*, 2016 ONSC 6800 at para. 22.

57 Moreover, and in accordance with s. 11.2(1), notice has been provided to the secured creditors proposed to be primed by the DIP, and as noted above, the proposed DIP Charge does not secure any pre-filing obligations of the Applicants. Cortland, the proposed DIP Lender, is already in first position as the senior secured creditor in respect of all of the property of the Applicants save and except for the Edmonton Facility which is not proposed to be primed by the DIP in any event. Stone Pine Capital is supportive of the proposed DIP Loan.

58 Section 11.2(4) of the CCAA sets out a non-exhaustive list of criteria that the court must consider in deciding whether to grant a DIP lender's charge. Those criteria include the period during which the Applicants are expected to be subject to CCAA proceedings, how the Applicants' business and financial affairs are to be managed during the proceedings, whether the Applicants' management has the confidence of its major creditors, whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the Applicants, the nature and value of the Applicants' property, whether any creditor would be materially prejudiced as a result of the security or charge, and whether the monitor supports the charge.

59 DIP financing may be approved even if it potentially prejudices some creditors, as long as the prejudice is outweighed by the benefit to all stakeholders.

60 It is important that an applicant meet the criteria in s. 11.2(1) as well as those in s. 11.2(4). (See *CanWest Publishing Inc., Re* 2010 ONSC 222 ("*CanWest*") at paras. 42-44).

61 I am satisfied that the Applicants are facing a liquidity crisis and the Cash Flow Statement shows that financing even on an interim basis is required to fund these proceedings.

62 I am also satisfied that the terms of the proposed DIP Loan are appropriate. I recognize that the interest rate is at the very high end of the range within which DIP loans have been approved by this Court. However, I am satisfied that it is appropriate here. First, the rate is exactly the same as the rate applicable to the existing credit facilities of the senior secured creditor, Cortland, who is the proposed DIP Lender, so there is no increase in the cost of borrowing relative to the current facilities. Second, the commitment fee is relatively modest as against the total funding to be made available. The cost of borrowing necessarily involves a consideration of the commitment fee together with the applicable interest rate. Third, interest rates generally have increased materially over the last year, so one must proceed with caution in considering a previously established range of interest rates. Fourth, the cannabis sector generally has faced and continues to face significant challenges and risks, with the result that the cost of borrowing within the sector generally is expensive.

63 Finally, the Proposed Monitor is supportive of the DIP Loan and corresponding charge, and is further in agreement that those amounts proposed to be advanced during the initial 10 day period are required in order to preserve the status quo and the going concern operations of the Applicants.

Administration Charge

64 The court has jurisdiction to grant an administration charge under s. 11.52 of the CCAA. It is to consider: the size and complexity of the business being restructured, the proposed role of the beneficiaries of the charge, whether there is an

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unwarranted duplication of roles, whether the quantum of the proposed charge appears to be fair and reasonable, the position of the secured creditors likely to be affected by the charge, and the position of the Monitor. (See *CanWest*, at para. 54).

65 The administration charge of $500,000 is appropriate. It is supported by the Proposed Monitor and the senior creditors.

Directors' Charge

66 The court has jurisdiction to grant a directors' charge under s. 11.51 of the CCAA, provided notice is given to the secured creditors who are likely to be affected by it. To ensure the stability of the business during the restructuring period, the Applicants need the ongoing assistance of their directors and officers, who have considerable institutional knowledge and specialized expertise.

67 Here, I recognize that the proposed quantum of the Directors' Charge is very significant at $5,300,000. However, almost all of that is as a result of the excise tax obligations owing by the Applicants which are very material and which, I observe, will increase going forward.

68 The Monitor supports the Applicants' request for the Directors' Charge. I am satisfied it is appropriate here.

69 The Directors' Charge is approved.

Relief from Securities Obligations

70 The Applicants seek relief to dispense with certain securities filing requirements and in particular, the authority to incur no further expenses in relation to any filings, and that none of the directors or officers, employees or other representatives of the Applicants or the Monitor shall have personal liability with respect thereto.

71 This Court has previously granted such relief and I am satisfied that it is appropriate here. See: *Aleafa Health Inc.*, amended and restated initial order issued August 4, 2023 [CV-23-00703350-00CL] paras. 45-46; *MPX International Corporation* , amended and restated initial order issued July 25, 2022 [CV-22-00684542-00CL] at para. 46-47; *CannTrust Holdings Inc., Re*, initial order issued March 31, 2021 [Court File No. CV-20-00638930] at paras. 46-47; and *Pure Global Cannabis, Inc., Re*, initial order issued March 19, 2020 [CV-20-00638503-00CL] at para. 49.

Authorization for Pre-Filing Payments

72 The Applicants seek the authority but not the requirement to make payments for goods or services supplied to the Applicants prior to the date of the Initial Order, but in all cases only with the consent of the Monitor and the DIP Lenders, and only in circumstances where, in the opinion of the Applicants and the Monitor, the supplier or service provider is critical to preserve, protect or enhance the value of the business.

73 While s. 11.4 of the CCAA gives the court authority to declare a person to be a critical supplier and to grant a charge on the debtor's property to secure amounts owing for services provided post-filing, nothing in that section removes the inherent jurisdiction of the court to allow the payment of pre-filing amounts to suppliers who services are critical to the post-filing operations of the debtor, even where the debtor does not propose to secure the payment of post-filing goods or services with a critical supplier charge: See *Cline Mining Corp., Re,*2014 ONSC 6998 at para. 38, and *MPX* at para. 70.

74 Such relief may be included in an initial order: see *Target*, at paras. 64-65.

75 I am satisfied that such relief is appropriate here, particularly given that the consent of the Monitor is required for such payments to be made.

Comeback Hearing

76 The comeback hearing shall take place on Friday, March 8, 2024 commencing at 2:00 PM via Zoom.

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77 The order I have signed is effective immediately and without the necessity of issuing and entering.

Application granted.

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KeyCite treatment
Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): The Cannabist Company Holdings Inc. et al | 2026 ONSC 1849, 2026 CarswellOnt 4767 | (Ont. S.C.J. [Commercial List], Mar 24, 2026)

2023 ONSC 3174
Ontario Superior Court of Justice [Commercial List]

Re Chalice Brands Ltd.

2023 CarswellOnt 8274, 2023 ONSC 3174, 2023 A.C.W.S. 2245, 8 C.B.R. (7th) 162

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 CHALICE BRANDS LTD.

Kimmel J.

Heard: May 23, 2023
Judgment: May 26, 2023
Docket: CV-23-00699872-00CL

Counsel: Shawn Irving, Marc Wasserman, Kathryn Esaw, Fabian Suárez-Amaya, for Chalice Brands Ltd.
Jeremy Bornstein, for Proposed Monitor, KSV Restructuring Inc.

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.a Grant and length of stay
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.d Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.7 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Qualifying company
Applicant was parent company of group of companies producing cannabis — Company missed filing deadline, leading to provincial commission issuing cease-trade order — Company's financial losses led to company starting bankruptcy process under Companies' Creditors Arrangement Act (CCAA) — Company applied for initial order under CCAA — Application granted — Order was needed, so that company could have some distance from its creditors to pursue going-concern sale — Company provided necessary information in form of cash flow forecast and report of monitor — Company and proposed trustee met necessary criteria, so that application could proceed.
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Miscellaneous
Applicant was parent company of group of companies producing cannabis — Company missed filing deadline leading to provincial commission issuing cease-trade order — Company's financial losses led to company starting bankruptcy process

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under Companies' Creditors Arrangement Act (CCAA) — Company applied for initial order under CCAA — Application granted — Stay of proceedings was extended to non-filing affiliates — If stay was not extended, stakeholders in company including its employees would be prejudiced.

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

Applicant was parent company of group of companies producing cannabis — Company missed filing deadline leading to provincial commission issuing cease-trade order — Company's financial losses led to company starting bankruptcy process under Companies' Creditors Arrangement Act (CCAA) — Company applied for initial order under CCAA — Application granted — First-ranking administration charge over assets was necessary to secure fees and expenses disbursements of proposed monitor and counsel of monitor and company — Administration charge was appropriately sized at $400,000 CAD — Comeback hearing was to take place to address additional authorizations that were not immediately needed.

Table of Authorities

Cases considered by *Kimmel J.*:

Hollander Sleep Products, LLC et al., Re (2019), 2019 ONSC 3238, 2019 CarswellOnt 8720, 72 C.B.R. (6th) 140 (Ont. S.C.J. [Commercial List]) — referred to

Imperial Tobacco Canada Limited, et al, Re (2019), 2019 ONSC 1684, 2019 CarswellOnt 4003, 68 C.B.R. (6th) 322 (Ont. S.C.J.) — referred to

JTI-Macdonald Corp., Re (2019), 2019 ONSC 1625, 2019 CarswellOnt 3653, 69 C.B.R. (6th) 285 (Ont. S.C.J. [Commercial List]) — referred to

Lydian International Limited (Re) (2019), 2019 ONSC 7473, 2019 CarswellOnt 21645, 75 C.B.R. (6th) 314 (Ont. S.C.J. [Commercial List]) — referred to

Nordstrom Canada Retail, Inc. (2023), 2023 ONSC 1422, 2023 CarswellOnt 3609, 6 C.B.R. (7th) 114 (Ont. S.C.J.) — referred to

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

Stelco Inc., Re (2004), 2004 CarswellOnt 5200, 2004 CarswellOnt 5201, 338 N.R. 196 (note) (S.C.C.) — referred to

Tamerlane Ventures Inc., Re (2013), 2013 ONSC 5461, 2013 CarswellOnt 12213, 6 C.B.R. (6th) 328 (Ont. S.C.J. [Commercial List]) — referred to

Target Canada Co., Re (2015), 2015 ONSC 303, 2015 CarswellOnt 620, 22 C.B.R. (6th) 323 (Ont. S.C.J.) — referred to

Urbancorp Toronto Management Inc., Re (2016), 2016 ONSC 3288, 2016 CarswellOnt 8410, 37 C.B.R. (6th) 44 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C.

Generally — referred to

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

s. 2 "trustee or licensed trustee" — referred to

s. 2 "insolvent person" — referred to

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

Generally — considered

Pt. IV — referred to

s. 2(1) "debtor company" — referred to

s. 9(1) — referred to

s. 11 — referred to

s. 11.02(1) [en. 2005, c. 47, s. 128] — referred to

s. 11.02(3)(a) [en. 2005, c. 47, s. 128] — referred to

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s. 11.02(3)(b) [en. 2005, c. 47, s. 128] — referred to

s. 11.7 [en. 1997, c. 12, s. 124] — referred to

s. 11.7(2) [en. 1997, c. 12, s. 124] — referred to

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

Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136

Generally — referred to

APPLICATION by company for initial order under *Companies' Creditors Arrangement Act*.

***Kimmel J.*:**

1 Chalice Brands Ltd. brings this application for an Initial Order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Having been satisfied that the preconditions were met, I signed the Initial Order on May 23, 2023 with a brief endorsement and reasons to follow. These are my reasons.

Background — The Chalice Group and its Current Liquidity Crisis

2 Chalice Brands Ltd. ("Chalice" or the "Applicant") is the ultimate parent company of the Chalice Group, a vertically integrated group of cannabis companies operating primarily in Oregon's regulated adult-use market. The Chalice Group operates a farm-to-table cannabis business. They grow, process, distribute and sell their own cannabis and cannabis products.

3 Chalice is incorporated and headquartered in Ontario.

4 The Ontario Securities Commission issued a cease-trade order on May 6, 2022 ("CTO") after Chalice missed its 2021 annual filing deadline. Prior to the CTO, Chalice's common shares traded on the Canadian Securities Exchange ("CSE") as well as over the counter on the OTCQX®.

5 Chalice's assets are comprised of cash and its direct and indirect ownership of the remaining entities in the Chalice Group. Chalice has five bank accounts in Canada. Chalice is the 100 percent owner of Greenpoint Holdings Inc. ("Greenpoint Holdings"), a Delaware company. Greenpoint Holdings is the 100 percent owner of each operating company in the Chalice Group.

6 All entities in the Chalice Group, other than Chalice, are United States based direct and indirect subsidiaries of Chalice with no assets in Canada (the "Non-Filing Affiliates"). Most of the operating entities are in Oregon.

7 The Chalice Group has twenty-one active bank accounts in the United States. The Chalice Group leases certain properties in Oregon, including its 16 retail stores, 3 production facilities and its cultivation location. Chalice has guaranteed some of those leases.

8 The Chalice Group does not own any real property in Canada or the United States.

9 The Chalice Group holds 32 regulatory licenses in Oregon related to producing, processing, wholesaling and retailing cannabis and cannabis products. While all these licenses are in good standing, four are on temporary closure status under the licensing regime. In Nevada, the Chalice Group holds four licenses related to cultivation and product manufacturing of medical marijuana. All four licenses are in good standing but are currently inactive.

10 The Chalice Group has 134 full-time employees and 37 part-time employees, all of whom work in the United States. All employees of the Chalice Group are employed and paid by one of Chalice's subsidiaries, Greenpoint Workforce, Inc. ("Greenpoint Workforce").

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11 Employee retention tax credits are an important asset of the Chalice Group. In 2020, the U.S. Congress passed the *Coronavirus Aid, Relief, and Economic Security (CARES) Act* which, among other things, created a new employee retention tax credit ("ERTCs"). The ERTCs are a refundable tax credit created to encourage employers to keep their employees on the payroll during the months in 2020 affected by the pandemic.

12 To date, Greenpoint Workforce has received $2,700,000 worth of ERTCs. Greenpoint Workforce anticipates receiving another $2,300,000 of ERTCs in the near future.

13 The Chalice Group's most recent financial statements are its unaudited, consolidated financial statements as at December 31, 2021. These statements disclosed that its liabilities exceeded its assets and that it had a net loss of almost $17 million. The evidentiary record indicates that its financial situation has deteriorated since 2021.

14 The current financial circumstances of the Chalice Group appear to be the result of its premature pursuit of an expansion plan. Anticipating that cannabis would be legalized on a Federal level in the United States, in 2021, the Chalice Group undertook an acquisition-based strategy, taking on debt to acquire retail stores and production facilities in Oregon to support its vertical integration. However, Federal deregulation did not occur.

15 In the meantime, capital investments in the cannabis industry have become more difficult to secure and Chalice's inability to finalize its 2021 (and subsequently, its 2022) audited financial statements and the subsisting CTO prevent the Chalice Group from raising funds through issuing securities. This, combined with supply chain issues, inflation, oversupply in the retail cannabis market driving retail prices down and detrimental tax treatment of controlled substances in the United States have reduced the Chalice Group's gross margins, profitability and cash flows.

16 Chalice's primary assets are inter-company receivables from the Non-Filing Affiliates. Its principal liabilities consist of outstanding debt obligations under three notes and two series of unsecured debentures with an aggregate outstanding principal of $10,259,297 (USD). Four of its subsidiaries also have funded debt obligations of $8,864,616 (USD). Chalice and certain of the Non-Filing Affiliates are alleged to be, or are, in default under their respective debt obligations.

17 These circumstances have led to the urgent liquidity crisis that the Chalice Group now faces. Chalice and its operating subsidiaries are unable to satisfy their obligations as they come due. The Chalice Group cannot pay its trade creditors, its landlords or its employees. At present, the Chalice Group owes approximately $6 million in trade payables, including over $1 million in missed rent.

18 Of immediate concern is that:

a. One of the lenders has threatened to move forward with nonjudicial foreclosure on the collateral and has written directly to the Oregon's cannabis regulator (the "OLCC") advising that they were purportedly taking steps to foreclose on assets of the Chalice Group and seeking approval for temporary authority to operate five of the Chalice Group's cannabis licenses; and

b. Chalice's subsidiaries have also fallen behind on making lease payments to certain of their landlords, which may entitle the landlords to declare a default under the lease and lock them out. This, in turn, would put the Chalice Group's store-based cannabis licenses at risk since, in Oregon, cannabis licenses are specific to a particular retail location. Therefore, the licenses risk being suspended or terminated if the retail location ceases operating.

19 Chalice and its subsidiaries (the Non-Filing Affiliates) need "breathing space" from their creditors to pursue a going-concern sale. Chalice seeks to extend the benefit of the *CCAA* stay in this proceeding to its Non-Filing Affiliates, all of which are integral to the operations of the Chalice Group. If proceedings were taken against the Non-Filing Affiliates, it would be highly detrimental to the Chalice Group's ability to achieve a going-concern solution.

20 Chalice has prepared a Cash Flow Forecast for the period from the week ending May 22, 2023 to the week ending August 18, 2023 (the "Period"). It indicates that Chalice requires $1,030,000 cash flow to meet anticipated obligations during

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the Period. Chalice's ability to do so is based on it having already received, or receiving, partial repayments of intercompany loans owing to it using proceeds from the recent ERTCs received by Greenpoint Workforce. Based on this Cash Flow Forecast, Chalice is not expecting to require a debtor-in-possession facility. Chalice intends to use these funds, in addition to certain other anticipated receipts, to fund Chalice's operations during this *CCAA* proceeding.

21 KSV Restructuring Inc. is the proposed monitor (the "Proposed Monitor" or "KSV"). The Proposed Monitor's pre-filing report reflects its understanding that, aside from Chalice, Greenpoint Workforce's only other creditors are three bridge lenders (the "Bridge Lenders") that advanced Greenpoint Workforce approximately $831,250 in aggregate loans (together the "Bridge Loans") to fund working capital requirements until it received the ERTCs from the Internal Revenue Service. The Proposed Monitor further reports, based on discussions with Scott Secord, the Chief Restructuring Officer ("CRO"), that the Chalice Group intends to repay the Bridge Lenders during the *CCAA* proceeding. The receipts in the Cash Flow Forecast represent the repayment of the intercompany debt from the anticipated receipt of the second round of ERTC payments less the repayment of the Bridge Loans.

The Planned Oregon Receivership — the Intended Co-ordinated Going Concern Solution

22 Since cannabis has not been legalized Federally in the United States, the Chalice Group is unable to seek protection under the U.S. Bankruptcy Code, irrespective of its compliance with state cannabis laws. As such, concurrently with the filing of this Application, proceedings were commenced in Oregon to place certain Non-Filing Affiliates which are formed or have assets in Oregon (the "Oregon Subsidiaries") into state receivership (the "Oregon Receivership"). Should the Oregon Subsidiaries be placed in receivership, there shall be an automatic stay of proceedings against those entities and their property in Oregon; however, there was no such stay as of May 23, 2023 when the Initial *CCAA* Order was granted.

23 Chalice seeks to have the *CCAA* stay of proceedings extended to all the Non-Filing Affiliates, with a carve-out for the Oregon receivership proceedings and the potential for a parallel stay in that jurisdiction. Subsidiaries in other states, such as Delaware, California and Nevada, will remain subject to the *CCAA* proceedings.

24 It is intended that Chalice, together with the CRO and the proposed Monitor, will work in a coordinated manner with the receiver appointed in Oregon (the "Oregon Receiver") to conduct a sales process to achieve a going concern solution.

Issues

25 The following issues raised by the relief sought are whether:

a. The Applicant meets the criteria for *CCAA* protection;

b. The *CCAA* stay should be extended to the Non-Filing Affiliates; and

c. The Administration Charge should be granted.

Analysis

Is the Applicant Eligible for CCAA Protection?

26 Section 9(1) of the *CCAA* provides that an application under the *CCAA* may be made to the court that has jurisdiction in the province where the debtor company has its "head office or chief place of business." The *CCAA* applies to a "debtor company" or "affiliated debtor companies" where the total claims against the debtor or its affiliates exceeds $5 million.

27 Chalice is incorporated in Ontario, with assets in Ontario (its bank accounts and shareholdings) and with total claims against it exceeding $5 million.

28 Chalice is in default under various secured debt obligations and does not have sufficient liquidity to make payments on unsecured debentures when the next interest payments come due on June 30, 2023. Given the CTO and the lack of interest in

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the capital markets for cannabis companies, Chalice's only immediate sources of funds are its subsidiaries. Those subsidiaries are struggling to pay retail landlords and employees.

29 Chalice has established that it is unable to meet its obligations as they become due and that it has ceased paying its current obligations in the ordinary course of business. It is an "insolvent person" within the meaning of s. 2 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") and under the expanded concept of insolvency accepted by this court in *Stelco Inc. (Re)*200448 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]) (Ont. S.C.), leave to appeal to ONCA ref'd, 2004 CarswellOnt 2936, leave to appeal to SCC ref'd, [2004] S.C.C.A. No. 336.

30 Chalice fits within the definition of a debtor company under s. 2 of the *CCAA* and is eligible to make this application under the *CCAA*.

31 Under s. 11.7 of the *CCAA*, when an Initial Order is made in respect of a *CCAA* debtor company, the court shall at the same time appoint a monitor. Chalice proposes to have KSV appointed as the monitor. KSV has consented to act as such.

32 KSV is a "trustee" within the meaning of subsection 2(1) of the *BIA*, it is established and qualified and has consented to act as monitor. KSV's involvement as the court-appointed monitor will lend stability and assurance to the Chalice Group's stakeholders. KSV is not subject to any of the restrictions set out in s. 11.7(2) of the *CCAA*.

Should the Stay of Proceedings be Extended to the Non-Filing Affiliates?

33 Section 11.02(1) of the *CCAA* permits this court to grant an initial stay of up to 10 days on an application for an initial order, provided the applicant establishes that such a stay is appropriate and that the applicant has acted with due diligence and in good faith (s. 11.02(3)(a-b)). The primary purpose of the *CCAA* stay is to maintain the *status quo* for a period while the debtor company consults with its stakeholders with a view to continuing its operations for the benefit of its creditors.

34 I am satisfied that the Applicant requires a stay of proceedings in order to provide it with the breathing room necessary to obtain the required funding to continue operations while pursuing various restructuring options.

35 Chalice seeks to extend the stay of proceedings to the Non-Filing Affiliates. The court's authority to grant such an order is derived from the broad jurisdiction under s. 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. The court has, on other occasions, extended the initial stay of proceedings to non-applicants, including foreign non-applicant affiliates. See for example, *Re Tamerlane Ventures Inc.*2013 ONSC 5461, 6 C.B.R. (6th) 328, at para. 2; *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323; *Re Nordstrom Canada Retail, Inc.*2023 ONSC 1422, at para. 42; *In the matter of a plan of compromise or arrangement of Lydian Group*, Court File No. CV-19-00633392-00CL (SCJ: Toronto, Commercial List) Order of Morawetz J. (Initial Order) dated December 23, 2019, at paras. 2, 10.

36 Further, in proceedings under Part IV of the *CCAA*, this court routinely extends a *CCAA* stay over non-applicants subject to foreign main insolvency proceedings. See for example, *In the matter of Hollander Sleep Products, LLC*, CV-19-620484-00CL (SCJ: Toronto, Commercial List) Order of Hainey J. (Initial Recognition Order) dated May 23, 2019, at para. 4; *In the matter of Brooks Brothers Group, Inc.*, Court File No. CV-20-00647463-00CL (SCJ: Toronto, Commercial List) Order of Hainey J. (Initial Recognition Order) dated September 14, 2020, at para. 4.

37 It has been held to be just and reasonable to extend a stay of proceedings to non-applicant affiliates when:

a. The applicant and its subsidiaries are "highly integrated ... and indispensable to the Applicants' business and restructuring... Failure to [extend the stay] would undermine the intent of the stay." See *Re Imperial Tobacco Canada Limited, et al*2019 ONSC 1684, 68 C.B.R. (6th) 322, at para. 12);

b. Without the benefit of a stay, the Non-Filing Affiliates would "run out of liquidity before the time that would reasonably be required to implement a restructuring." See *Re Urbancorp Toronto Management Inc.*2016 ONSC 3288, 37 C.B.R. (6th) 44, at para. 44.

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38 The Proposed Monitor explains that the extension of the stay over the Non-Filing Affiliates is critical to the stabilization of the Chalice Group's operation and ensuring a co-ordinated restructuring process, for a variety of reasons, including:

a. The vertically integrated nature of the Chalice Group's business, in which most key decision making is done through the Canadian parent company;

b. Greenpoint Workforce acts as the only employer within the Chalice Group and funds payroll;

c. The Non-Filing Affiliates hold the cannabis licences, operate the cultivation and production facilities and operate the sixteen retail stores;

d. Certain creditor and landlord-driven enforcement action is being pursued against certain Non-Filing Affiliates that may put the licences at risk; and

e. If enforcement steps are taken against the Non-Filing Affiliates, it is expected to materially destroy value and negatively impact a going-concern sale of the Chalice Group's assets or business.

39 These are among the factors described in *Re JTI-Macdonald Corp.*2019 ONSC 1625 at para. 15, as well as factors identified in the other case law cited above, that exist in this case in support of the extension of the stay to the Non-Filing Affiliates. The Applicant summarizes these factors in their factum as follows:

a. The business and operations of the Non-Filing Affiliates are significantly intertwined with those of the Applicant. The Chalice Group operates as a vertically integrated business and most key decision-making is done through the Applicant.

b. Not extending the stay to the Non-Filing Affiliates could jeopardize the success of a potential going concern sale of the business. Creditors are already pursuing enforcement action against the Non-Filing Affiliates that may put the Chalice Group's cannabis licenses at risk.

c. Failure of the restructuring would be more detrimental than extending the stay to the Non-Filing Affiliates. Enforcement action against the Non-Filing Affiliates, in Canada or elsewhere, would be detrimental to the Applicant's efforts to pursue a going concern sale of the Chalice Group and would undermine a process that would otherwise benefit the stakeholders of the Chalice Group as a whole.

d. The Non-Filing Affiliates will run out of liquidity before this proceeding can be completed. The Non-Filing Affiliates do not have enough cash to maintain regular operations, and cannot even independently fund the proposed Oregon Receivership.

e. The balance of convenience favours extending the stay. Extending the *CCAA* stay, concurrent with the stay of proceedings pursuant to the Oregon Receivership, will protect the Applicant's creditors by protecting the investment in its subsidiaries, as well as the stakeholders including employees, suppliers, customers, and lenders.

f. The Proposed Monitor supports extending the stay to the Non-Filing Affiliates.

40 Federal laws in the United States have precluded Chalice from pursuing a coordinated U.S. *Bankruptcy Code* proceeding. Any stay granted pursuant to the Oregon Receivership may not have effect beyond Oregon. In the circumstances, where protection under the U.S. *Bankruptcy Code* is not available to the Chalice Group, extending the *CCAA* stay to the Non-Filing Affiliates is the best option to achieve the breathing space necessary to preserve the value of the Chalice Group while efforts are co-ordinated between the Monitor, the CRO and the Oregon Receiver in the Oregon Receivership (if granted) for a going concern transaction.

41 No authority was cited for the precise situation in this case, of the *CCAA* stay being extended over Non-Filing Applicants that include some entities over which it is expected that a stay may be granted in another jurisdiction (the Oregon Receivership).

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However, it is not expected to be a conflicting or competing stay, but rather one that will be complementary and utilized in the co-ordinated efforts of the Monitor, the CRO and the Oregon Receiver.

42 The commencement of a *CCAA* proceeding to address the significant issues the Chalice Group faces represents the only realistic path forward at this time. An inability to restructure in a coordinated, court-supervised manner would be potentially disastrous for many stakeholders of the Chalice Group, including the employees and creditors of Chalice and its Non-Filing Affiliates.

Should the Administration Charge be Granted?

43 The proposed Initial Order creates a first-ranking Administration Charge of $400,000 CAD over Chalice's assets to secure the fees and expenses disbursements of the Proposed Monitor and its counsel and of Chalice's counsel. The services of these advisors are critical to the Applicant's ability to restructure. The Chalice Group requires the expertise of these professionals who will have distinct roles in the cross-border restructuring efforts of the Chalice Group. The Proposed Monitor has reviewed the Administration Charge and considers it to be reasonable and appropriate in the circumstances given the anticipated services to be provided by the professionals involved.

44 The Cash Flow Forecast anticipates professional fees payable as of June 2, 2023 of $300,000, with a similar monthly amount payable in early July and August. The initial anticipated payment of professional fees reflects the fact that pre-filing efforts have been undertaken to organize a co-ordinated restructuring plan which have brought the Applicants to the point they are in the current proceedings. The court expects that the payment of any professional fees will be subject to the usual review requirements in *CCAA* proceedings.

45 Section 11.52 of the *CCAA* gives this court the jurisdiction to grant a charge for the fees and expenses of financial, legal and other advisors or experts. Such charge can rank in priority to the claims of existing secured creditors. I am satisfied that the Administration Charge is necessary in the circumstances, is appropriately sized given the nature and complexity of the proceeding and should be granted.

The Initial Order and the Comeback Hearing

46 Chalice has worked with its advisors and the Proposed Monitor to limit the relief sought on this initial application to only the relief that is reasonably necessary in the circumstances for the continued operation of its businesses within the initial stay period. I am satisfied that the requested relief is necessary for the immediate stabilization of Chalice's businesses and to protect it and the interests of its various stakeholders. Additional authorizations must be addressed at the comeback hearing.

47 For the foregoing reasons the Initial Order was granted on May 23, 2023.

48 The "come back" hearing shall take place before me on June 1, 2023 at 2:00 p.m. on Zoom.

Application granted.

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2023 ONSC 1422
Ontario Superior Court of Justice

Nordstrom Canada Retail, Inc.

2023 CarswellOnt 3609, 2023 ONSC 1422, 2023 A.C.W.S. 870, 6 C.B.R. (7th) 114

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 NORDSTROM CANADA RETAIL INC., NORDSTROM CANADA HOLDINGS INC., LLC AND NORDSTROM CANADA HOLDINGS II, LLC

G.B. Morawetz C.J. Ont. S.C.J.

Heard: March 2, 2023
Judgment: March 3, 2023
Docket: CV-23-00695619-00CL

Counsel: Jeremy Dacks, Tracy Sandler, Martino Calvaruso, Marleigh Dick, for Applicants
Susan Ursel, Karen Ensslen, for Proposed Employee Representative Counsel
Brendan O'Neill, Brad Wiffen, for Proposed Monitor
George Benchetrit, for Directors and Officers of the Nordstrom Canada Entities
Aubrey Kauffman, for Nordstrom, Inc. (U.S.)

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.1 Stay of proceedings
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.d Miscellaneous
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings
Applicants including corporation and related companies sought relief under Companies' Creditors Arrangement Act — Corporation sought stay of proceedings to preserve applicants' business and stakeholder value — Corporation claimed that they were insolvent, and needed assistance of Act procedure to wind down in orderly fashion — Proposed monitor supported relief, sought by corporation — Corporation applied for above-noted relief, as well as appointment of monitor — Application granted — Applicants were affiliated debtor companies — Applicants were insolvent, and would not be able to satisfy their obligations without intervention — Court had jurisdiction over proceedings, as chief place of business was Ontario — Extension of stay, would prevent multiplicity of proceedings.
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Applicants including corporation and related companies sought relief under Companies' Creditors Arrangement Act — Corporation sought stay of proceedings to preserve applicants' business and stakeholder value — Corporation claimed that they were insolvent, and needed assistance of Act procedure to wind down in orderly fashion — Proposed monitor supported relief, sought by corporation — Corporation applied for above-noted relief, as well as appointment of monitor — Application granted — Administration and directors' charge as sought by corporation, were granted — Requested amount for administrative charge was reasonable, and was tailored to needs of corporation within stay period — Directors' charge was necessary, given

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potential liabilities and director's continued service — Increased amount of charge to $13.25 M from $10.75 M was reasonable in circumstances.

Table of Authorities

Cases considered by *G.B. Morawetz C.J. Ont. S.C.J.*:

BBB Canada Ltd., Re (2023), 2023 ONSC 1230 (Ont. S.C.J.) — referred to

Boreal Capital Partners Ltd et al. (Re) (2021), 2021 ONSC 7802, 2021 CarswellOnt 18878 (Ont. S.C.J. [Commercial List]) — referred to

Cannapiece Group Inc v. Carmela Marzili (2022), 2022 ONSC 6379, 2022 CarswellOnt 16818, 4 C.B.R. (7th) 194 (Ont. S.C.J. [Commercial List]) — referred to

Canwest Publishing Inc. / Publications Canwest Inc., Re (2010), 2010 ONSC 222, 2010 CarswellOnt 212, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) — referred to

In the Matter of the Companies' Creditors Arrangement Act (2023), 2023 ONSC 753, 2023 CarswellOnt 1528 (Ont. S.C.J. [Commercial List]) — referred to

Index Energy Mills Road Corporation (Re) (2017), 2017 ONSC 4944, 2017 CarswellOnt 13040, 51 C.B.R. (6th) 216 (Ont. S.C.J.) — referred to

Laurentian University of Sudbury (2021), 2021 ONSC 659, 2021 CarswellOnt 1224, 87 C.B.R. (6th) 278 (Ont. S.C.J.) — referred to

Lydian International Limited (Re) (2019), 2019 ONSC 7473, 2019 CarswellOnt 21645, 75 C.B.R. (6th) 314 (Ont. S.C.J. [Commercial List]) — referred to

McEwan Enterprises Inc. (2021), 2021 CarswellOnt 13630, 2021 ONSC 6453, 93 C.B.R. (6th) 80 (Ont. S.C.J.) — referred to

Northern Transportation Co., Re (2016), 2016 ABQB 522, 2016 CarswellAlta 1834, 40 C.B.R. (6th) 263, [2017] 3 W.W.R. 371 (Alta. Q.B.) — referred to

Re Just Energy Corp. (2021), 2021 ONSC 1793, 2021 CarswellOnt 3724 (Ont. S.C.J. [Commercial List]) — referred to

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

Target Canada Co., Re (2015), 2015 ONSC 303, 2015 CarswellOnt 620, 22 C.B.R. (6th) 323 (Ont. S.C.J.) — considered

4519922 Canada Inc., Re (2015), 2015 ONSC 124, 2015 CarswellOnt 178, 22 C.B.R. (6th) 44 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

Generally — referred to

s. 2 "insolvent person" — referred to

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

Generally — referred to

s. 2(1) "company" — referred to

s. 11 — referred to

s. 11.001 [en. 2019, c. 29, s. 136] — referred to

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — referred to

s. 11.04 [en. 2005, c. 47, s. 128] — referred to

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

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

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APPLICATION by corporation for relief including stay of proceedings in bankruptcy matter.

***G.B. Morawetz C.J. Ont. S.C.J.*:**

Background

1 At the conclusion of the hearing on March 2, 2023, I granted the requested relief, with reasons to follows. These are the reasons.

2 Nordstrom Canada Retail, Inc. ("Nordstrom Canada"), together with the other applicants listed above (collectively, the "Applicants"), seek relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). The Applicants seek a stay of proceedings (the "Stay") for the initial ten-day period (the "Initial Stay Period") under section 11.02(2) of the CCAA, together with related relief necessary to preserve the Applicants' business and stakeholder value during the Initial Stay Period. The Applicants also seek to extend the stay of proceedings to Nordstrom Canada Leasing LP ("Canada Leasing LP") and, for limited purposes, to Nordstrom, Inc. ("Nordstrom US"). The Applicants and Canada Leasing LP are referred to collectively below as the "Nordstrom Canada Entities."

3 Nordstrom Canada is a retailer which acts as the Canadian operating subsidiary of Nordstrom US. Nordstrom Canada entered the Canadian marketplace in September 2014 and currently operates 13 retail stores in Ontario, Alberta and British Columbia. Nordstrom Canada has experienced losses each year. Nordstrom Canada has only been able to sustain operations due to the financial support of Nordstrom US, which has provided Nordstrom Canada with approximately USD$775 million in net funding through various means since inception. Nordstrom US also provides various other ongoing strategic support, and administrative services.

4 Given Nordstrom Canada's financial performance and after considering available options, Nordstrom US has determined that it is in the best interest of its stakeholders to discontinue further financial and operational support for Nordstrom Canada in order to focus on its core business in the US. Nordstrom US has terminated its support and IP licensing arrangements with the Nordstrom Canadian Entities and replaced them with a Wind-Down Agreement (described further below).

5 The Applicants contend that without support from Nordstrom US, the Nordstrom Canada Entities are insolvent and require the flexibility of the CCAA in order to effect an orderly, responsible and controlled wind-down of operations.

6 The Applicants further contend that the requested relief is urgent, as the Nordstrom Canada Entities cannot operate without Nordstrom US's support, and continued support during the wind-down process is conditional on obtaining protection under the CCAA.

7 The requested relief includes the approval of the Employee Trust, the appointment of Employee Representative Counsel, Court-ordered Administration and D&O charges in an amount required for the Initial Stay Period, as well as a Co-tenancy Stay of proceedings (the "Co-tenancy Stay") and a stay in favour of Nordstrom US.

8 At the Comeback Hearing, the Applicants anticipate seeking certain additional relief, including the approval of an Employee Retention Plan. Additionally, the Applicants, in consultation with Alvarez & Marsal Canada Inc. (the "Proposed Monitor"), also plan to solicit bids from a number of professional third-party liquidators and to seek court approval in the near term to engage the successful liquidator bidder and to conduct an orderly realization process.

9 The facts have been set out in an affidavit of Misti Heckel, President of Nordstrom Canada Retail, Inc., and President and Treasurer of Nordstrom Canada Holdings, LLC and Nordstrom Canada Holdings II LLC. In addition, the Proposed Monitor has filed a pre-filing report.

10 The Proposed Monitor supports the position of the Applicants.

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The Nordstrom Canada Entities

11 Nordstrom Canada is incorporated pursuant to the laws of British Columbia. It is a wholly-owned subsidiary of Nordstrom International Limited ("NIL"). NIL is a wholly-owned subsidiary of Nordstrom US, a publicly traded company on the New York Stock Exchange. Nordstrom Canada serves as the Canadian retail sales operating entity.

12 As of January 28, 2023, Nordstrom Canada employed approximately 1925 full-time and 575 part-time employees. Of these, 2,047 are full-line store and 310 are Rack store employees.

13 Nordstrom Canada Holdings, LLC ("NCH") is a US single member limited liability company wholly-owned by NIL. NCH, as general partner, owns 99.9% of Canada Leasing LP, the Canadian leasing entity. Nordstrom Canada Holdings II, LLC ("NCHII") is a US holding company that owns 0.1% of Canada Leasing LP, as its limited partner.

14 Canada Leasing LP is an Alberta limited partnership responsible for the Canadian real estate activities, such as leasing retail space from the Landlords, and subleasing the retail space to Nordstrom Canada.

Business of the Applicants

15 Nordstrom Canada currently operates six Nordstrom-branded full-line stores and seven off-price Nordstrom Rack stores in Ontario, Alberta and British Columbia. These retail operations are conducted in facilities which are leased to Canada Leasing LP, as lessee, by third-party landlords (the "Landlords") pursuant to leases (the "Leases") and sublet by Canada Leasing LP to Nordstrom Canada pursuant to subleases (the "Subleases").

16 Ms. Heckel contends that Nordstrom Canada Entities' business is dependent on Nordstrom US for administrative and business support services, including legal, finance, accounting, bill processing, payroll, human resources, merchandising, strategy, and information technology project support (the "Shared Services"). Nordstrom US formerly provided these Shared Services under an inter-affiliate licence and services agreement, effective as of February 3, 2019, between Nordstrom US and Nordstrom Canada (the "Licence and Services Agreement").

17 On March 1, 2023, Nordstrom US notified Nordstrom Canada that it would be terminating the Licence and Services Agreement in accordance with its terms, as well as the other agreements referenced above to which it is a party. Subsequently, the Nordstrom Canada Entities agreed to have the termination become effective immediately. Nordstrom US and the Nordstrom Canada Entities have entered into a new administrative services agreement effective March 1, 2023 (the "Wind-Down Agreement") for Nordstrom US to continue providing Shared Services, as well as a license to use the essential IP, for the sole purpose of an orderly wind down under the CCAA.

Financial Position of the Nordstrom Canada Entities

18 As of January 28, 2023, the Nordstrom Canada Entities had combined total assets with a book value of approximately $500,784,000 and total liabilities of approximately $561,024,000.

19 Since 2014, Nordstrom Canada has experienced yearly losses across the majority of its 13 Canadian locations. For the year ended January 28, 2023, Nordstrom Canada generated revenue of $515,046,000. As a result of its high occupancy and other operating costs, its EBITDA for the year ending January 28, 2023, was negative $34,563,000, prior to taking into account intercompany payments.

20 Most of the Nordstrom Canada Entities' losses have been absorbed by Nordstrom US through intercompany payments. However, Nordstrom US has resolved to discontinue this support, without which Nordstrom Canada cannot continue operating.

21 The Nordstrom Canada Entities do not owe any secured indebtedness. Prior to the commencement of this proceeding, by virtue of amendments agreed upon by parties to a revolving Credit Agreement among Nordstrom US (as Borrower), Wells Fargo Bank, National Association, and certain other lenders, Nordstrom Canada was released from its guarantee obligations in

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relation to this indebtedness. The corresponding security interest granted by Nordstrom Canada was also released. Nordstrom Canada does not have any commitments under and has not granted any security in relation to the remaining debt agreements of Nordstrom US.

22 Ms. Heckel states that since 2014, Nordstrom US has provided the Nordstrom Canada Entities with approximately USD $950 million. Taking into account the distributions of USD $175.6 million made by Nordstrom Canada to Nordstrom US, Nordstrom US has provided net funding to Nordstrom Canada of USD $775 million.

23 Nordstrom US, with the support of its advisors, has decided in its business judgment that it is in the best interests of Nordstrom US to discontinue its support of the Canadian operations. The Applicants contend that due to its operational and financial dependence on Nordstrom US, Nordstrom Canada cannot continue operations without the full support of Nordstrom US, including a licence to use Nordstrom US's IP.

24 The Nordstrom Canada Entities believe that these CCAA proceedings are the only practical means of ensuring a fair and orderly wind-down. Additionally, Nordstrom US has indicated that it is only willing to continue providing the Shared Services and to permit use of the IP if the wind-down is supervised by this Court under the CCAA.

Requested Relief

25 Having reviewed the record and hearing submissions, I am satisfied that the Applicants are all affiliated debtor companies with total claims against them in excess of $5 million. I am also satisfied that Nordstrom Canada and the other Applicants are each a "company" for the purposes of s. 2 of the CCAA because they do business in or have assets in Canada.

26 I accept that without the ongoing support of Nordstrom US, the realizable value of the Nordstrom Canada Entities' assets will be insufficient to satisfy all of their obligations to their creditors. I am satisfied that the Applicants in these proceedings are either currently insolvent under the definition of "insolvent person" in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") or the expanded concept of insolvency adopted by this Court in *Stelco Inc., Re*, 2004 CanLII 24933 (Ont. Sup. Ct.).

27 I am also satisfied that this Court has jurisdiction over the proceedings. The chief place of business of the Nordstrom Canada Entities is Ontario: 8 of the 13 Nordstrom Canada retail stores are located in Ontario, while approximately 1,450 out of Nordstrom Canada's 2,500 full and part-time employees work in Ontario. Further, during fiscal year 2022, store sales in Ontario totalled $220 million, compared to $148 million in British Columbia and $77 million in Alberta .

28 There are a number of examples of CCAA proceedings that have been commenced for the purpose of winding down a business. Recent examples include Target Canada Co. (Re), 2015 ONSC 303, *Bed Bath & Beyond Canada Limited (Re)* 2023 ONSC 1014, and *Bed Bath & Beyond Canada Limited (Re)*, 2023 ONSC 1230 (Ont. S.C.J.) .

29 Section 11.02(1) of the CCAA permits the Court to grant an initial stay of up to 10 days on an application for an initial order, provided such a stay is appropriate and the applicants have acted with due diligence and in good faith. Under section 11.001, other relief granted pursuant to this Court's powers under section 11 of the CCAA at the same time as an order under s. 11.02(1) must be limited "to relief that is reasonably necessary for the continued operation of the debtor company in the ordinary course of business during that period." In my view, the relief requested in this first-day application meets these criteria.

30 Where the operations of partnerships are integral and closely related to the operations of the applicants, it is well-established that the CCAA Court has the jurisdiction to extend the protection of the stay of proceedings to those partnerships in order to ensure that the purposes of the CCAA can be achieved. (See: Target Canada Co. (Re), 2015 ONSC 303 at paras. 42 and 43; *4519922 Canada Inc. (Re)*, 2015 ONSC 124 at para. 37; *Just Energy Corp. (Re)*, 2021 ONSC 1793 at para. 116; *Bed Bath & Beyond Canada Limited (Re)*, 2023 ONSC 1014, at para. 28).

31 The Applicants submit that it is appropriate to extend the Stay to Canada Leasing LP. As the lessor of Nordstrom Canada's retail premises, its business and operations are fully intertwined with those of the Nordstrom Canadian Entities, and any proceedings commenced against Canada Leasing LP would necessarily involve key personnel of the Applicants, who

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collectively hold a 100% interest in Canada Leasing LP. As counterparty to the store Leases, Canada Leasing LP is also insolvent and needs the breathing space provided by the stay to prevent the exercise of Landlord remedies during the pendency of the proposed liquidation sale.

32 I accept this submission. In my view, the proposed extension of the Stay is appropriate in the circumstances.

33 Many retail leases provide that other tenants within the same shopping centre have certain rights against the Landlords upon an anchor tenant's (such as Nordstrom Canada's) insolvency or cessation of operations. In order to alleviate potential prejudice, the Applicants request that the Court extend the Stay to all rights of third-party tenants against the Landlords, owners, operators or managers of the commercial properties where the Nordstrom Canada's stores, offices or warehouses are located that arise as a result of the Applicants' insolvency, or as a result of any steps taken by the Applicants pursuant to the proposed Initial Order.

34 The Court's authority to grant the Co-tenancy Stay flows from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on "any terms that may impose." The Applicants submit that a Co-tenancy Stay is justified on the basis that, if tenants were permitted to exercise these "co-tenancy" rights during the Initial Stay Period (and beyond), the claims of the landlords against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company and that such claims would result in a multiplicity of proceedings which would be detrimental to an efficient and orderly wind-down.

35 I have been persuaded that the Co-tenancy Stay should be granted in the circumstances.

36 The Applicants also request that the Stay be extended (subject to certain exceptions related to the Cash Management System) to Nordstrom US in relation to claims that are derivative of the primary liability of or related to the Nordstrom Canada Entities (the "Parent Stay"). The Applicants submit that, among others, the Parent Stay would affect contractual counterparties with contracts or purchase orders involving Nordstrom Canada merchandise and concession operations entered into or issued by Nordstrom US on behalf of, or jointly with, Nordstrom Canada. The Parent Stay would also affect claims that arise out of or in connection with any indemnity, guarantee or surety relating the Leases. The proposed Initial Order further provides that any Landlord claim pursuant to an indemnity or guarantee in relation to either Canada Leasing LP or the Applicants shall not be released or affected in any way in any Plan filed by the Applicants under the CCAA, or any proposal under the BIA.

37 The Parent Stay is being requested as a temporary measure designed to preserve the *status quo* and create breathing space during the Initial Stay Period, in particular to engage in good faith discussions with the Landlords. It is intended to prevent a multitude of proceedings being commenced in several different jurisdictions against Nordstrom US during this initial period with possibly inconsistent outcomes.

38 The Court recently granted similar relief during the initial stay period in *Bed Bath & Beyond Canada Limited (Re), 2023 ONSC 1014*. I note that it is the Applicants' intention to request a continuation of the Parent Stay for a reasonable period beyond the Initial Stay Period at the Comeback Hearing.

39 I note that the Applicants submit that section 11.04 of the CCAA does not prohibit this relief. Firstly, the Indemnities are not "guarantees." Secondly, even if the Indemnities could be characterized as "guarantees", the opening words of section. 11.04 do not oust the Court's jurisdiction under section 11 to grant a third party stay in favour of a guarantor in appropriate circumstances.

40 The Applicant submits that the Court has jurisdiction under section 11 to grant a third party stay and references *Target Canada* at para. 50, *McEwan Enterprises Inc.*, , 2021 ONSC 6453 at para. 45, *Laurentian University of Sudbury*2021 ONSC 659 at paras. 30-33 and *Lydian International Limited*, 2019 ONSC 7473 at para. 39. The Applicant submits that section 11.04 of the CCAA does not prevent the Court from granting such a remedy in its discretion on the basis that the section is inapplicable, as the indemnities at issue here are not guarantees. In its factum, the Applicant also references that the Alberta Court of Queen's Bench in *Northern Transportation Company Limited (Re)*, 2016 ABQB 522 at para. 69 took a contrary view. The contrary view was also expressed in *Cannapiece Group Inc. v. Carmela Marzili*, 2022 ONSC 6379.

41 This issue is not free of doubt and affected landlords have not been served and did not appear at this hearing.

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42 There are outstanding issues as between the Applicant and the landlords that have to be addressed in the near future. In an effort to encourage discussions as between the Applicants and the various landlords, I am prepared to grant the Parent Stay for the initial 10-day period prior to the comeback hearing.

43 Ms. Heckel states that it is expected that the vast majority of Nordstrom Canada's employees will be provided with working notice of termination on, or shortly after, the commencement of these CCAA proceedings.

44 Nordstrom Canada is seeking this Court's approval of the Employee Trust, which is to be funded by Nordstrom US. The Employee Trust is intended to provide Nordstrom Canada employees with a measure of financial security during the wind-down process.

45 The Applicants submit that the Court in *Target Canada* exercised its CCAA jurisdiction to sanction the establishment of an employee trust established by the debtor company's parent for similar purposes.

46 The Applicants submit that the Employee Trust is intended to ensure that these employees receive the full amount of termination and severance pay owing to them pursuant to employment standards legislation in a timely manner. Nordstrom US has a right of subrogation against Nordstrom Canada in respect of amounts paid pursuant to the Employee Trust.

47 I am satisfied that the creation of an Employee Trust is fair and appropriate in the circumstances. The Employee Trust is approved.

48 The Applicants seek the appointment of Ursel Phillips Fellows Hopkinson LLP as Employee Representative Counsel, to represent Nordstrom Canada's store-level employees and all non-KERP eligible non-store employees. Among other things, Employee Representative Counsel will assist with questions regarding Eligible Employee Claims and other issues with respect to the Employee Trust.

49 I am satisfied that the appointment of Employee Representative Counsel is appropriate in these circumstances. Employees who do not wish to be represented by Ursel Phillips will have the right to opt out.

50 The Applicants also seek authorization, with the consent of the Monitor, to make payments of pre-filing amounts owing to certain suppliers, including: (i) logistics or supply chain providers; (ii) providers of information, internet, telecommunications and other technology; and (iii) providers of payment, credit, debit and gift card processing related services. The Applicants believe that categories of suppliers are fundamental to continuing operations and the proposed liquidation sale and any disruptions of their services could jeopardize the orderly wind down, given the expedited timelines for the proposed Realization Process.

51 For third-party suppliers or service providers other than those listed above, the Initial Order proposes permitting payments in respect of pre-filing amounts up to a maximum aggregate amount of $1,000,000 with the consent of the Monitor, if, in the opinion of the Nordstrom Canada Entities, the supplier is critical to the orderly wind down of Nordstrom Canada's business.

52 The Applicants submit that the Court has exercised its jurisdiction on multiple occasions to grant similar relief (See: *Target Canada* at paras. 62-65; *Just Energy*, at para. 99; *Original Traders Energy Ltd. and 2496750 Ontario Inc. (Re)2023 ONSC 753 (Ont. S.C.J. [Commercial List])* , at paras. 72-74; *Boreal Capital Partners Ltd et al. (Re), 2021 ONSC 7802*, at paras. 20-22). The Court in *Index Energy Mills Road Corporation (Re),*2017 ONSC 4944 at para. 31 outlined the factors that courts have considered in determining whether to grant such authorization, including (a) whether the goods and services are integral to the business of the applicants; (b) the applicants' dependency on the uninterrupted supply of the goods or services; (c) the fact that no payments will be made without the consent of the Monitor (which is a requirement under the proposed Initial Order); and (d) the effect on the debtors' operations and ability to restructure if it could not make such payments.

53 In my view, a consideration of these factors leads to the conclusion that this requested relief should be granted.

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54 Pursuant to section 11.52 of the CCAA, the Applicants are requesting an Administration Charge in favour of the Proposed Monitor, along with its counsel, counsel to the Nordstrom Canada Entities, counsel to the directors and officers of the Nordstrom Canada Entities, and Employee Representative Counsel, as security for their respective fees and disbursements up to a maximum of $750,000 (the "Administration Charge"), which amount covers the time period until the comeback hearing. The Applicants anticipate requesting an increase to $1.5 million at the Comeback Hearing. The Administration Charge was sized in consultation with the Proposed Monitor and is proposed to have first priority over all other charges and security interests.

55 In my view, the requested Charge satisfies the well-accepted factors originally established by Pepall J. (as she then was) in *Canwest Publishing Inc./Publications Canwest Inc. (Re)2010 ONSC 222 (Ont. S.C.J. [Commercial List])* , at para. 39. Among other factors, the requested amount is fair and reasonable, and appropriate to the size and complexity of the businesses being restructured. In addition, the initial amount requested is tailored only to the needs within the Initial Stay Period. This relief is granted.

56 In accordance with section 11.51 of the CCAA, the Applicants also seek a directors and officers charge (the "Directors' Charge") in the amount of $10.75 million until the Comeback Hearing. The Applicants anticipate requesting an increase to $13.25 million at the Comeback Hearing. The Applicants submit that the quantum of the Director's Charge was arrived at in consultation with the Proposed Monitor and is proposed to be secured by the property of the Nordstrom Canada Entities and to rank behind the Administration Charge. The Directors' Charge would act as security for the Nordstrom Canada Entities' indemnification obligations for director and officer liabilities that may be incurred after the commencement of the CCAA proceeding. This charge would only be relied upon to the extent liabilities are not covered by existing insurance.

57 In light of the potential liabilities, the continued service and involvement of the director and officers in this proceeding is conditional upon the granting of an Order which includes the Directors' Charge. I am satisfied that the Directors' Charge is necessary in the circumstances.

Disposition

58 In summary, the Applicants' request for the relief set out in the proposed Order is granted and Alvarez & Marsal Canada Inc. is appointed as Monitor. The Comeback Hearing is scheduled for March 10, 2023.

Application granted.

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2018 SKCA 36
Saskatchewan Court of Appeal

Industrial Properties Regina Limited v. Copper Sands Land Corp.

2018 CarswellSask 252, 2018 SKCA 36, 292 A.C.W.S. (3d) 479, 422 D.L.R. (4th) 749, 61 C.B.R. (6th) 38

Industrial Properties Regina Limited (Appellant / Respondent) And Copper Sands Land Corp., Willow Rush Development Corp., Midtdal Developments & Investments Corp., Prairie Country Homes Ltd., JJL Developments & Investments Corp. and MDI Utility Corp. (Respondents / Applicants)

101297277 Saskatchewan Ltd. (Appellant / Respondent) And Copper Sands Land Corp., Willow Rush Development Corp., Midtdal Developments & Investments Corp., Prairie Country Homes Ltd., JJL Developments & Investments Corp. and MDI Utility Corp. (Respondents / Applicants)

Affinity Credit Union 2013 (Appellant / Respondent) and Copper Sands Land Corp., Willow Rush Development Corp., Midtdal Developments & Investments Corp., Prairie Country Homes Ltd., JJL Developments & Investments Corp. and MDI Utility Corp. (Respondents / Applicants)

Herauf, Ryan-Froslie, Schwann JJ.A.

Heard: March 5, 2018
Judgment: May 23, 2018 *
Docket: CACV3176, CACV3177, CACV3178

Counsel: Diana K. Lee, Q.C., Alexander Shalashniy, for Industrial Properties Regina Ltd.
Rick Van Beselaere, Q.C., for 101297277 Saskatchewan Ltd.
Ryan A. Pederson, for Affinity Credit Union
Jeffery M. Lee, Q.C., Paul Olfert, for Respondents

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.6 Appeals
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Appeals
Debtors operated trailer park — Debtors' assets were comprised of undeveloped lands, lands that housed trailer park and incomplete water and waste treatment facility — Debtors owed secured creditors amount of $10.7 million — Debtors sought protection under Companies' Creditors Arrangement Act (CCAA) following initiation of foreclosure proceedings and obtained initial order staying creditor enforcement for 30 days, authorizing of $1.25 million in interim financing for ongoing costs, cost of CCAA proceedings, and completion of commissioning of water treatment utility — Sale approval and vesting order was granted in respect of undeveloped lands — Secured creditors were granted leave to appeal on issue of whether it was appropriate to grant initial order for CCAA protection and $1.25 million in interim financing — Appeal by secured creditors — Appeal allowed in part — Evidence supported findings that appropriate circumstances and reasonable possibility of restructuring existed, and that debtors acted in good faith and with due diligence — Chambers judge appropriately considered secured creditors' lack of confidence in viability of debtors' plan — Judge erred in permitting debtors to obtain $1.25 million in interim financing as part of initial order without consideration of mandatory factors enumerated in s. 11.2(4) of CCAA, particularly whether loan would enhance prospects of viable compromise or arrangement given secured creditors' steadfast opposition to further

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financing — There was no evidence of urgent circumstances justifying interim financing — Nature of debtors' business did not require interim financing to continue operation — There was no evidence of how commissioning of water treatment facility would contribute to viable restructuring of debtors — Part of initial order related to interim financing was set aside Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s 11.2(4).

Table of Authorities

Cases considered by *Herauf J.A.*:

Alberta Treasury Branches v. Conserve Oil 1st Corp. (2016), 2016 ABCA 87, 2016 CarswellAlta 548, 35 C.B.R. (6th) 6 (Alta. C.A.) — referred to

Alberta Treasury Branches v. Tallgrass Energy Corp (2013), 2013 ABQB 432, 2013 CarswellAlta 1496, 8 C.B.R. (6th) 161 (Alta. Q.B.) — considered

Forest & Marine Financial Corp., Re (2009), 2009 BCCA 319, 2009 CarswellBC 1738, 54 C.B.R. (5th) 201, [2009] 9 W.W.R. 567, 96 B.C.L.R. (4th) 77, 273 B.C.A.C. 271, 461 W.A.C. 271 (B.C. C.A.) — referred to

Hush Homes Inc., Re (2015), 2015 ONSC 370, 2015 CarswellOnt 558, 22 C.B.R. (6th) 67 (Ont. S.C.J.) — referred to

Matco Capital Ltd. v. Interex Oilfield Services Ltd. (August 1, 2006), Doc. 0601-08395 (Alta. Q.B.) — considered

New Skeena Forest Products Inc., Re (2005), 2005 BCCA 192, 2005 CarswellBC 705, 7 M.P.L.R. (4th) 153, 9 C.B.R. (5th) 278, 39 B.C.L.R. (4th) 338, [2005] 8 W.W.R. 224, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 210 B.C.A.C. 247, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 348 W.A.C. 247 (B.C. C.A.) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1990 CarswellOnt 139 (Ont. C.A.) — referred to

Pacific Shores Resort & Spa Ltd., Re (2011), 2011 BCSC 1775, 2011 CarswellBC 3500, 75 C.B.R. (5th) 248 (B.C. S.C. [In Chambers]) — referred to

Redstone Investment Corp., Re (2014), 2014 ONSC 2004, 2014 CarswellOnt 5119 (Ont. S.C.J.) — referred to

Rimmer v. Adshead (2002), 2002 SKCA 12, 2002 CarswellSask 19, [2002] 4 W.W.R. 119, 24 R.F.L. (5th) 159, 217 Sask. R. 94, 265 W.A.C. 94 (Sask. C.A.) — followed

Stomp Pork Farm Ltd., Re (2008), 2008 SKCA 73, 2008 CarswellSask 358, 43 C.B.R. (5th) 42, [2008] 8 W.W.R. 607, 311 Sask. R. 186, 428 W.A.C. 186 (Sask. C.A.) — considered

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — considered

York (Regional Municipality) v. Thornhill Green Co-Operative Homes Inc. (2010), 2010 ONCA 393, 2010 CarswellOnt 3658, 262 O.A.C. 232, 94 R.P.R. (4th) 1, 68 C.B.R. (5th) 73 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

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

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — referred to

s. 11.2(2) [en. 2005, c. 47, s. 128] — considered

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

s. 11.02(3)(a) [en. 2005, c. 47, s. 128] — considered

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s. 11.02(3)(b) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4) [en. 2005, c. 47, s. 128] — referred to

s. 11.2(4)(a) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(d) [en. 2007, c. 36, s. 65] — considered

s. 13 — referred to

s. 14(1) — referred to

s. 36 — considered

APPEAL by secured creditors from initial order under *Companies' Creditors Arrangement Act*.

***Herauf J.A.*:**

I. INTRODUCTION

1 The respondents are six corporations, all of which are owned and controlled by one individual. The appellants represent the secured creditors of one or more of the respondents. On December 20, 2017, the respondents were granted an initial order, a sale approval and vesting order and access to interim financing pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*]. The appellants appealed those orders to this Court. The appeal was heard on March 5, 2018. On March 9, 2018, the Court allowed the appeal in part with more extensive written reasons to follow. These are those reasons.

II. BACKGROUND FACTS

2 The assets of the respondents consist of a trailer park (Copper Sands Trailer Park) and an incomplete water treatment and waste water treatment facility located on lands owned by the respondents, and undeveloped lands known as the Willow Rush property. The Copper Sands Trailer Park is the respondents' only functioning business and has two employees.

3 As of November 2017, the respondents owed the appellants, collectively, in excess of $10,725,000. When the appellant, Affinity Credit Union, commenced foreclosure proceedings, the respondents applied pursuant to the *CCAA*, seeking the following relief, *inter alia*:

(a) an initial order staying creditor enforcement to facilitate the companies' restructurings, including the sale of Willow Rush; and

(b) an order authorizing interim financing up to $1.25 million with a priority charge, to enable it to complete the water treatment facility.

4 On November 15, 2017, the parties argued the matter before a Chambers judge. The appellants firmly opposed the relief sought by the respondents, challenging the appropriateness of *CCAA* proceedings in the circumstances. The appellants were skeptical of the legitimacy of the Willow Rush sale and questioned whether the water treatment facility was capable of completion and, if so, whether it could produce viable capital. Due to these concerns, amongst others, the appellants opposed the initial order and the interim financing, stressing the prejudice the creditors would suffer if these orders were granted.

5 After hearing submissions, the Chambers judge concluded the respondents' application was premature and adjourned the matter to enable the respondents to confirm the validity of the Willow Rush sale and to file additional material relating to completion of the water treatment facility ((21 November 2017) Saskatoon, QBG 1693/2017 (Sask CA) [*November fiat*]).

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6 The matter was returned to the Court of Queen's Bench on December 11, 2017. At that time, in addition to the application for an initial order and interim financing, the respondents asked the Chambers judge to grant sale approval and a vesting order pursuant to s. 36 of the *CCAA*, to facilitate the sale of the Willow Rush property.

7 In his fiat ((20 December 2017) Saskatoon, QBG 1693/2017 (Sask CA) [*December fiat*]), the Chambers judge granted the respondents' applications. The Chambers judge granted the initial order, imposing a stay of creditor enforcement for 30 days, authorized $1.25 million interim financing, $800,000 of which was to be used to "complete the commissioning of the water treatment utility", $337,500 for the cost of the *CCAA* proceedings, and $112,500 for "ongoing costs", and granted the sale approval and vesting order. The vesting order was set to expire on January 12, 2018, if the proposed sale did not close.

8 Pursuant to ss. 13 and 14(1) of the *CCAA*, the appellants sought leave from this Court to appeal the initial order, the interim financing and the sale approval and vesting order. Before leave was granted and before the expiry of the vesting order, the Willow Rush sale closed for the asking price of $4.2 million. For this reason, leave to appeal relating to the sale and vesting order were denied. Leave was granted on the issue of whether it was appropriate to grant the initial order for *CCAA* protection and to grant $1.25 million interim financing.

9 On March 9, 2018, the Court concluded the Chambers judge had erred in granting the interim financing and the appeal related to that aspect of the matter was allowed. The appeal relating to the appropriateness of the initial order wasdismissed.

III. STANDARD OF REVIEW

10 Decisions made pursuant to the *CCAA* are highly discretionary and attract deference from this Court. In *Stomp Pork Farm Ltd., Re*, 2008 SKCA 73, 311 Sask. R. 186 (Sask. C.A.) [*Stomp Pork*], Jackson J.A. articulated the Court's general reluctance to intervene in *CCAA* matters, noting the familiarly *CCAA* judges have with the different parties involved and the Chambers judge's meaningful understanding of the circumstances:

> [25] The Court recognizes that there is a general reluctance on behalf of appellate courts to intervene in decisions taken by restructuring judges in *CCAA* matters. The mix of business and legal decisions made in real time can make it difficult to say, after the fact and with any degree of precision, that one particular decision would have been better than another. Further, the Court is hesitant to elevate a decision in one restructuring to a principle of law that will hamper the appropriate exercise of discretion in another. ...

11 Although appellate courts exercise their right of review sparingly, *CCAA* decisions are not immune from appellate intervention. Judges making *CCAA* orders must exercise their discretion judiciously, which requires considering relevant factors and reaching a legally correct conclusion: *Stomp Pork* at para 27; *New Skeena Forest Products Inc., Re*, 2005 BCCA 192B.C. C.A. at para 26, [2005] 8 W.W.R. 224 (B.C. C.A.). As Dr. Janis P. Sara explains, appellate courts will intervene in limited circumstances:

> Appellate courts will accord a high degree of deference when asked to interfere with the exercise of authority of a *CCAA* court. At the same time, discretionary decisions are not immune from review if the appellate court reaches the clear conclusion that there has been a wrongful exercise of authority or there is a fundamental question of the lower court's jurisdiction.
>
> (*Rescue! The Companies' Creditors Arrangement Act*, 2d ed (Toronto: Carswell, 2013) at 181)

12 In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [*Century Services*], the Supreme Court discussed a court's wide discretion in *CCAA* matters. The Supreme Court explained that this judicial discretion must be exercised in furtherance of the legislation's remedial purposes:

> [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:

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

13 The standard of review with respect to the exercise of judicial discretion, such as in *CCAA* matters, is set out in *Rimmer v. Adshead*, 2002 SKCA 12 (Sask. C.A.) at para 58, (2002), 217 Sask. R. 94 (Sask. C.A.):

> ... [T]he powers in issue are discretionary and therefore fall to be exercised as the judge vested with them thinks fit, having regard for such criteria as bear upon their proper exercise. The discretion is that of the judge of first instance, not ours. Hence, our function, at least at the outset, is one of review only: review to determine if, in light of such criteria, the judge abused his or her discretion. Did the judge err in principle, disregard a material matter of fact, or fail to act judicially? Only if some such failing is present are we free to override the decision of the judge and do as we think fit. Either that, or the result must be so plainly wrong as to amount to an injustice and invite intervention on that basis. ...

14 Applying this standard of review, we see no merit to the appellants' argument that the Chambers judge erred in granting the initial order. However, we are of the opinion the Chambers judge failed to consider the mandatory factors enumerated in s. 11.2(4) of the *CCAA* prior to granting the interim financing. This error resulted in a wrongful exercise of discretion given the preliminary nature of the *CCAA* proceedings.

IV. THE INITIAL ORDER

15 The first formal step in *CCAA* proceedings is the debtor company applying to the court for an initial order. The terms of initial orders are provided for in ss. 11.02(1) and (3) of the *CCAA*:

> **11.02** (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> . . .
>
> (3) *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*.
>
> (Emphasis added)

16 The purpose of the initial order is to stay creditor enforcement in order to maintain the debtor corporation's "status quo" for a specified and limited period so that it may develop a plan to be presented to creditors for their consideration. The initial order

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staying creditor enforcement provides the debtor corporation some breathing room to allow it to prepare, file and seek approval from creditors and ultimately the courts of its proposed plan: *Rescue! The Companies' Creditors Arrangement Act* at 31.

17 Pursuant to ss. 11.02(1) and (3), the court may grant an initial order staying creditor enforcement for a term not exceeding 30 days, if the applicant satisfies the court that the appropriate circumstances exist and that it is acting in good faith and with due diligence.

A. Appropriate circumstances

18 In *Century Services*, the Supreme Court discussed the remedial objectives of the *CCAA* and explained that "appropriate circumstances" exist when an order advances these remedial objectives by providing the conditions under which the debtor can attempt to reorganize:

> [60] Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed. ...
>
> . . .
>
> [70] ... 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. ...
>
> (Emphasis added)

19 The evidentiary burden the debtor corporation must satisfy to establish "appropriate circumstances" for the purposes of a 30-day stay order is not exceptionally onerous*: Alberta Treasury Branches v. Tallgrass Energy Corp*, 2013 ABQB 432 (Alta. Q.B.) at para 14, 2013 8 C.B.R. (6th) 161(Alta. Q.B.) [*Alberta Treasury*]; *Matco Capital Ltd. v. Interex Oilfield Services Ltd.* (August 1, 2006), Doc. 0601-08395 (Alta. Q.B.) [*Matco*]; *Hush Homes Inc., Re*, 2015 ONSC 370 (Ont.)S.C.J. at paras 51-53, 201522 C.B.R. (6th) 67(Ont. S.C.J.); *Redstone Investment Corp., Re*, 2014 ONSC 2004 (Ont. S.C.J.) at paras 49-50.

20 As the Supreme Court noted in *Century Services*, initial *CCAA* orders are made in the "hothouse of real-time litigation" (at para 58). The debtor corporation is often in crisis-mode due to its failure to meet creditor obligations and is seeking *CCAA* protection to obtain some breathing room to enable it to get its affairs in order without creditors knocking at the door. Therefore, to obtain an initial 30-day order, the applicant is not required to prove it has a "feasible plan" but merely "a germ of a plan": *Alberta Treasury* at para 14. The court must assess whether the circumstances are such that, with the initial order, the debtor corporation has a "reasonable possibility of restructuring": *Matco*. To require the applicant corporation to present a fully-developed restructuring plan or have the support of all its creditors at the initial stage of *CCAA* proceedings, although desirable, is not expected. To impose such a threshold to establish "appropriate circumstances" would unduly hinder the purpose of an initial order which, as the Supreme Court explained in *Century Services*, is to provide the conditions under which the debtor can *attempt* to reorganize.

21 For the purposes of an initial order, the debtor corporation must convince the court that the initial order will "usefully further" its efforts towards attempted reorganization. If the debtor corporation satisfies this onus, the court may grant the initial application and provide the conditions under which the debtor corporation can attempt to reorganize, namely, staying creditor enforcement to preserve the debtor corporation's status quo for a limited period of time. If, however, the debtor corporation fails to satisfy this onus and the court determines that the application is merely an effort by the debtor corporation to avoid its obligations to its creditors and postpone an inevitable liquidation, the initial application should be denied: *Rescue! The Companies' Creditors Arrangement Act* at 53-54.

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B. Good faith and due diligence

22 In addition to proving appropriate circumstances, the applicant corporation must convince the court that it is acting in good faith and with due diligence pursuant to s. 11.02(3)(b). Despite the wording of s. 11.02(3)(b) indicating "good faith and due diligence" applies only to orders under subsection (2), that being orders "other than initial applications", the Supreme Court in *Century Services* determined good faith and due diligence applies to initial orders as well:

> [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. ...

23 Although it is a consideration for granting an initial order, courts generally defer the in-depth analysis of good faith and due diligence to subsequent applications, such as the extension of the initial 30-day order: Rogers, Sieradski & Kanter, "What Does 'Good Faith' Mean in Insolvency Proceedings?" Vol 4-4 Insolvency Institute of Canada (Articles) (WL). If, however, the court determines the debtor corporation is not seeking *CCAA* protection in good faith or there is convincing evidence of a lack of due diligence, the court may deny an initial order on the basis of a failure to satisfy the baseline requirement in s. 11.02(3)(b): see *Alberta Treasury*.

C. Did the Chambers judge err in granting the initial order?

24 The appellants submit the Chambers judge erred in concluding the respondents had satisfied the "appropriate circumstances" and "good faith and due diligence" requirements contained in ss. 11.02(3)(a) and (b).

25 In support of this argument, the appellants contend *CCAA* proceedings are not appropriate as the respondents have only one active business, the Copper Sands Trailer Park, which has only two employees. The appellants argue *CCAA* proceedings are not needed to "avoid the social and economic costs of liquidating assets" as there are no such consequences given the minimal business activity of the respondents.

26 In addition, the appellants submit the Chambers judge failed to consider the creditors' lack of faith and confidence in management when determining whether the initial order was appropriate. The appellants also allege the Chambers judge failed to provide adequate reasons for his conclusion that the respondents were acting in good faith and with due diligence.

27 The Chambers judge determined the respondents were engaged in active business, which was "facing a looming liquidity condition or crisis" if an initial order and a stay of proceedings were not granted (*November fiat* at para 15). The Chambers judge concluded the "initial stay of proceedings [would] give the applicants the time to restructure and refinance their operations" (*December fiat* at para 14).

28 The Chambers judge was satisfied the respondents were not seeking *CCAA* protection merely to postpone inevitable liquidation:

> [10] In this case I find that the applicants, or at least MDI Utility Corp. and CSLC, are engaged in an active business rather than being simply real estate developers as alleged by the respondents. CSLC operates a mobile home park. MDI Utility Corp. is completing a water treatment utility to provide wastewater treatment services to both the existing mobile home park and an upcoming Tanglewood development on CSLC lands. This is not a situation where the applicants seek CCAA protection for the purpose of obtaining more time to sell or refinance property as was the situation in *Marine Drive Properties Ltd. (Re)*, 2009 BCSC 145; *Redekop Properties Inc. (Re)*, 2001 BCSC 1892; and *Octagon Properties Group Ltd. (Re)*, 2009 ABQB 500, 486 AR 296. (*December fiat*)

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29 As for whether there was a reasonable possibility of restructuring, the Chambers judge noted he was "satisfied that the completion of the water treatment utility [would] add to the overall net worth" of the respondents (*December fiat* at para 13). The Chambers judge also noted that the respondents had, at the time of the initial application, secured an interim financer willing to fund the completion of the water treatment utility and the *CCAA* proceedings.

30 On this basis, the Chambers judge concluded as follows:

> [14] I am satisfied that the applicants have satisfied the onus upon them to establish that they are acting in good faith and with due diligence and that an order for an initial stay of proceedings is appropriate. ...
>
> (*December fiat*)

31 As discussed, the purpose of the initial order is to stay creditor enforcement to grant the debtor corporation a limited period of time to attempt to devise a viable restructuring plan. To obtain an initial order, the debtor corporation must satisfy the court that the initial order will "usefully further" its efforts towards attempted reorganization. The debtor corporation is not required, at this stage of the proceedings, to provide a full-fledged restructuring plan, but is required to show, at the very least, it has a "germ of a plan": see *Alberta Treasury*. The court must be convinced the debtor corporation is not seeking *CCAA* proceedings simply to delay the inevitable liquidation in order to "buy time".

32 It is clear the Chambers judge was cognizant of these purposes and the baseline considerations, which the respondents had to satisfy prior to receiving the initial order. The Chambers judge concluded the initial order would usefully further the remedial purposes of the *CCAA* by providing the conditions upon which the respondents could attempt to reorganize their affairs. He was satisfied on the evidence before him, that there was at least a "germ of a plan", given the fact the respondents had secured interim financing to facilitate the commissioning of the water treatment facility.

33 It is also clear the Chambers judge considered the creditors' lack of confidence. In his fiat, the Chambers judge stated: "[u]fortunately, and unlike many *CCAA* applications, all of the respondent secured creditors oppose the application" (*November fiat* at para 21). Despite this, the Chambers judge determined the initial order was appropriate in the circumstances based on the factors discussed above. The Chambers judge was entitled to reach this conclusion. Whether the creditors have lost confidence in the debtor corporation's management is something the court must consider when assessing whether to grant an initial order. However, the creditors' lack of faith is not determinative and does not necessarily dictate denying an initial application: *Forest & Marine Financial Corp., Re*, 2009 BCCA 319B.C. C.A. at para 27, 200996 B.C.L.R. (4th) 77(B.C. C.A.); *Pacific Shores Resort & Spa Ltd., Re*, 2011 BCSC 1775 (B.C. S.C. [In Chambers]) at paras 40-44 and 49(c).

34 Upon review, although his reasons are not extensive, it is clear the Chambers judge properly considered whether the baseline considerations contained in ss. 11.02(3)(a) and (b) were satisfied. Given the real time nature of *CCAA* proceedings, Chambers judges are not required to give extensive reasons addressing each and every argument raised by the parties when granting initial applications (*Alberta Treasury Branches v. Conserve Oil 1st Corp.*, 2016 ABCA 87 (Alta. C.A.) at paras 14-15, 2016 35 C.B.R. (6th) 6(Alta. C.A.)). We also note that the Chambers judge was not required to undertake an in-depth analysis to determine good faith and due diligence at this stage of the proceedings as a more in-depth analysis will be taken if the respondents make an application to extend the order or if they seek additional court orders.

35 Given the deference afforded to a chambers judge making *CCAA* decisions, this Court will only intervene if the lack of reasons leads to a reasonable belief that the Chambers judge ignored or misconceived the evidence *in a way that affected his conclusion* (*York (Regional Municipality) v. Thornhill Green Co-Operative Homes Inc.*, 2010 ONCA 393, 262 O.A.C. 232 (Ont. C.A.)). This threshold for intervention is not met in this case. Therefore, the appellants' appeal regarding the initial order is dismissed.

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V. INTERIM FINANCING

36 In addition to granting the initial order, the Chambers judge authorized the respondents to obtain interim financing up to $1.25 million. The interim financing was given a priority charge upon the respondents' assets and over the claims of the appellants. The appellants appealed this order on the grounds the Chambers judge failed to consider the relevant factors pursuant to s. 11.2(4) of the *CCAA* prior to granting the order with respect to interim financing.

37 Pursuant to s. 11.2(1) of the *CCAA*, a debtor corporation may apply to the court at any stage of the proceedings for interim financing. As Dr. Janis Sarra explains, "interim financing" refers primarily to the working capital that the debtor corporation requires in order to continue operating during restructuring proceedings, as well as to finance the costs of the *CCAA* process (*Rescue! The Companies' Creditors Arrangement Act* at 197). The underlying premise of interim financing is that it is a benefit to all stakeholders "as it allows the debtor to protect going-concern value while it attempts to devise a plan of compromise or arrangement acceptable to creditors" (at 197). Interim financing is generally granted to ensure the debtor corporation can continue its essential operations, such as "keeping the lights on" and paying employees, while it undergoes the *CCAA* proceedings.

38 Before an order allowing interim financing to be obtained can be granted, the court must consider, among other things, the factors enumerated in s. 11.2(4). If granted, the court may order the interim financing have a priority charge over the corporation's assets pursuant to s. 11.2(2):

> **11.2** (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(b), if any.

39 If the applicant corporation applies for interim financing at the same time as it applies for an initial order, the court must be diligent in its consideration of the factors enumerated in s. 11.2(4). The court must assess whether it is imperative and appropriate to order interim financing at the very outset of *CCAA* proceedings. Given that the purpose of seeking and granting an initial order is to provide the conditions upon which the debtor corporation can plan a compromise or reorganization to present to its creditors, the court must be cautious when asked to authorize large sums of interim financing at the initial stage,

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unless there is evidence that the financing is needed to enable the debtor corporation to undergo this planning process. This is especially important when the applicant is seeking a priority charge on the interim financing.

A. Did the Chambers judge err in allowing interim financing to be obtained?

40 The appellants submit the Chambers judge erred in granting the respondents $1.25 million interim financing due to his failure to consider one or more of the factors identified in s. 11.2(4).

41 The Chambers judge provided the following reasons for authorizing the interim financing at the same time he granted the initial application:

> [13] I also approve the interim financing order sought by the applicants. The interim financing lender, Staheli Construction Ltd., has agreed to advance the sum of $1,250,000 to the applicants subject to obtaining a first charge on the assets of the company. The $1,250,000 will be allocated $800,000 to complete the commissioning of the water treatment utility owned by MDI Utility, $337,500 for the cost of the CCAA proceedings and $112,500 for the ongoing costs of the applicants according to the proposed monitor's initial report. The respondents say that they will be prejudiced by any priority charge given to the interim lender and suggest that the completion of the water treatment utility adds little to no value to the overall net worth of the applicants. However, I am satisfied that the completion of the water treatment utility will add to the overall net worth of the applicants and the monitor will ensure that the $800,000 is being appropriately used for the purpose intended.
>
> (*December fiat*)

42 This analysis fails to consider multiple factors in s. 11.2(4), namely the period of time the parties were expected to be subject to *CCAA* proceedings pursuant to s. 11.2(4)(a) and "whether the loan would enhance the prospects of a viable compromise or arrangement" pursuant to s. 11.2(4)(d).

43 The appellants strongly opposed the use of any funds to complete the commissioning of the water treatment facility. In their view, it is a failed operation that will cost more than the allotted $800,000 to complete. Even if completed, the appellants are of the opinion the water treatment facility has no reasonable commercial value and therefore, its completion cannot result in a viable restructuring or compromise between it and the respondents. The appellants argued that granting interim financing to complete the water treatment facility would only result in the respondents incurring further debt; debt that will inevitably fall on the creditors' shoulders when the respondents are forced to liquidate, given that there is no chance of a successful restructuring. The appellants stressed that the interim financing would significantly prejudice their position as it has received a priority charge over the respondents' assets.

44 Although the Chambers judge concluded the completion of the water treatment facility would "add to the overall net worth" of the respondents, he failed to consider whether this added net worth would enhance the prospect of a viable compromise pursuant to s. 11.2(4)(d). Given the creditors steadfast opposition to the interim financing, it was incumbent on the Chambers judge to consider this factor. It is clear the Chambers judge failed to do so. He also failed to consider the length of time the parties would be subject to *CCAA* proceedings pursuant to s. 11.2(4)(a).

45 There was no evidence of urgent circumstances dictating a need to permit the respondents to obtain interim financing with a priority charge at this stage of the proceedings. Given that the respondents' only active business is the Copper Sands Trailer Park, which receives a monthly income that is sufficient to keep the lights on and to pay the only two employees, the interim financing was not needed to preserve the status quo or maintain the respondents' essential operations. Moreover, there was no evidence the interim financing was needed to enable the respondents' *planning* of the compromise or arrangement it would eventually present to the creditors. To the contrary, there was evidence that granting interim financing to complete the water treatment plan would *deter* the parties from reaching a viable compromise at this stage of the proceedings.

46 Given the preliminary stage the *CCAA* proceedings were at, there was no detailed plan evidencing how the commissioning of the water treatment facility would contribute to a viable restructuring of the respondents. As discussed above, a detailed plan

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is not a prerequisite to obtain an initial order. However, something more concrete and justifiable is needed in order to grant interim financing for something that is beyond what is needed to preserve the debtor corporation's status quo.

47 We note that this is not a situation where there was unanimous creditor support for the interim financing to fund the commissioning of the water treatment facility. The creditors strongly opposed the funds being sought to facilitate the construction of a project they viewed as an inevitable failure. This fact further detracts from the appropriateness of granting the interim financing, with a priority charge, at this preliminary stage of the proceedings.

48 The Chambers judge erred by failing to properly consider how these facts impacted the likelihood of a viable compromise or arrangement being made with respect to the respondents pursuant to s. 11.2(4)(d).

VI. CONCLUSION

49 In conclusion, we find no error with the Chambers judge's determination that "appropriate circumstances" existed and that the respondents were acting in good faith and with due diligence so as to merit granting the initial 30-day order. The Chambers judge did, however, err in permitting the respondents to obtain $1.25 million interim financing when he granted the initial order.

50 Therefore, the appeal is allowed in relation to the interim financing and the part of the initial order relating to interim financing is set aside. The remaining components of the initial order remain intact and the other grounds of appeal are dismissed. We note that our decision does not prevent the respondents from initiating another application for interim financing at a later date if they so choose.

51 Since there was divided success, there will be no order as to costs with respect to the appeal or the leave application.

***Ryan-Froslie J.A.*:**

I concur.

***Schwann J.A.*:**

I concur.

Appeal allowed in part.

Footnotes

* A corrigendum issued by the court on May 31, 2018 has been incorporated herein.

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KeyCite treatment
Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Sanovest Holdings Ltd. v. Matthews | 2026 BCSC 551, 2026 CarswellBC 957 | (B.C. S.C., Mar 27, 2026)

2021 SCC 30, 2021 CSC 30
Supreme Court of Canada

Canada v. Canada North Group Inc.

2021 CarswellAlta 1780, 2021 CarswellAlta 1781, 2021 CSC 30, 2021 SCC 30, [2021] 10 W.W.R. 1, [2021] 2 S.C.R. 571, [2021] 2 R.C.S. 571, [2021] 5 C.T.C. 111, [2021] A.W.L.D. 3408, [2021] A.W.L.D. 3521, [2021] S.C.J. No. 30, 19 B.L.R. (6th) 1, 2021 D.T.C. 5080, 2021 D.T.C. 5081, 28 Alta. L.R. (7th) 1, 333 A.C.W.S. (3d) 23, 460 D.L.R. (4th) 309, 91 C.B.R. (6th) 1, EYB 2021-397318

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

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

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

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

Counsel: Michael Taylor, Louis L'Heureux, for Appellant
Darren R. Bieganek, Q.C., Brad Angove, for Respondents, Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd. and Ernst & Young Inc. in its capacity as Monitor
Jeffrey Oliver, Mary I. A. Buttery, Q.C., for Respondent, Business Development Bank of Canada
Kelly J. Bourassa, for Intervener, Insolvency Institute of Canada
Randal Van de Mosselaer, for Intervener, Canadian Association of Insolvency and Restructuring Professionals

Subject: Civil Practice and Procedure; Estates and Trusts; Income Tax (Federal); Insolvency; Tax — Miscellaneous
Related Abridgment Classifications
Bankruptcy and insolvency
X Priorities of claims
X.5 Claims of Crown
X.5.a Federal
Tax
II Income tax
II.22 Special rules
II.22.c Bankruptcy

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II.22.c.i Corporations

Headnote

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

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

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

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

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

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

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

Held: The appeal was dismissed.

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

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

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

Per Moldaver J. (dissenting): While the analysis and conclusions of Brown and Rowe JJ. were largely agreed with, it was unnecessary to define the particular nature or operation of the Crown's interest under s. 227(4.1) of the ITA and whether it

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amounted to an ownership interest. Further, s. 37(2) of the CCAA does not amount to an explicit and unambiguous restriction on s. 11 of the CCAA but merely preserves the Crown's deemed trust under s. 227(4.1) of the ITA. As such, using s. 11 of the CCAA to prioritize the priming charges over the Crown's deemed trust would conflict with s. 227(4.1) of the ITA. Such direct conflict would trigger the "notwithstanding [. . .] any other enactment of Canada" language in s. 227(4.1) of the ITA that imposes an external restriction on the court's power under s. 11 of the CCAA. Section 6(3) of the CCAA does not give effect to the absolute supremacy of the Crown's deemed trust claim over priming charges.

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

Arrêt: Le pourvoi a été rejeté.

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

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

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

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

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

Table of Authorities

Cases considered by *Côté J.*:

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

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

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

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

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

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

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

First Vancouver Finance v. Minister of National Revenue (2002), 2002 SCC 49, 2002 CarswellSask 317, 2002 CarswellSask 318, *(*sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 6998 (Eng.), *(*sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 7007 (Fr.), [2002] 3 C.T.C. 285, 212 D.L.R.

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(4th) 615, [2002] G.S.T.C. 23, 288 N.R. 347, [2003] 1 W.W.R. 1, [2002] 2 S.C.R. 720, 45 C.B.R. (4th) 213 (S.C.C.) — considered

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

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136, 1990 CarswellBC 394 (B.C. C.A.) — considered

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GREEN GROWTH BRANDS INC. (2020), 2020 ONSC 3565, 2020 CarswellOnt 8331, 84 C.B.R. (6th) 146 (Ont. S.C.J.) — referred to

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

McDiarmid Lumber Ltd. v. God's Lake First Nation (2006), 2006 SCC 58, 2006 CarswellMan 424, 2006 CarswellMan 425, 57 C.L.R. (3d) 1, [2007] 2 W.W.R. 1, [2007] 1 C.N.L.R. 206, 27 C.B.R. (5th) 204, 274 D.L.R. (4th) 577, 356 N.R. 1, 212 Man. R. (2d) 7, 389 W.A.C. 7, [2006] 2 S.C.R. 846 (S.C.C.) — considered

Ministre du Revenu national c. Caisse Populaire du bon Conseil (2009), 2009 SCC 29, 2009 CarswellNat 1568, 2009 CarswellNat 1569, [2009] 4 C.T.C. 330, (sub nom. *Caisse populaire Desjardins de l'Est de Drummond v. R.)* 2009 D.T.C. 5106 (Eng.), (sub nom. *Caisse populaire Desjardins de l'Est de Drummond v. R.)* 2009 D.T.C. 5107 (Fr.), (sub nom. *Minister of National Revenue v. Caisse populaire du Bon Conseil)* 389 N.R. 199, 15 P.P.S.A.C. (3d) 35, (sub nom. *Caisse populaire Desjardins de l'Est de Drummond v. Canada)* 309 D.L.R. (4th) 323, [2009] 2 S.C.R. 94 (S.C.C.) — considered

National Bank of Greece (Canada) c. Katsikonouris (1990), [1990] I.L.R. 1-2663, (sub nom. *National Bank of Greece (Canada) v. Katsikonouris)* 74 D.L.R. (4th) 197, (sub nom. *National Bank of Greece (Canada) v. Katsikonouris)* [1990] 2 S.C.R. 1029, (sub nom. *National Bank of Greece (Canada) c. Simcoe & Erie General Assurance Co.)* 115 N.R. 42, (sub nom. *National Bank of Greece (Canada) c. Simcoe & Erie General Assurance Co.)* 32 Q.A.C. 25, (sub nom. *Panzera c. Simcoe & Érié Cie d'assurance)* [1990] R.D.I. 715, (sub nom. *Panzera c. Simcoe & Érié Cie d'assurance)* 50 C.C.L.I. 1, 1990 CarswellQue 118, 1990 CarswellQue 84, [1990] R.R.A. 1043 (S.C.C.) — referred to

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — considered

Pecore v. Pecore (2007), 2007 SCC 17, 2007 CarswellOnt 2752, 2007 CarswellOnt 2753, 361 N.R. 1, 32 E.T.R. (3d) 1, 37 R.F.L. (6th) 237, 279 D.L.R. (4th) 513, 224 O.A.C. 330, [2007] 1 S.C.R. 795 (S.C.C.) — referred to

Royal Bank v. Sparrow Electric Corp. (1997), [1997] 2 W.W.R. 457, 46 Alta. L.R. (3d) 87, 193 A.R. 321, 135 W.A.C. 321, 208 N.R. 161, 143 D.L.R. (4th) 385, 44 C.B.R. (3d) 1, [1997] 1 S.C.R. 411, (sub nom. *R. v. Royal Bank)* 97 D.T.C. 5089, 12 P.P.S.A.C. (2d) 68, 1997 CarswellAlta 112, 1997 CarswellAlta 113 (S.C.C.) — distinguished

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, 2010 CSC 60 (S.C.C.) — considered

Temple City Housing Inc., Re (2007), 2007 ABQB 786, 2007 CarswellAlta 1806, [2008] 2 C.T.C. 61, [2007] G.S.T.C. 188, 42 C.B.R. (5th) 274 (Alta. Q.B.) — referred to

Timminco Ltd., Re (2012), 2012 ONSC 506, 2012 CarswellOnt 1263, 95 C.C.P.B. 48, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — referred to

Triton Électronique inc., Re (2009), 2009 QCCS 1202, 2009 CarswellQue 2648, 2009 CarswellQue 4972 (C.S. Que.) — considered

Valard Construction Ltd. v. Bird Construction Co. (2018), 2018 SCC 8, 2018 CSC 8, 2018 CarswellAlta 261, 2018 CarswellAlta 262, 418 D.L.R. (4th) 1, [2018] 4 W.W.R. 217, 65 Alta. L.R. (6th) 1, 73 C.L.R. (4th) 1, [2018] 1 S.C.R. 224 (S.C.C.) — referred to

9354-9186 Québec inc. v. Callidus Capital Corp. (2020), 2020 SCC 10, 2020 CSC 10, 2020 CarswellQue 3772, 2020 CarswellQue 3773, 78 C.B.R. (6th) 1, 444 D.L.R. (4th) 373, 1 B.L.R. (6th) 1 (S.C.C.) — considered

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Cases considered by *Karakatsanis J.*:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513 (Ont. C.A.) — referred to

Alternative granite & marbre inc., Re (2009), 2009 SCC 49, 2009 CarswellQue 10706, 2009 CarswellQue 10707, (sub nom. *Dep. Min. Rev. Quebec v. Caisse populaire Desjardins de Montmagny)* 2009 G.T.C. 2036 (Eng.), [2009] G.S.T.C. 154, (sub nom. *9083-4185 Québec Inc. (Bankrupt), Re)* 394 N.R. 368, 60 C.B.R. (5th) 1, 312 D.L.R. (4th) 577, (sub nom. *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny)* [2009] 3 S.C.R. 286, 2009 CSC 49 (S.C.C.) — considered

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

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

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

First Vancouver Finance v. Minister of National Revenue (2002), 2002 SCC 49, 2002 CarswellSask 317, 2002 CarswellSask 318, (sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 6998 (Eng.), (sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 7007 (Fr.), [2002] 3 C.T.C. 285, 212 D.L.R. (4th) 615, [2002] G.S.T.C. 23, 288 N.R. 347, [2003] 1 W.W.R. 1, [2002] 2 S.C.R. 720, 45 C.B.R. (4th) 213 (S.C.C.) — considered

Foskett v. McKeown (2000), [2001] 1 A.C. 102, [2000] 3 All E.R. 97, [2000] UKHL 29, [2000] 2 W.L.R. 1299 (U.K. H.L.) — referred to

Friends of Toronto Public Cemeteries Inc. v. Public Guardian and Trustee (2020), 2020 ONCA 282, 2020 CarswellOnt 6132, 59 E.T.R. (4th) 174 (Ont. C.A.) — referred to

Husky Oil Operations Ltd. v. Minister of National Revenue (1995), [1995] 10 W.W.R. 161, 188 N.R. 1, 24 C.L.R. (2d) 131, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, 1995 CarswellSask 739, 1995 CarswellSask 740 (S.C.C.) — considered

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

Lunenburg (Town) v. Lunenburg (Municipality) (1931), 4 M.P.R. 181, 1931 CarswellNS 61, [1932] 1 D.L.R. 386 (N.S. S.C. [In Banco]) — referred to

Moore, Re (2013), 2013 ONCA 769, 2013 CarswellOnt 17670, 53 M.V.R. (6th) 169, 7 C.B.R. (6th) 167, (sub nom. *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Ltd.)* 118 O.R. (3d) 161, (sub nom. *Moore (Bankrupt), Re)* 314 O.A.C. 152, 369 D.L.R. (4th) 385 (Ont. C.A.) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1990 CarswellOnt 139 (Ont. C.A.) — referred to

R. v. D.L.W. (2016), 2016 SCC 22, 2016 CSC 22, 2016 CarswellBC 1552, 2016 CarswellBC 1553, 335 C.C.C. (3d) 269, 398 D.L.R. (4th) 193, 29 C.R. (7th) 344, 484 N.R. 81, 388 B.C.A.C. 1, 670 W.A.C. 1, [2016] 1 S.C.R. 402 (S.C.C.) — referred to

Rawluk v. Rawluk (1990), 23 R.F.L. (3d) 337, [1990] 1 S.C.R. 70, 65 D.L.R. (4th) 161, 36 E.T.R. 1, 103 N.R. 321, 71 O.R. (2d) 480, 38 O.A.C. 81, 1990 CarswellOnt 217, 1990 CarswellOnt 987, 71 O.R. (2d) 480 (note) (S.C.C.) — referred to

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Royal Bank v. Sparrow Electric Corp. (1997), [1997] 2 W.W.R. 457, 46 Alta. L.R. (3d) 87, 193 A.R. 321, 135 W.A.C. 321, 208 N.R. 161, 143 D.L.R. (4th) 385, 44 C.B.R. (3d) 1, [1997] 1 S.C.R. 411, (sub nom. *R. v. Royal Bank)* 97 D.T.C. 5089, 12 P.P.S.A.C. (2d) 68, 1997 CarswellAlta 112, 1997 CarswellAlta 113 (S.C.C.) — considered

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 625, 6 C.B.R. (4th) 314, 96 O.T.C. 272 (Ont. Gen. Div. [Commercial List]) — referred to

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 792, 7 C.B.R. (4th) 293, 96 O.T.C. 279 (Ont. Gen. Div. [Commercial List]) — referred to

Saulnier (Receiver of) v. Saulnier (2008), 2008 SCC 58, 2008 CarswellNS 569, 2008 CarswellNS 570, 13 P.P.S.A.C. (3d) 117, (sub nom. *Royal Bank of Canada v. Saulnier)* 298 D.L.R. (4th) 193, 50 B.L.R. (4th) 1, (sub nom. *Saulnier (Bankrupt), Re)* 381 N.R. 1, 48 C.B.R. (5th) 159, (sub nom. *Saulnier (Bankrupt), Re)* 271 N.S.R. (2d) 1, (sub nom. *Saulnier v. Royal Bank of Canada)* [2008] 3 S.C.R. 166, (sub nom. *Saulnier (Bankrupt), Re)* 867 A.P.R. 1, 2008 CSC 58 (S.C.C.) — considered

Stelco Inc., Re (2005), 2005 CarswellOnt 1188, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 196 O.A.C. 142, 253 D.L.R. (4th) 109, 75 O.R. (3d) 5 (Ont. C.A.) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, 2010 CSC 60 (S.C.C.) — considered

Temple City Housing Inc., Re (2007), 2007 ABQB 786, 2007 CarswellAlta 1806, [2008] 2 C.T.C. 61, [2007] G.S.T.C. 188, 42 C.B.R. (5th) 274 (Alta. Q.B.) — referred to

The Guarantee Company of North America v. Royal Bank of Canada (2019), 2019 ONCA 9, 2019 CarswellOnt 300, 9 P.P.S.A.C. (4th) 193, 67 C.B.R. (6th) 29, 430 D.L.R. (4th) 434, 86 C.L.R. (4th) 1, 44 E.T.R. (4th) 1, 144 O.R. (3d) 225 (Ont. C.A.) — referred to

U.S. Steel Canada Inc., Re (2016), 2016 ONCA 662, 2016 CarswellOnt 14104, 39 C.B.R. (6th) 173, 402 D.L.R. (4th) 450, 61 B.L.R. (5th) 1 (Ont. C.A.) — referred to

Urbancorp Cumberland 2 GP Inc. (Re) (2020), 2020 ONCA 197, 2020 CarswellOnt 3403, 77 C.B.R. (6th) 196, 444 D.L.R. (4th) 273 (Ont. C.A.) — referred to

Wotherspoon v. Canadian Pacific Ltd. (1987), 76 N.R. 241, (sub nom. *Eaton Retirement Annuity Plan v. Canadian Pacific Ltd.)* 45 R.P.R. 138, (sub nom. *Eaton Retirement Annuity Plan v. Canadian Pacific Ltd.)* 21 O.A.C. 79, (sub nom. *Wotherspoon v. Cdn. Pacific Ltd.)* [1987] 1 S.C.R. 952, (sub nom. *Wotherspoon v. Cdn. Pacific Ltd.)* 39 D.L.R. (4th) 169, 1987 CarswellOnt 673, 1987 CarswellOnt 966, 63 O.R. (2d) 731 (note), 63 O.R. (2d) 731 (S.C.C.) — referred to

9354-9186 Québec inc. v. Callidus Capital Corp. (2020), 2020 SCC 10, 2020 CSC 10, 2020 CarswellQue 3772, 2020 CarswellQue 3773, 78 C.B.R. (6th) 1, 444 D.L.R. (4th) 373, 1 B.L.R. (6th) 1 (S.C.C.) — referred to

Cases considered by *Brown, Rowe JJ.* (dissenting):

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

Baxter Student Housing Ltd. v. College Housing Co-operative Ltd. (1975), [1976] 2 S.C.R. 475, [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240, 57 D.L.R. (3d) 1, 5 N.R. 515, 1975 CarswellMan 3, 1975 CarswellMan 85 (S.C.C.) — refered to in a minority or dissenting opinion

Bristol-Myers Squibb Co. v. Canada (Attorney General) (2005), 2005 SCC 26, 2005 CarswellNat 1261, 2005 CarswellNat 1262, 39 C.P.R. (4th) 449, 253 D.L.R. (4th) 1, 334 N.R. 55, [2005] 1 S.C.R. 533, 2005 CSC 26 (S.C.C.) — refered to in a minority or dissenting opinion

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

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

DaimlerChrysler Financial Services (Debis) Canada Inc. v. Mega Pets Ltd. (2002), 2002 BCCA 242, 2002 CarswellBC 786, [2002] 5 W.W.R. 587, 22 B.L.R. (3d) 14, 33 C.B.R. (4th) 44, 212 D.L.R. (4th) 41, 1 B.C.L.R. (4th) 237, 166 B.C.A.C. 298, 271 W.A.C. 298, [2003] 3 C.T.C. 400, 2003 D.T.C. 5612, [2002] B.C.T.C. 58 (B.C. C.A.) — refered to in a minority or dissenting opinion

First Vancouver Finance v. Minister of National Revenue (2002), 2002 SCC 49, 2002 CarswellSask 317, 2002 CarswellSask 318, (sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 6998 (Eng.), (sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 7007 (Fr.), [2002] 3 C.T.C. 285, 212 D.L.R. (4th) 615, [2002] G.S.T.C. 23, 288 N.R. 347, [2003] 1 W.W.R. 1, [2002] 2 S.C.R. 720, 45 C.B.R. (4th) 213 (S.C.C.) — considered in a minority or dissenting opinion

Lévis (Ville) c. Côté (2007), 2007 SCC 14, 2007 CarswellQue 1926, 2007 CarswellQue 1927, (sub nom. *Lévis (City) v. Fraternité des policiers de Lévis Inc.)* 359 N.R. 199, (sub nom. *Lévis (Ville) v. Fraternité des Policiers de Lévis Inc.)* 278 D.L.R. (4th) 577, (sub nom. *Lévis (Ville) v. Fraternité des policiers de Lévis Inc.)* 160 L.A.C. (4th) 1, 35 M.P.L.R. (4th) 1, (sub nom. *Lévis (City) v. Fraternité des policiers de Lévis Inc.)* [2007] 1 S.C.R. 591, 64 Admin. L.R. (4th) 1 (S.C.C.) — refered to in a minority or dissenting opinion

Merk v. I.A.B.S.O.I., Local 771 (2005), 2005 SCC 70, 2005 CarswellSask 768, 2005 CarswellSask 769, 2005 C.L.L.C. 210-051, 47 C.C.E.L. (3d) 1, 260 D.L.R. (4th) 385, (sub nom. *R. v. International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers, Local 771)* 341 N.R. 357, [2006] 5 W.W.R. 114, [2005] 3 S.C.R. 425, (sub nom. *R. v. International Assn. of Bridge, Structural, Ornamental & Reinforcing Iron Workers, Local 771)* 275 Sask. R. 1, (sub nom. *R. v. International Assn. of Bridge, Structural, Ornamental & Reinforcing Iron Workers, Local 771)* 365 W.A.C. 1 (S.C.C.) — refered to in a minority or dissenting opinion

Minister of National Revenue v. Schwab Construction Ltd. (2002), 2002 SKCA 6, 2002 CarswellSask 17, 213 Sask. R. 278, 260 W.A.C. 278, 31 C.B.R. (4th) 75, [2002] 4 W.W.R. 628, [2003] 3 C.T.C. 426 (Sask. C.A.) — refered to in a minority or dissenting opinion

Ministre du Revenu national c. Caisse Populaire du bon Conseil (2009), 2009 SCC 29, 2009 CarswellNat 1568, 2009 CarswellNat 1569, [2009] 4 C.T.C. 330, (sub nom. *Caisse populaire Desjardins de l'Est de Drummond v. R.)* 2009 D.T.C. 5106 (Eng.), (sub nom. *Caisse populaire Desjardins de l'Est de Drummond v. R.)* 2009 D.T.C. 5107 (Fr.), (sub nom. *Minister of National Revenue v. Caisse populaire du Bon Conseil)* 389 N.R. 199, 15 P.P.S.A.C. (3d) 35, (sub nom. *Caisse populaire Desjardins de l'Est de Drummond v. Canada)* 309 D.L.R. (4th) 323, [2009] 2 S.C.R. 94 (S.C.C.) — considered in a minority or dissenting opinion

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1990 CarswellOnt 139 (Ont. C.A.) — refered to in a minority or dissenting opinion

R. v. McIntosh (1995), 36 C.R. (4th) 171, 95 C.C.C. (3d) 481, 21 O.R. (3d) 797 (note), 178 N.R. 161, 79 O.A.C. 81, [1995] 1 S.C.R. 686, 1995 CarswellOnt 4, 1995 CarswellOnt 518 (S.C.C.) — refered to in a minority or dissenting opinion

R. v. Verrette (1978), [1978] 2 S.C.R. 838, 40 C.C.C. (2d) 273 at 283, 85 D.L.R. (3d) 1 at 11, 3 C.R. (3d) 132, 21 N.R. 571, 1978 CarswellQue 8, 1978 CarswellQue 122 (S.C.C.) — refered to in a minority or dissenting opinion

Royal Bank v. Sparrow Electric Corp. (1997), [1997] 2 W.W.R. 457, 46 Alta. L.R. (3d) 87, 193 A.R. 321, 135 W.A.C. 321, 208 N.R. 161, 143 D.L.R. (4th) 385, 44 C.B.R. (3d) 1, [1997] 1 S.C.R. 411, (sub nom. *R. v. Royal Bank)* 97 D.T.C. 5089, 12 P.P.S.A.C. (2d) 68, 1997 CarswellAlta 112, 1997 CarswellAlta 113 (S.C.C.) — considered in a minority or dissenting opinion

Stelco Inc., Re (2005), 2005 CarswellOnt 1188, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 196 O.A.C. 142, 253 D.L.R. (4th) 109, 75 O.R. (3d) 5 (Ont. C.A.) — refered to in a minority or dissenting opinion

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy*

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Trucking Ltd., Re) 326 D.L.R. (4th) 577, *(*sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, *(*sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, *(*sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, 2010 CSC 60 (S.C.C.) — considered in a minority or dissenting opinion

Temple City Housing Inc., Re (2007), 2007 ABQB 786, 2007 CarswellAlta 1806, [2008] 2 C.T.C. 61, [2007] G.S.T.C. 188, 42 C.B.R. (5th) 274 (Alta. Q.B.) — refered to in a minority or dissenting opinion

Toronto-Dominion Bank v. Canada (2020), 2020 FCA 80, 2020 CarswellNat 1443, 78 C.B.R. (6th) 104, 2020 CAF 80, 2020 CarswellNat 2345, *(*sub nom. *TD Bank v. The Queen)* 2020 D.T.C. 5042, [2020] G.S.T.C. 16, 4 B.L.R. (6th) 1, 12 P.P.S.A.C. (4th) 27, [2020] 3 F.C.R. 201 (F.C.A.) — refered to in a minority or dissenting opinion

9354-9186 Québec inc. v. Callidus Capital Corp. (2020), 2020 SCC 10, 2020 CSC 10, 2020 CarswellQue 3772, 2020 CarswellQue 3773, 78 C.B.R. (6th) 1, 444 D.L.R. (4th) 373, 1 B.L.R. (6th) 1 (S.C.C.) — refered to in a minority or dissenting opinion

Cases considered by *Moldaver J.* (dissenting):

Stelco Inc., Re (2005), 2005 CarswellOnt 1188, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 196 O.A.C. 142, 253 D.L.R. (4th) 109, 75 O.R. (3d) 5 (Ont. C.A.) — refered to in a minority or dissenting opinion

9354-9186 Québec inc. v. Callidus Capital Corp. (2020), 2020 SCC 10, 2020 CSC 10, 2020 CarswellQue 3772, 2020 CarswellQue 3773, 78 C.B.R. (6th) 1, 444 D.L.R. (4th) 373, 1 B.L.R. (6th) 1 (S.C.C.) — refered to in a minority or dissenting opinion

Statutes considered by *Côté J.*:

Bank Act, S.C. 1991, c. 46

Generally — referred to

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

Generally — referred to

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

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

art. 1260 — considered

art. 1261 — considered

art. 1278 — referred to

art. 1306 — referred to

art. 1313 — referred to

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

Generally — referred to

s. 2 "secured creditor" — considered

s. 6(3) — considered

s. 6(3)(a) — referred to

s. 11 — considered

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

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

s. 11.2(2) [en. 2005, c. 47, s. 128] — referred to

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

s. 11.4(4) [en. 2005, c. 47, s. 128] — referred to

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

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

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

s. 36 — referred to

ss. 37-39 — referred to

s. 37(1) — considered

s. 37(2) — considered

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

Generally — referred to

Pt. XII.5 [en. 1997, c. 25, s. 62] — referred to

Pt. XIII — referred to

s. 18(5) "security interest" — considered

s. 116 — referred to

s. 153(1) — referred to

s. 224(1.2) — referred to

s. 224(1.3) "security interest" — considered

s. 227(4) — considered

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — considered

s. 227(4.2) [en. 1998, c. 19, s. 226(1)] — referred to

s. 227(9) — referred to

s. 227(9.2) — referred to

s. 227(9.3) — referred to

s. 227(9.4) — referred to

s. 227(10.1) — referred to

s. 227(10.2) — referred to

Interpretation Act, R.S.C. 1985, c. I-21

s. 8.1 [en. 2001, c. 4, s. 8] — considered

s. 8.2 [en. 2001, c. 4, s. 8] — considered

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Personal Property Security Act, R.S.O. 1990, c. P.10
Generally — referred to

s. 30(7) — referred to
Social Service Tax Act, R.S.B.C. 1979, c. 388
Generally — referred to
Winding-up and Restructuring Act, R.S.C. 1985, c. W-11
s. 6(1) — referred to
Statutes considered by *Karakatsanis J.*:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 43(1) — referred to

s. 67 — referred to

s. 67(1)(a) — considered

s. 67(2) — referred to

s. 67(3) — considered

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

s. 81.2 [en. 1992, c. 27, s. 38(1)] — referred to

s. 86(3) — referred to
Canada Pension Plan, R.S.C. 1985, c. C-8
Generally — referred to

s. 23(4) — referred to
Code civil du Québec, L.Q. 1991, c. 64
art. 1260 — referred to

art. 1261 — referred to

art. 1278 — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 2 "secured creditor" — referred to

s. 3(1) — referred to

s. 6(3) — considered

s. 6(3)(a) — referred to

s. 11 — considered

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

s. 11.2(4) [en. 2005, c. 47, s. 128] — referred to

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

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

s. 18.3(1) [en. 1997, c. 12, s. 125] — referred to

s. 37 — referred to

ss. 37-39 — considered

s. 37(1) — considered

s. 37(2) — considered

s. 38 — referred to

s. 38(1) — referred to

s. 38(2) — referred to

s. 38(3) — referred to

s. 39 — referred to

s. 39(1) — referred to

s. 39(2) — referred to

Employment Insurance Act, S.C. 1996, c. 23

Generally — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266] — referred to

Excise Tax Act, R.S.C. 1985, c. E-15

s. 222(3) [en. 1990, c. 45, s. 12(1)] — referred to

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

Generally — referred to

s. 153(1) — referred to

s. 222 — referred to

s. 223(1)-223(3) — considered

s. 223(5) — referred to

s. 223(6) — referred to

s. 224 — referred to

s. 224(1) — referred to

s. 224(1.3) "security interest" — considered

s. 227(4) — referred to

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — considered

s. 227(4.1)(a) [en. 1998, c. 19, s. 226(1)] — referred to

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s. 227(4.1)(b) [en. 1998, c. 19, s. 226(1)] — considered

s. 227(4.2) [en. 1998, c. 19, s. 226(1)] — referred to

Interpretation Act, R.S.C. 1985, c. I-21

s. 8.1 [en. 2001, c. 4, s. 8] — referred to

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Generally — referred to

Statutes considered by *Brown, Rowe JJ.* (dissenting):

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

s. 67(1)(a) — referred to

s. 67(3) — referred to

Canada Pension Plan, R.S.C. 1985, c. C-8

s. 23(3) — considered

s. 23(4) — considered

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

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

Generally — referred to

s. 2(1) "secured creditor" — considered

s. 6(3) — considered

s. 10(2)(c) — referred to

s. 11 — considered

s. 11.09 [en. 2005, c. 47, s. 128] — considered

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

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

s. 11.2(2) [en. 2005, c. 47, s. 128] — considered

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

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

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

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

s. 11.52(1) [en. 2007, c. 36, s. 66] — considered

s. 11.52(2) [en. 2007, c. 36, s. 66] — considered

s. 37 — referred to

ss. 37-39 — referred to

s. 37(1) — considered

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s. 37(2) — considered

s. 38 — referred to

s. 38(1) — considered

s. 38(2) — referred to

s. 38(3) — referred to

s. 39 — referred to

s. 39(1) — referred to

s. 39(2) — referred to

Employment Insurance Act, S.C. 1996, c. 23

s. 23(4) — considered

s. 86(2) — considered

s. 86(2.1) [en. 1998, c. 19, s. 266] — considered

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

Generally — referred to

s. 224(1.2) — referred to

s. 224(1.3) "security interest" — considered

s. 227(4) — considered

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — considered

Income War Tax Act, R.S.C. 1927, c. 97

s. 92(6) — referred to

s. 92(7) — referred to

Statutes considered by *Moldaver J.* (dissenting):

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

Generally — referred to

s. 6(3) — considered

s. 6(3)(a) — referred to

s. 11 — considered

s. 37(1) — considered

s. 37(2) — considered

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

Generally — referred to

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — considered

Rules considered by *Côté J.*:

Rules of the Supreme Court of Canada, SOR/2002-156

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Sched. B — referred to
Rules considered by *Karakatsanis J.*:
Rules of the Supreme Court of Canada, SOR/2002-156
Sched. B — referred to
Rules considered by *Brown, Rowe JJ.* (dissenting):
Rules of the Supreme Court of Canada, SOR/2002-156
Sched. B — referred to
Rules considered by *Moldaver J.* (dissenting):
Rules of the Supreme Court of Canada, SOR/2002-156
Sched. B — referred to
Regulations considered by *Côté J.*:
Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Income Tax Regulations, C.R.C. 1978, c. 945

s. 2201(1) "prescribed security interest" — referred to
Regulations considered by *Karakatsanis J.*:
Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Income Tax Regulations, C.R.C. 1978, c. 945

s. 2201(1) "prescribed security interest" — referred to

APPEAL by Crown from judgment reported at *Canada v. Canada North Group Inc.* (2019), 2019 ABCA 314, 2019 CarswellAlta 1815, 72 C.B.R. (6th) 161, 437 D.L.R. (4th) 122, 93 Alta. L.R. (6th) 29, 95 B.L.R. (5th) 222, [2019] 12 W.W.R. 635, 11 P.P.S.A.C. (4th) 157, 2019 D.T.C. 5111 (Alta. C.A.), dismissing its appeal from ruling that court could rank super-priority charges ahead of statutory deemed trusts for unremitted source deductions.

POURVOI formé par la Couronne à l'encontre d'un jugement publié à *Canada v. Canada North Group Inc.* (2019), 2019 ABCA 314, 2019 CarswellAlta 1815, 72 C.B.R. (6th) 161, 437 D.L.R. (4th) 122, 93 Alta. L.R. (6th) 29, 95 B.L.R. (5th) 222, [2019] 12 W.W.R. 635, 11 P.P.S.A.C. (4th) 157, 2019 D.T.C. 5111 (Alta. C.A.), ayant rejeté l'appel que cette dernière a interjeté à l'encontre d'une décision selon laquelle un tribunal avait le pouvoir de faire passer les charges super prioritaires devant les fiducies réputées créées par la loi pour les retenues à la source non versées.

***Côté J.* (Wagner C.J.C., Kasirer J. concurring):**

I. Overview

1 The *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), has a long and storied history. From its origins in the Great Depression to its revival and reinvention during the 1970s and 1980s, the *CCAA* has played an important role in Canada's economy. Today, the *CCAA* provides an opportunity for insolvent companies with more than $5,000,000 in liabilities to restructure their affairs through a plan of arrangement. The goal of the *CCAA* process is to avoid bankruptcy and maximize value for all stakeholders.

2 In order to facilitate the restructuring process, courts supervising *CCAA* restructurings may authorize an insolvent company to incur certain critical costs associated with this process. Supervising courts may also secure payment of these costs by ordering a super-priority charge against the insolvent company's assets. Today, our Court is called upon to determine whether a supervising court may order super-priority charges over assets that are subject to a claim of Her Majesty protected by a deemed trust created by s. 227(4.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*").

3 The Crown raises two arguments as to why a supervising court should be unable to subordinate Her Majesty's interest to super-priority charges. First, the Crown says that s. 227(4.1) creates a proprietary interest in a debtor's assets and a court cannot attach a super-priority charge to assets subject to Her Majesty's interest. Second, the Crown says that even if s. 227(4.1)

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does not create a proprietary interest, it creates a security interest that has statutory priority over all other security interests, including super-priority charges.

4 Both of these arguments must fail. As this Court has previously held, the *CCAA* generally empowers supervising judges to order super-priority charges that have priority over all other claims, including claims protected by deemed trusts. In all cases where a supervising court is faced with a deemed trust, the court must assess the nature of the interest established by the empowering enactment, and not simply rely on the title of deemed trust. In this case, when the relevant provisions of the *ITA* are examined in their entirety, it is clear that the *ITA* does not establish a proprietary interest because Her Majesty's claim does not attach to any specific asset. Further, there is no conflict between the *CCAA* order and the *ITA*, as the deemed trust created by the *ITA* has priority only over a defined set of security interests. A super-priority charge ordered under s. 11 of the *CCAA* does not fall within that definition. For the reasons that follow, I would therefore dismiss the appeal.

II. Background

5 Canada North Group and six related corporations ("Debtors") initiated restructuring proceedings under s. 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), but soon changed course and sought to restructure under the *CCAA*. In their initial *CCAA* application, they requested a package of relief standard to *CCAA* proceedings, including a thirty-day stay on all proceedings against them, the appointment of a monitor and the creation of three super-priority charges. The first charge they requested was an administration charge of up to $1,000,000 in favour of counsel, a monitor and a chief restructuring officer for the fees they incurred. The second was a $1,000,000 financing charge in favour of an interim lender. The third was a $150,000 directors' charge protecting their directors and officers against liabilities incurred after the commencement of the proceedings. The Debtors included in their initial motion an affidavit from one of their directors attesting to a $1,140,000 debt to Her Majesty The Queen for source deductions and Goods and Services Tax ("GST").

6 Justice Nielsen of the Court of Queen's Bench heard the motion together with a cross-motion by the Debtors' primary lender, Canadian Western Bank, seeking the appointment of a receiver. Justice Nielsen granted an initial order in favour of the Debtors on the terms requested in the initial application, aside from a $500,000 reduction in the administration charge (Alta. Q.B., No. 1703-12327, July 5, 2017 ("Initial Order")). The terms of that order included the following with regard to priority:

> Each of the Directors' Charge, Administration Charge and the Interim Lender's Charge (all as constituted and defined herein) shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "Encumbrances") in favour of any Person.
>
> [Emphasis deleted; para. 44.]

Justice Nielsen further ordered that these charges "shall not otherwise be limited or impaired in any way by ... (d) the provisions of any federal or provincial statutes" (para. 46).

7 Three weeks after the Initial Order was granted, the Debtors sought supplementary orders extending the stay of proceedings and increasing the interim financing to $2,500,000. Canadian Western Bank again filed a motion to appoint a receiver. At the hearing of the three motions, counsel for Her Majesty appeared in order to advise that Her Majesty would be filing a motion to vary the Initial Order on the ground that the order failed to recognize Her priority interest in unremitted source deductions (the portion of remuneration that employers are required to withhold from employees and remit directly to the Canada Revenue Agency ("CRA")).

8 The Crown filed the motion soon after. Its argument for variance was grounded in the nature of Her Majesty's interest in the Debtors' property. It argued that the nature of Her Majesty's interest is determined by s. 227(4.1) of the *ITA* and that that provision creates a proprietary interest:

> **(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

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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.

(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 and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) 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 deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, 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 such a security interest

and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

III. Judgments Below

A. Court of Queen's Bench, 2017 ABQB 550, 60 Alta. L.R. (6th) 103

9 Justice Topolniski heard Her Majesty's motion to vary the Initial Order. Despite the delay between the Initial Order and the motion to vary, Topolniski J. found that she had jurisdiction to hear the motion based on the discretion and flexibility conferred by the *CCAA*. However, she dismissed the motion on the ground that s. 227(4.1) of the *ITA* creates a security interest that can be subordinated to court-ordered super-priority charges.

10 Justice Topolniski relied upon *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274, and *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, to conclude that the deemed trust created by s. 227(4.1) of the *ITA* is not a proprietary interest. Rather, the *ITA* creates something similar to a floating charge over all the debtor's assets, which permits the debtor to alienate property subject to the deemed trust. These characteristics are inconsistent with a proprietary interest, and thus s. 227(4.1) does not create such an interest.

11 Justice Topolniski also considered whether s. 227(4.1) creates a security interest that requires Her Majesty's interest to take priority over court-ordered charges. She acknowledged that the *CCAA* preserves the operation of the deemed trust, but she found that it also authorizes the reorganization of priorities by court order. Because each of the charges included in the Initial Order was critical to the restructuring process, they were necessarily required by the *CCAA* regime.

B. Leave to Appeal, 2017 ABCA 363, 54 C.B.R. (6th) 5

12 Following the dismissal of the Crown's motion, the Debtors determined that there were sufficient assets in the estate to satisfy both Her Majesty and the beneficiaries of the three court-ordered super-priority charges in full. However, the Crown sought and obtained leave to appeal in order to seek appellate guidance on the nature of Her Majesty's priority.

C. Court of Appeal of Alberta, 2019 ABCA 314, 93 Alta. L.R. (6th) 29

13 The Court of Appeal dismissed the appeal. It was divided as to whether the super-priority charges had priority over Her Majesty's claim. Justice Rowbotham wrote for the majority and agreed with the motion judge that s. 227(4.1) of the *ITA* creates a security interest, in accordance with this Court's earlier finding in *First Vancouver* that the deemed trust is like a "floating

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charge over all of the assets of the tax debtor in the amount of the default" (*First Vancouver*, at para. 40). She found further support for this in the fact that the deemed trust also falls squarely within the *ITA*'s definition of "security interest" in s. 224(1.3).

14 After determining that Her Majesty's interest in the Debtors' property was a security interest, Rowbotham J.A. turned to the question of whether the deemed trust could be subordinated to the court-ordered super-priority charges. She found that "while a conflict may appear to exist at the level of the 'black letter' wording" of the *ITA* and the *CCAA*, "the presumption of statutory coherence require[d] that the provisions be read to work together" (para. 45). A deemed trust that could not be subordinated to super-priority charges would undermine both Acts' objectives because fewer restructurings could succeed and thus less tax revenue could be collected. If the Crown's position prevailed, then absurd consequences could follow. Approximately 75 percent of restructurings require interim lenders. Without the assurance that they would be repaid in priority, these lenders would not come forward, nor would monitors or directors. The reality is that all of these services are provided in reliance on super priorities. Without these priorities, *CCAA* restructurings may be severely curtailed or at least delayed until Her Majesty's exact claim could be ascertained, by which point the company might have totally collapsed.

15 Justice Wakeling dissented. In his view, none of the arguments raised by the majority could overcome the text of the *ITA*. On his reading, the text of s. 227(4.1) is clear: Her Majesty is the beneficial owner of the amounts deemed to be held separate and apart from the debtor's property, and these amounts must be paid to Her Majesty notwithstanding any type of security interest, including super-priority charges. In his view, nothing in the *CCAA* overrides this proprietary interest. Section 11 of the *CCAA* cannot permit discretion to be exercised without regard for s. 227(4.1) of the *ITA*, nor can ss. 11.2, 11.51 and 11.52 of the *CCAA* be used, as they only allow a court to make orders regarding "all or part of the company's property" (s. 11.2(1)). In conclusion, since no part of the *CCAA* authorizes a court to override s. 227(4.1), a court must give effect to the clear text of s. 227(4.1) and cannot subordinate Her Majesty's claims to super-priority charges.

IV. Issue

16 The central issue in this appeal is whether the *CCAA* authorizes courts to grant super-priority charges with priority over a deemed trust created by s. 227(4.1) of the *ITA*. In order to answer this question, I proceed in three stages. First, I assess the nature of the *CCAA* regime and the power of supervising courts to order such charges. Given that supervising courts generally have the authority to order super-priority charges with priority over all other claims, I then turn to s. 227(4.1) of the *ITA* to determine whether it gives Her Majesty an interest that cannot be subordinated to super-priority charges. Here I assess the Crown's two arguments as to why s. 227(4.1) provides for an exception to the general rule, namely that Her Majesty has a proprietary or ownership interest in the insolvent company's assets and that, even if Her Majesty does not have such an interest, s. 227(4.1) provides Her with a security interest that has absolute priority over all claims. I conclude by assessing how courts should exercise their authority to order super-priority charges where Her Majesty has a claim against an insolvent company protected by a s. 227(4.1) deemed trust.

V. Analysis

17 In order to determine whether the *CCAA* empowers a court to order super-priority charges over assets subject to a deemed trust created by s. 227(4.1) of the *ITA*, we must understand both the *CCAA* regime and the nature of the interest created by s. 227(4.1).

A. CCAA Regime

18 The *CCAA* is part of Canada's system of insolvency law, which also includes the *BIA* and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, s. 6(1), for banks and other specified institutions. Although both the *CCAA* and the *BIA* create reorganization regimes, what distinguishes the *CCAA* regime is that it is restricted to companies with liabilities of more than $5,000,000 and "offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations" (*Century Services Inc. v. Canada (Attorney General)*2010 SCC 60, [2010] 3 S.C.R. 379, at para. 14).

19 The *CCAA* works by creating breathing room for an insolvent debtor to negotiate a way out of insolvency. Upon an initial application, the supervising judge makes an order that ordinarily preserves the status quo by freezing claims against the

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debtor while allowing it to remain in possession of its assets in order to continue carrying on business. During this time, it is hoped that the debtor will negotiate a plan of arrangement with creditors and other stakeholders. The goal is to enable the parties to reach a compromise that allows the debtor to reorganize and emerge from the *CCAA* process as a going concern (*Century Services*, at para. 18).

20 The view underlying the entire *CCAA* regime is thus that debtor companies retain more value as going concerns than in liquidation scenarios (*Century Services*, at para. 18). The survival of a going-concern business is ordinarily the result with the greatest net benefit. It often enables creditors to maximize returns while simultaneously benefiting shareholders, employees, and other firms that do business with the debtor company (para. 60). Thus, this Court recently held that the *CCAA* embraces "the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally" (*9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521, at para. 42, quoting J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at p. 14).

21 The most important feature of the *CCAA* — and the feature that enables it to be adapted so readily to each reorganization — is the broad discretionary power it vests in the supervising court (*Callidus Capital*, at paras. 47-48). Section 11 of the *CCAA* confers jurisdiction on the supervising court to "make any order that it considers appropriate in the circumstances". This power is vast. As the Chief Justice and Moldaver J. recently observed in their joint reasons, "[o]n the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be 'appropriate in the circumstances'" (*Callidus Capital*, at para. 67). Keeping in mind the centrality of judicial discretion in the *CCAA* regime, our jurisprudence has developed baseline requirements of appropriateness, good faith and due diligence in order to exercise this power. The supervising judge must be satisfied that the order is appropriate and that the applicant has acted in good faith and with due diligence (*Century Services*, at para. 69). The judge must also be satisfied as to appropriateness, which is assessed by considering whether the order would advance the policy and remedial objectives of the *CCAA* (para. 70). For instance, given that the purpose of the *CCAA* is to facilitate the survival of going concerns, when crafting an initial order, "[a] court must first of all provide the conditions under which the debtor can attempt to reorganize" (para. 60).

22 On review of a supervising judge's order, an appellate court should be cognizant that supervising judges have been given this broad discretion in order to fulfill their difficult role of continuously balancing conflicting and changing interests. Appellate courts should also recognize that orders are generally temporary or interim in nature and that the restructuring process is constantly evolving. These considerations require not only that supervising judges be endowed with a broad discretion, but that appellate courts exercise particular caution before interfering with orders made in accordance with that discretion (*Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368 (C.A.), at paras. 30-31).

23 In addition to s. 11, there are more specific powers in some of the provisions following that section. They include the power to order a super-priority security or charge on all or part of a company's assets in favour of interim financiers (s. 11.2), critical suppliers (s. 11.4), the monitor and financial, legal or other experts (s. 11.52), or indemnification of directors or officers (s. 11.51). Each of these provisions empowers the court to "order that the security or charge rank in priority over the claim of any secured creditor of the company" (ss. 11.2(2), 11.4(4), 11.51(2) and 11.52(2)).

24 As this Court held in *Century Services*, at para. 70, the general language of s. 11 is not restricted by the availability of these more specific orders. In fact, courts regularly grant super-priority charges in favour of persons not specifically referred to in the aforementioned provisions, including through orders that have priority over orders made under the specific provisions. These include, for example, key employee retention plan charges (*Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169), and bid protection charges (*In the Matter of a Plan of Compromise or Arrangement of Green Growth Brands Inc.*, 2020 ONSC 3565, 84 C.B.R. (6th) 146).

25 In *Sun Indalex Finance, LLC v. United Steelworkers*2013 SCC 6, [2013] 1 S.C.R. 271, at para. 60, quoting the amended initial order in that case, this Court confirmed that a court-ordered financing charge with priority over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise", had priority over a deemed trust established by the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*"), to protect employee pensions. Justice Deschamps wrote for a unanimous

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Court on this point. She found that the existence of a deemed trust did not preclude orders granting first priority to financiers: "This will be the case only if the provincial priorities provided for in s. 30(7) of the *PPSA* ensure that the claim of the Salaried Plan's members has priority over the [debtor-in-possession ("DIP")] charge" (para. 48).

26 Justice Deschamps first assessed the supervising judge's order to determine whether it had truly been necessary to give the financing charge priority over the deemed trust. Even though the supervising judge had not specifically considered the deemed trust in the order authorizing a super-priority charge, he had found that there was no alternative but to make the order. Financing secured by a super priority was necessary if the company was to remain a going concern (para. 59). Justice Deschamps rejected the suggestion "that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust", because "[t]he harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries" (para. 59).

27 After determining that the order was necessary, she turned to the statute creating the deemed trust's priority. Section 30(7) of the *PPSA* provided that the deemed trust would have priority over all security interests. In her view, this created a conflict between the court-ordered super priority and the statutory priority of the claim protected by the deemed trust. The super priority therefore prevailed by virtue of federal paramountcy (para. 60).

28 There are also practical considerations that explain why supervising judges must have the discretion to order other charges with priority over deemed trusts. Restructuring under the *CCAA* often requires the assistance of many professionals. As Wagner C.J. and Moldaver J. recently recognized for a unanimous Court, the role the monitor plays in a *CCAA* proceeding is critical: "The monitor is an independent and impartial expert, acting as 'the eyes and the ears of the court' throughout the proceedings .... The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing" (*Callidus Capital*, at para. 52, quoting *Ernst & Young Inc. v. Essar Global Fund Ltd.*2017 ONCA 1014, 139 O.R. (3d) 1, at para. 109). In the words of Morawetz J. (as he then was), "[i]t is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position" (*Timminco*, at para. 66).

29 This Court has similarly found that financing is critical as "case after case has shown that 'the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout'" (*Indalex*, at para. 59, quoting J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). As lower courts have affirmed, "[p]rofessional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges" (*First Leaside Wealth Management Inc. (Re)*2012 ONSC 1299, at para. 51 (CanLII)).

30 Super-priority charges in favour of the monitor, financiers and other professionals are required to derive the most value for the stakeholders. They are beneficial to all creditors, including those whose claims are protected by a deemed trust. The fact that they require super priority is just a part of "[t]he harsh reality ... that lending is governed by the commercial imperatives of the lenders" (*Indalex*, at para. 59). It does not make commercial sense to act when there is a high level of risk involved. For a monitor and financiers to put themselves at risk to restructure and develop assets, only to later discover that a deemed trust supersedes all claims, smacks of unfairness. As McLachlin J. (as she then was) said, granting a deemed trust absolute priority where it does not amount to a trust under general principles of law would "defy fairness and common sense" (*British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, at p. 33).

31 It is therefore clear that, in general, courts supervising a *CCAA* reorganization have the authority to order super-priority charges to facilitate the restructuring process. Similarly, courts have ensured that the *CCAA* is given a liberal construction to fulfill its broad purpose and to prevent this purpose from being neutralized by other statutes: [TRANSLATION] "As the courts have ruled time and again, the purpose of the *CCAA* and orders made under it cannot be affected or neutralized by another [Act], whether of public order or not" (*Triton Électronique inc. (Arrangement relatif à)*2009 QCCS 1202, at para. 35 (CanLII)). "This case is not so much about the rights of employees as creditors, but the right of the court under the [*CCAA*] to serve not the special interests of the directors and officers of the company but the broader constituency referred to in *Chef Ready Foods*

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Ltd. [*v. Hongkong Bank of Can*. (1990), 51 B.C.L.R. (2d) 84 (C.A.)] ... Such a decision may inevitably conflict with provincial legislation, but the broad purposes of the [*CCAA*] must be served" (*Pacific National Lease Holding*, at para. 28). Courts have been particularly cautious when interpreting security interests so as to ensure that the *CCAA*'s important purpose can be fulfilled. For instance, in *Chef Ready Foods*, Gibbs J.A. observed that if a bank's rights under the *Bank Act*, S.C. 1991, c. 46, were to be interpreted as being immune from the provisions of the *CCAA*, then the benefits of *CCAA* proceedings would be "largely illusory" (p. 92). "There will be two classes of debtor companies: those for whom there are prospects for recovery under the [*CCAA*]; and those for whom the [*CCAA*] may be irrelevant dependent upon the whim of the [creditor]" (p. 92). It is important to keep in mind that *CCAA* proceedings operate for the benefit of the creditors as a group and not for the benefit of a single creditor. Without clear and direct instruction from Parliament, we cannot countenance the possibility that it intended to create a security interest that would limit or eliminate the prospect of reorganization and recovery under the *CCAA* for some companies. To do so would turn the *CCAA* into a dead letter. With this in mind, I turn to the specific provision at issue in this appeal.

B. Nature of the Interest Created by Section 227(4.1) of the ITA

32 The Crown argues that, despite the authority a supervising court may have to order super-priority charges, Her Majesty's claim to unremitted source deductions is protected by a deemed trust, and that ordering charges with priority over the deemed trust is contrary to s. 227(4.1) of the *ITA*. To determine whether this is true, we must begin by understanding how the deemed trust comes about.

33 Section 153(1) of the *ITA* requires employers to withhold income tax from employees' gross pay and forward the amounts withheld to the CRA. When an employer withholds income tax from its employees in accordance with the *ITA*, it assumes its employees' liability for those amounts (s. 227(9.4)). As a result, Her Majesty cannot have recourse to the employees if the employer fails to remit the withheld amounts. Instead, Her Majesty's interest is protected by a deemed trust. Section 227(4) of the *ITA* provides that amounts withheld are deemed to be held separate and apart from the employer's assets and in trust for Her Majesty. If an employer fails to remit the amounts withheld in the manner provided by the *ITA*, s. 227(4.1) extends the trust to all of the employer's assets. In this case, the Debtors failed to remit the amounts withheld to the CRA, bringing s. 227(4.1) into operation.

34 When a company seeks protection under the *CCAA*, s. 37(1) of the *CCAA* provides that most of Her Majesty's deemed trusts are nullified (unless the property in question would be regarded as held in trust in the absence of the statutory provision creating the deemed trust). However, s. 37(2) of the *CCAA* exempts the deemed trusts created by s. 227(4) and (4.1) of the *ITA* from the nullification provided for in s. 37(1). These deemed trusts continue to operate throughout the *CCAA* process (*Century Services*, at para. 45). In my view, this preservation by the *CCAA* of the deemed trusts created by the *ITA* does not modify the characteristics of these trusts. They continue to operate as they would have if the insolvent company had not sought *CCAA* protection. Therefore, the Crown's arguments must be assessed by reviewing the nature of the interest created by s. 227(4.1) of the *ITA*.

35 Before doing so, and while it is not strictly speaking required of me given the reasons I set out below, I pause here to clarify the role of s. 6(3) of the *CCAA*, which provides as follows:

> **(3)** Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under
>
> (a) subsection 224(1.2) of the *Income Tax Act* ....

36 Section 6(3) merely grants Her Majesty the right to insist that a compromise or arrangement not be sanctioned by a court unless it provides for payment in full to Her Majesty of certain claims within six months after court sanction. Section 6(3) does not say that it modifies the deemed trust created by s. 227(4.1) of the *ITA* in any way, and it comes into operation only at the end of the *CCAA* process when parties seek court approval of their arrangement or compromise. Section 6(3) also

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applies to numerous claims that are not protected by the deemed trust, including penalties, interest, withholdings on non-resident dispositions and certain retirement contributions (see ss. 224(1.2) and 227(10.1) of the *ITA*, the latter of which refers to amounts payable under ss. 116, 227(9), (9.2), (9.3), (9.4) and (10.2), Part XII.5 and Part XIII). Equating the deemed trust with the right under s. 6(3) renders s. 37(2) of the *CCAA* and the deemed trust meaningless. I therefore proceed, as this Court did in *Indalex*, by assessing the interest created by s. 227(4.1) of the *ITA* without regard to the *CCAA* (*Indalex*, at para. 48).

37 Section 227(4.1) provides:

> **(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 and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) 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 deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, 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 such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

(1) Does Section 227(4.1) of the ITA Create a Proprietary or Ownership Interest in the Debtor's Assets?

38 This appeal — like previous appeals to this Court — does not require the Court to exhaustively define the nature and content of the interest created by s. 227(4.1) of the *ITA* (*Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, and *First Vancouver*). All that is necessary is to determine whether s. 227(4.1) confers upon Her Majesty an interest in the debtor's property that precludes a court from ordering charges with priority over Her Majesty's claim. The Crown argues that s. 227(4.1) does so by giving Her Majesty a proprietary interest in the debtor's assets, which "causes those assets to become the property of the Crown" (A.F., at para. 46). The Crown rests this argument on the wording of the section. First, it says that property equal in value to the amount deemed to be held in trust by a person is deemed to be held "separate and apart from the property of the person". Second, it says that the property deemed to be held in trust is deemed "to form no part of the estate or property of the person". Third, it says that the property deemed to be held in trust "is property beneficially owned by Her Majesty notwithstanding any security interest in such property". The Crown submits that, as a result of Her Majesty's proprietary interest, amounts subject to the deemed trust cannot be considered assets of the debtor in *CCAA* proceedings.

39 In order to determine whether s. 227(4.1) confers a proprietary or ownership interest upon Her Majesty, we must look at the nature of the rights afforded to Her Majesty by the deemed trust and compare them to the rights ordinarily afforded to an owner. To begin with, it is clear that the statute does not purport to transfer legal title to any property to Her Majesty. Instead, the Crown's argument places considerable weight on the common law meaning of the words "beneficially owned by Her Majesty" and "in trust". Trusts and beneficial ownership are equitable concepts that are part of the common law. As in all cases of statutory interpretation, the meaning of these words is a question of parliamentary intent. In the interpretation of a federal statute that uses concepts of property and civil rights, reference must be had to ss. 8.1 and 8.2 of the *Interpretation Act*, R.S.C. 1985, c. I-21. These sections provide:

> **8.1** Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a

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province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.

8.2 Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.

40 In other words, where Parliament uses a private law expression and is silent as to its meaning, courts must refer to the applicable provincial private law. This is known as the principle of complementarity. However, as both these sections also make clear, Parliament is free to derogate from provincial private law and create a uniform rule across all provinces (see R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 158-59).

41 In this case, Parliament has expressly chosen to dissociate itself from provincial private law. Section 227(4.1) says that it operates "*[n]otwithstanding 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*". In *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94, the majority found that, through these words, Parliament has created a standalone scheme of uniform application across all provinces (paras. 11-13). The nature of the deemed trust created by s. 227(4.1) must thus be understood on its own terms.

42 With that said, it is also clear that Parliament has chosen to use terms with established legal meanings in constructing the deemed trust. While the meaning of these terms is not to be based on their precise meaning under Alberta common law, it is difficult to attempt to understand s. 227(4.1) without any reference to how these concepts generally operate. Despite the protestations of my colleagues Justices Brown and Rowe, I do not see how we could begin to understand the meaning of the words "deemed trust", "held in trust" or "beneficially owned" without reference to the civil law or common law. The law of trusts in both civil law and common law thus provides critical context for understanding Parliament's intent. From a civil law perspective, some courts have found it awkward to apply the idea of beneficial ownership under s. 227(4.1) in Quebec "on the ground that it is a concept that is obviously derived from the common law" (*Canada (Attorney General) v. Caisse populaire d'Amos*2004 FCA 92, 324 N.R. 31, at para. 48). I agree with the following observation by Noël J.A. (as he then was):

It is not the task of the judiciary to determine whether it is appropriate for Parliament to use common law concepts in Quebec (or to use civil law concepts elsewhere in Canada) for the purpose of giving effect to federal legislation. The task of the courts is limited to discovering Parliament's intention and giving effect to it. [para. 49]

43 Under Quebec civil law, it is clear that s. 227(4.1) does not establish a trust within the meaning of the *Civil Code of Québec* ("*C.C.Q.*"). Articles 1260 and 1261 *C.C.Q.* provide the following:

1260. A trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer.

1261. The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right.

As this Court held in *Bank of Nova Scotia v. Thibault*2004 SCC 29, [2004] 1 S.C.R. 758, at para. 31, "[t]hree requirements must therefore be met in order for a trust to be constituted [under Quebec civil law]: property must be transferred from an individual's patrimony to another patrimony by appropriation; the property must be appropriated to a particular purpose; and the trustee must accept the property."

44 Under s. 227(4.1) of the *ITA*, however, no specific property is transferred to a trust patrimony. Indeterminacy remains as to which assets are subject to the deemed trust, *ergo*, as to which assets left the settlor's patrimony and entered the trust's patrimony. Although s. 227(4.1) provides that the assets are deemed to be held "separate and apart from the property of the person" and "to form no part of the estate or property of the person", this is not sufficient to constitute an autonomous patrimony

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such as the one contemplated by the civilian trust regime. It flows from the autonomous nature of the trust patrimony that assets held in trust must be property in which none of the settlor, trustee or beneficiary has any property right. But this runs afoul of the interest created by s. 227(4.1), because nothing in that provision deprives the person whose assets are subject to a deemed trust of property rights in these assets. Therefore, the main element of a civilian trust is absent in the deemed trust established by s. 227(4.1): there is no autonomous patrimony to which specific property is transferred.

45 Furthermore, under s. 227(4.1), the person whose assets are subject to the deemed trust would act as trustee. Again, this is inconsistent with the definition of a trustee in civil law. The person whose assets are subject to a deemed trust pursuant to s. 227(4.1) does not "undertak[e], by his acceptance, to hold and administer" a trust patrimony (art. 1260 *C.C.Q.*). But most importantly, the fact that assets subject to the deemed trust are indeterminate makes the trustee's role effectively impossible to play. The *C.C.Q.* provides that the trustee "has the control and the exclusive administration of the trust patrimony" and "acts as the administrator of the property of others charged with full administration" (art. 1278). Thus, the trustee under s. 227(4.1) would be required to administer its own property — or at least an indefinite part of it — in the interest of Her Majesty (art. 1306 *C.C.Q.*). The trustee would be subject to obligations impossible to fulfill, such as the obligation not to mingle the administered property with its own (art. 1313 *C.C.Q.*). Obviously, one cannot act as an administrator of the property of others with respect to one's own property. It is therefore clear that the interest created by s. 227(4.1) has little, if anything, in common with the trust in civil law.

46 In the common law, a trust arises when legal ownership and beneficial ownership of a particular property are separated (see *Valard Construction Ltd. v. Bird Construction Co.*2018 SCC 8, [2018] 1 S.C.R. 224, at para. 18). "Because a trust divides legal and beneficial title to property between a trustee and a beneficiary, respectively, the 'hallmark' characteristic of a trust is the fiduciary relationship existing between the trustee and the beneficiary, by which the trustee is to hold the trust property solely for the beneficiary's enjoyment" (para. 17 (footnote omitted)). As Rothstein J. wrote, because of this fiduciary relationship, "[t]he beneficial owner of property has been described as 'the real owner of property even though it is in someone else's name'" (*Pecore v. Pecore*2007 SCC 17, [2007] 1 S.C.R. 795, at para. 4, quoting *Csak v. Aumon*, (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.), at p. 570).

47 While the precise rights given to a beneficial owner may vary according to the terms of the trust and the principles of equity, I agree with the Crown that, where this type of interest exists, it will generally be inappropriate for the supervising judge to order a super-priority charge over the property subject to the interest, although the broad power conferred on the court by s. 11 of the *CCAA* would enable it to do so. Property held in trust cannot be said to belong to the trustee because "in equity, it belongs to another person" (*Henfrey*, at p. 31). However, a close examination of the nature of the interest created by s. 227(4.1) of the *ITA* reveals that it does not create this type of interest because "[t]he employer is not actually required to hold the money separate and apart, the usual fiduciary obligations of a trustee are absent, and the trust exists without a *res*. The law of tracing is similarly corrupted" (R. J. Wood and R. T. G. Reeson, "The Continuing Saga of the Statutory Deemed Trust: *Royal Bank v. Tuxedo Transportation Ltd.*" (2000), 15 *B.F.L.R.* 515, at p. 532). In other words, the key attributes that allow the common law to refer to beneficial ownership as being a proprietary interest are missing.

48 According to the common law understanding of a trust, the legal owner or trustee owes a fiduciary duty to the equitable owner or beneficiary. The fiduciary relationship impresses the office of trustee with three fundamental duties: the trustee must act honestly and with reasonable skill and prudence, the trustee cannot delegate the office, and the trustee cannot personally profit from its dealings with the trust property or its beneficiaries (see *Valard*, at para. 17). This severely restricts what the trustee may do with trust property and creates a relationship significantly different from the one between a debtor and a creditor. For instance, while a debtor may attempt to reduce its debt or reach a compromise, a trustee cannot, since it must always act in the best interest of the beneficiary and cannot consider its own interests. Similarly, while a debtor is liable to a creditor until the debt is repaid, a trustee is not liable to a beneficial owner where property is lost, unless it was lost through a breach of the standard of care owed (see E. E. Gillese, *The Law of Trusts* (3rd ed. 2014), at p. 14). In the case of the deemed trust, however, Parliament did not create such a fiduciary relationship. Parliament expressly contemplated a potential compromise between Her Majesty and the debtor in s. 6(3) of the *CCAA*. In addition, the terms of the *ITA* do not require that the debtor actually keep the property subject to the deemed trust separate and use it solely for the benefit of Her Majesty. In fact, Her Majesty does

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not enjoy the benefit of Her interest in the property while the property is held by the debtor. Instead, Parliament contemplated that the debtor would continue to use and dispose of the property subject to the trust for its own business purposes (see *First Vancouver*, at paras. 42-46).

49 Another core attribute of beneficial ownership is certainty as to the property that is subject to the trust (see Gillese, at p. 39). Many deemed trusts fail to provide for certainty of subject matter. For instance, in *Henfrey*, the Court considered the deemed trust created by the British Columbia *Social Service Tax Act*, R.S.B.C. 1979, c. 388. Like s. 227(4.1) of the *ITA*, the *Social Service Tax Act* provided that tax collected but not remitted was deemed to be held in trust for Her Majesty. It further provided that unremitted amounts were deemed to be held separate and apart from and form no part of the assets or estate of the tax collector. While McLachlin J. found that the property was identifiable at the time the tax was collected, she noted that "[t]he difficulty in this, as in most cases, is that trust property soon ceases to be identifiable. The tax money is mingled" (p. 34). Therefore, she concluded that there was no trust under general principles of equity. The legislature's attempt to resolve this problem by deeming the amounts to be separate from and form no part of the tax debtor's property was merely a tacit acknowledgment that "the reality is that after conversion the statutory trust bears little resemblance to a true trust. There is no property which can be regarded as being impressed with a trust" (p. 34).

50 In *First Vancouver*, this Court examined the nature of the interest created by s. 227(4.1) of the *ITA*. Writing for the Court, Iacobucci J. held that this provision creates a charge which "is in principle similar to a floating charge over all the assets of the tax debtor in the amount of the default" (para. 40). He concluded that Parliament specifically intended to create a charge with fluidity, a charge that could readily float over all of the debtor's assets rather than attach to a particular one (para. 33). Parliament's intention was to capture any property that comes into the possession of the tax debtor whilst simultaneously allowing any asset to be alienated and the proceeds of disposition to be captured (para. 5).

51 This lack of certainty as to the subject matter of the trust is even starker in the present case than in *Henfrey* or in *Sparrow Electric*, where there was certainty as to the assets until they were mingled. Section 227(4.1) purports to bring all assets owned by the debtor within its reach. Despite the wording of the section, this interest — one of the same nature as a "floating charge" — has no particular property to which it attaches. Without certainty of subject matter, equity cannot know which property the debtor has a fiduciary obligation to maintain in the beneficiary's interest and thus "[t]he notion of a trust without a *res* simply cannot be made sensible or coherent" (Wood and Reeson, at pp. 532-33 (footnote omitted); see also *Sparrow Electric*, at para. 31).

52 Parliament's decision to avoid certainty of subject matter was an intentional modification to the deemed trust following this Court's decision in *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182. In *Dauphin Plains*, the Court refused to enforce Her Majesty's claim because the Crown had failed to establish that the moneys purported to be deducted actually existed or were kept in such a way as to be traceable (p. 1197). Traceability is another key aspect of a beneficial interest, since it allows the beneficial owner to enjoy the benefits of ownership, such as income from the property. It also ensures that the beneficial owner is responsible for the costs of ownership. By choosing not to attach Her Majesty's claim to any particular asset, Parliament has protected Her Majesty from the risks associated with asset ownership, including damage, depreciation and loss. I agree with Gonthier J., who, speaking of the predecessor to s. 227(4.1) (albeit in dissent), said that "this subsection is antithetical to tracing in the traditional sense, to the extent that it requires no link at all between the subject matter of the trust and the fund or asset which the subject matter is being traced into" (*Sparrow Electric*, at para. 37). Had Parliament wanted to confer a beneficial ownership interest upon Her Majesty, it would have had to impose these associated risks as well.

53 For the same reason as in *Henfrey*, the statement that property is deemed to be removed from the debtor's estate is equally ineffective at preventing a judge from ordering super priorities over the debtor's property. Because the deemed trust does not attach to specific property and the debtor remains free to alienate any of its assets, no property is actually removed from the debtor's estate.

54 This interpretation is supported by the existence of s. 227(4.2) of the *ITA*, which specifically anticipates other interests taking priority over the deemed trust (something that would be impossible if there were an ownership interest). It states that "[f]or the purposes of subsections 227(4) and 227(4.1), a security interest does not include a prescribed security interest". In the *Income Tax Regulations*, C.R.C., c. 945, s. 2201(1), the Governor in Council has defined "prescribed security interest" as

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a registered mortgage "that encumbers land or a building, where the mortgage is registered ... before the time the amount is deemed to be held in trust by the person". Therefore, in certain situations, mortgage holders take priority over Her Majesty.

55 I reiterate that, without specific property to attach to, there can be no trust. The fact that s. 227(4.1) specifically anticipates that the character of assets will change over time and automatically releases any assets that the debtor chooses to alienate from the deemed trust means that Parliament had in mind something different from beneficial ownership in the common law sense of the word. I tend to agree with Noël J.A.'s assessment of s. 227(4.1): "The deemed trust mechanism, whether applied in Quebec or elsewhere, effectively creates in favour of the Crown a security interest ..." (*Caisse populaire d'Amos*, at para. 46).

56 Other scholars agree that s. 227(4.1) "merely secures payment or performance of an obligation" (R. J. Wood, "Irresistible Force Meets Immovable Object: *Canada v. Canada North Group Inc.*" (2020), 63 *Can. Bus. L.J.* 85, at p. 95; see also A. Duggan and J. Ziegel, "Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security" (2007), 57 *U.T.L.J.* 227, at pp. 245-46). Wood and Reeson reach the particularly damning conclusion that "[t]he concept of a trust is used in the legislation, but in virtually every respect the characteristics of a trust are lacking" and thus "the use of inappropriate legal concepts" has led to the creation of a "statutory provision [that] is deeply flawed" (pp. 531-32). They "suspec[t] that the intention of the drafters was that Revenue Canada should obtain a charge on all the assets of the debtor", and they state that "the statutory deemed trust is nothing more than a legislative mechanism that is intended to create a non-consensual security interest in the assets of the employer" (p. 533).

57 Nonetheless, for our purposes it is not necessary to conclusively determine whether the interest created by s. 227(4.1) should be characterized as a security interest. What is clear is that s. 227(4.1) does not create a beneficial interest that can be considered a proprietary interest. Like the deemed trust at issue in *Henfrey*, it "does not give [the Crown] the same property interest a common law trust would" (p. 35). Without attaching to specific property, creating the usual right to the enjoyment of property or the fiduciary obligations of a trustee, the interest created by s. 227(4.1) lacks the qualities that allow a court to refer to a beneficiary as a beneficial owner. Therefore, I do not accept the Crown's argument that Her Majesty has a proprietary interest in a debtor's property that is adequate to prevent the exercise of a supervising judge's discretion to order super-priority charges under s. 11 of the *CCAA* or any of the sections that follow it.

(2) Does Section 227(4.1) of the ITA Create a Super Priority That Conflicts With a Court-Ordered Super-Priority Charge?

58 The Crown also refers to the part of s. 227(4.1) which states that the Receiver General shall be paid the proceeds of a debtor's property "in priority to all such security interests", as defined in s. 224(1.3). In the Crown's view, court-ordered super-priority charges under s. 11 of the *CCAA* or any of the sections that follow it are security interests within the meaning of s. 224(1.3) and therefore Her Majesty's interest has priority over them.

59 My colleagues Justices Brown and Rowe point to the legislative history of s. 227(4.1) as evidence that Parliament intended Her Majesty's deemed trust to have "absolute priority" over all other security interests (para. 201). In particular, they rely upon Justice Iacobucci's comment in *Sparrow Electric* that "it is open to Parliament to step in and assign absolute priority to the deemed trust" by using the words "shall be paid to the Receiver General in priority to any such security interest" (para. 202, citing *Sparrow Electric*, at para. 112). They further rely upon the press release accompanying the amendments, which stated that the deemed trust was to have absolute priority.

60 With respect, I disagree with this reasoning. *Sparrow Electric* dealt with a type of interest very different from the one before us now. In *Sparrow Electric*, this Court held that a fixed and specific charge over the tax debtor's inventory had priority over Her Majesty's deemed trust created by the *ITA*. Thus the purpose of the amendments was to "clarify that the deemed trusts for unremitted source deductions and GST apply whether or not other security interests have been granted in respect of the inventory or trade receivables of a business" (Department of Finance Canada, *Unremitted Source Deductions and Unpaid GST* (April 7, 1997), at p. 2). If Parliament had intended that the deemed trust have absolute priority, it would not have enacted s. 227(4.2) at the same time. As noted above, s. 227(4.2) provides that "a security interest does not include a prescribed security interest", and thus specifically envisions that the deemed trust will not have absolute priority. In my view, by using the words "in priority to all such security interests" in s. 227(4.1), Parliament intended that the priority be absolute not over all possible

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interests, but only over security interests as defined in s. 224(1.3). What must therefore be determined is whether a court-ordered super-priority charge under the *CCAA* falls within that definition.

61 Section 224(1.3) reads as follows:

> ***security interest*** means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for ....

62 This definition is expansive. However, the list of illustrative security interests makes it clear that a super-priority charge created under the *CCAA* cannot fall within its meaning. Court-ordered super-priority charges are utterly different from any of the interests listed. These super-priority charges are granted, not for the sole benefit of the holder of the charge, but to facilitate restructuring in furtherance of the interests of all stakeholders. In this way, they benefit the creditors as a group. The fact that Parliament chose to provide a list of examples whose nature is so unlike that of a court-ordered super-priority charge demonstrates that it must have had a very different type of interest in mind when drafting s. 224(1.3). I could not agree more with Professor Wood about the limited class of interests that Parliament had in mind:

> [Court-ordered super-priority charges] are fundamentally different in nature from security interests that arise by way of agreement between the parties and from non-consensual security interests that arise by operation of law. Court-ordered charges are unlike conventional consensual and non-consensual security interests in that they are integrally connected to insolvency proceedings that operate for the benefit of the creditors as a group. Given the fundamentally different character of court-ordered charges, it would be reasonable to expect that they would be specifically mentioned in the ITA definition of a security interest if they were to be included.
>
> [Emphasis added; p. 98.]

63 My colleagues Brown and Rowe JJ. allege that this interpretation of s. 224(1.3) is contrary to our Court's decision in *Caisse populaire Desjardins de l'Est de Drummond*, where Rothstein J. wrote that the provided examples "do not diminish the broad scope of the words 'any interest in property' (para. 15; see also para. 14). With respect, I disagree with my colleagues. As Justice Rothstein explained at para. 40, his comments were made in response to the argument that the list of examples of security interests was exhaustive. I agree with him that the list of examples provided is not exhaustive. However, the examples remain illustrative of the types of interests that Parliament had in mind and are clearly united by a common theme or class because Parliament employed a compound "means ... and includes" structure to establish its definition: "*security interest means* any interest in, or for civil law any right in, property that secures payment or performance of an obligation *and includes* ...". In my view, this structure evidences Parliament's intent that the list have limiting effect, such that only the instruments enumerated and instruments that are similar in nature fall within the definition. The critical difference between the listed security interests and super-priority charges ordered under s. 11 of the *CCAA* or any of the sections that follow it explains both why the latter are excluded from the list of specific instruments and why there can be no suggestion that they may be included in the broader term "encumbrance" at the end of that list. The *ejusdem generis* principle supports this position by limiting the generality of the final words on the basis of the narrow enumeration that precedes them (*National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029, at p. 1040). All of the other instruments arise by agreement or by operation of law. Therefore, court-ordered super-priority charges under s. 11 or any of the sections that follow it are different in kind from anything on the list.

64 Using the list of specific examples to ascertain Parliament's intent in this case is also consistent with the presumption against tautology. In *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846, McLachlin C.J. defined this presumption in the following way:

> It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain: Sullivan, at p. 158. Thus, "[e]very word in a statute is presumed to make sense and to have a specific role

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

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

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

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

67 Finally, if Parliament had wanted to include court-ordered super-priority charges in the definition of "security interest", it would have said so specifically. Parliament must be taken to have legislated with the operation of the *CCAA* in mind. In the words of Professor Sullivan, "[t]he legislature is presumed to know its own statute book and to draft each new provision with regard to the structures, conventions, and habits of expression as well as the substantive law embodied in existing legislation" (Sullivan (2014), at p. 422 (footnote omitted)). Given that, in *Indalex*, this Court has already found that granting super-priority charges is critical as "a key aspect of the debtor's ability to attempt a workout", one would expect Parliament to use clearer language where such a definition could jeopardize the operation of another one of its Acts. I am therefore in total disagreement with my colleagues Justices Brown and Rowe that "nothing in the definition of security interest in the *ITA* precludes the inclusion of an interest that is designed to operate to the benefit of all creditors" (para. 210). To the contrary, everything hints at priming charges being excluded from the definition of security interest.

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

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

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

70 As discussed above, a supervising court's authority to order super-priority charges is grounded in its broad discretionary power under s. 11 of the *CCAA* and also in the more specific grants of authority under ss. 11.2, 11.4, 11.51 and 11.52. Those

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provisions authorize the court to grant certain priming charges that rank ahead of the claims of "any secured creditor". While I have already concluded that Her Majesty does not have a proprietary interest as a result of Her deemed trust, it is less certain whether Her Majesty is a "secured creditor" under the *CCAA*. Professor Wood is of the view that Her Majesty is not a "secured creditor" under the *CCAA* by virtue of Her deemed trust interest; rather, ss. 37 to 39 of the *CCAA* create "two distinct approaches — one that applies to a deemed trust, the other that applies when a statute gives the Crown the status of a secured creditor" (p. 96). Therefore, the ranking of a priming charge ahead of the deemed trust would fall outside the scope of the express priming charge provisions. I do not need to definitively determine if Her Majesty falls within the definition of "secured creditor" under the *CCAA* by virtue of Her trust. Instead, I would ground the supervising court's power in s. 11, which "permits courts to create priming charges that are not specifically provided for in the *CCAA*" (p. 98). I respectfully disagree with the suggestion of my colleagues Brown and Rowe JJ. that Professor Wood or any other author has suggested that s. 11 is limited by the specific provisions that follow it (para. 228). To the contrary, this Court said in *Century Services*, at paras. 68-70, that s. 11 provides a very broad jurisdiction that is not restricted by the availability of more specific orders.

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

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

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

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VI. Disposition

74 I would dismiss the appeal with costs in this Court in accordance with the tariff of fees and disbursements set out in Schedule B of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

The reasons of Karakatsanis and Martin JJ. were delivered by

***Karakatsanis J.* (Martin J. concurring):**

I. Overview

75 When a company seeks to restructure its affairs in order to avoid bankruptcy, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (*CCAA*), allows the court to order charges in favour of parties that are necessary to the restructuring process: lenders who provide interim financing, the monitor who administers the company's restructuring, and directors and officers who captain the sinking ship (among others). These charges, often referred to as "priming charges", are meant to encourage investment in the company as it undergoes reorganization. A company's reorganization, as an alternative to the devastating effects of bankruptcy, serves the public interest by benefitting creditors, employees, and the health of the economy more generally.

76 In this case, the *CCAA* judge ordered priming charges over the estates of Canada North Group and six related companies (Debtor Companies) in favour of an interim lender, the monitor, and directors. Property of two of the Debtor Companies, however, was also subject to a deemed trust in favour of the Crown, under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (*ITA*), for unremitted source deductions consisting of employees' income tax, Canada Pension Plan contributions, and employment insurance premiums. While this appeal is moot because there are sufficient assets to satisfy both the Crown's deemed trust claim and the priming charges, this Court is asked to determine which has priority in the restructuring: the priming charges under the *CCAA* or the deemed trust under the *ITA*.

77 Section 227(4.1) of the *ITA* provides that, when an employer fails to remit source deductions to the Crown, a deemed trust attaches to the property of the employer to the extent of the unremitted source deductions. The deemed trust operates "notwithstanding any security interest in such property" and "[n]otwithstanding ... any other enactment of Canada". Sections 11.2, 11.51 and 11.52 of the *CCAA* give the court authority to order priming charges over a company's property in favour of interim lenders, directors and officers, and estate administrators. Priming charges can rank ahead of any other secured claim. Read on their own, these provisions appear to give different parties super-priority in an insolvency. This issue of statutory interpretation has been described as the collision of an unstoppable force with an immoveable object (R. J. Wood, "Irresistible Force Meets Immovable Object: *Canada v. Canada North Group Inc.*" (2020), 63 *Can. Bus. L.J.* 85).

78 The appellant, the Crown, argues that s. 227(4.1) of the *ITA* creates a proprietary right in the Crown because, through the mechanism of a deemed trust, it gives the Crown beneficial ownership of the amount of the unremitted source deductions. In other words, that *amount* is the Crown's property and a *CCAA* judge cannot, therefore, order a charge over it; it should be taken out of the estate and can play no role in the restructuring process.

79 In contrast, the respondents argue that s. 227(4.1) creates a security interest in the Crown squarely contemplated by ss. 11.2, 11.51 and 11.52 of the *CCAA*. They further submit that there is no conflict between the relevant provisions because the policies underlying both Acts can be harmonized in favour of giving effect to the *CCAA* provisions.

80 For the reasons below, I conclude that there is no conflict between the *ITA* and *CCAA* provisions. The right that attaches to "beneficial ownership" under s. 227(4.1) of the *ITA* must be interpreted in the specific statutory context in which it arises. Here, the Crown's right to unremitted source deductions in a *CCAA* restructuring is protected by the requirement that the plan of compromise pay the Crown in full. Because I do not conclude that the Crown's interest fits within the relevant statutory definition of "secured creditor" under the *CCAA*, it is not captured by the court's authority to order priming charges under ss. 11.2, 11.51 and 11.52 of the *CCAA*. However, in my view, the broad discretionary power under s. 11 of the *CCAA* permits a

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court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions. This conclusion harmonizes the purposes of both federal statutes. I would dismiss the appeal.

II. Facts

81 In July 2017, the Court of Queen's Bench of Alberta issued an order granting the Debtor Companies protection under the *CCAA* (Alta. Q.B., No. 1703-12327, July 5, 2017 (Initial Order)). The Initial Order provided for priming charges in the following order of priority: (1) an Administration Charge of $500,000 in favour of the court-appointed Monitor, Ernst & Young Inc.; (2) an Interim Lender's Charge of $1,000,000 in favour of the interim lender, Business Development Bank of Canada (BDBC); and (3) a Directors' Charge of $150,000 (together, Priming Charges). The Interim Lender's Charge was later increased to $3,500,000 and the Administration Charge to $950,000.

82 Paragraph 44 of the Initial Order provided that the Priming Charges have priority over the claims of secured creditors:

> Each of the Directors' Charge, Administration Charge and the Interim Lender's Charge ... shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise ... in favour of any Person.

83 Paragraph 46 of the Initial Order provided that the Priming Charges "shall not otherwise be limited or impaired in any way by ... (d) the provisions of any federal or provincial statutes".

84 At the time of the Initial Order, two of the Debtor Companies had failed to remit source deductions and owed the Crown $685,542.93. The Crown applied to vary the Priming Charges in the Initial Order on the basis that paras. 44 and 46(d) failed to recognize the Crown's legislated interest in unremitted source deductions. The Crown argued that s. 227(4.1) of the *ITA*, s. 23(4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (*CPP*), and s. 86(2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23 (*EIA*), require the Crown's claims for unremitted source deductions to have priority over the claims of all other creditors of a debtor, notwithstanding any other federal statute, including the *CCAA*. In these reasons, I will only refer to s. 227(4.1) of the *ITA* as the relevant *ITA*, *CPP* and *EIA* provisions are identical and the latter two statutes cross-reference the *ITA*.

III. Decisions Below

A. Court of Queen's Bench of Alberta, 2017 ABQB 550, 60 Alta. L.R. (6th) 103 (Topolniski J.)

85 The application judge held that court-ordered priming charges under ss. 11.2, 11.51 and 11.52 of the *CCAA* have priority over the Crown's deemed trust for unremitted source deductions. First, she concluded that the Crown's deemed trust under s. 227(4.1) of the *ITA* creates a security interest rather than a proprietary interest because the definition of "security interest" in the *ITA* includes an interest created by a deemed or actual trust, and it would be inconsistent to interpret the Crown's interest under s. 227(4.1) contrary to its enabling statute. She also reasoned that the deemed trust is a security interest because it lacks certainty of subject matter and is therefore not a true trust.

86 Second, the application judge concluded that s. 227(4.1) of the *ITA* and ss. 11.2, 11.51 and 11.52 of the *CCAA* are not inconsistent because any conflict can be avoided by interpretation. She reasoned that the policy objectives of both Acts have to be respected because they were enacted by the same government. On the one hand, the collection of source deductions is at the heart of the *ITA*. On the other, the *CCAA* aims to facilitate business survival. The application judge concluded that, without the court's ability to order priming charges, interim lending "would simply end", along with "the hope of positive *CCAA* outcomes" (para. 102). The goals of both Acts can therefore only be achieved if priority is given "to those charges necessary for restructuring", while the deemed trust ranks in priority to all other secured creditors (para. 112).

B. Court of Appeal of Alberta, 2019 ABCA 314, 93 Alta. L.R. (6th) 29 (Rowbotham and Schutz JJ.A., Wakeling J.A. Dissenting)

87 A majority of the Court of Appeal dismissed the Crown's appeal. It agreed with the application judge that the Crown's deemed trust under s. 227(4.1) of the *ITA* creates a security interest rather than a proprietary interest. It also agreed that the

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Crown's position failed to reconcile the objectives of the *ITA* and *CCAA*, and given the importance of interim lending, concluded that absurd consequences could follow if the Crown's position prevailed.

88 Wakeling J.A. disagreed. He concluded that s. 227(4.1) of the *ITA* makes two unequivocal statements: first, that the Crown is the beneficial owner of the debtor's property to the extent of the unremitted source deductions; and second, that this amount must be paid to the Crown notwithstanding the security interests of any other secured creditors, including, in his opinion, the holders of a priming charge. As a result, it was unnecessary to reconcile policy objectives. In his view, the notwithstanding clause in s. 227(4.1) was conclusive because the relevant *CCAA* provisions lacked the same language. As a result, there was "no need to look beyond the four corners of s. 227(4.1) to determine the scope of the unassailable priority it creates" (para. 135). Finally, Wakeling J.A. noted that there is perfect correlation between the purpose of the *ITA* and the plain meaning of s. 227(4.1).

IV. Parties' Submissions

A. The Appellant the Crown

89 The Crown's submissions before this Court echo the dissent at the Court of Appeal: the text of s. 227(4.1) unequivocally states that unremitted source deductions become the property of the Crown. The Crown argues that the plain meaning of s. 227(4.1) aligns with its purpose, which is to protect the largest source of government revenue.

90 The Crown makes two principal submissions. First, it submits that the Crown's interest under s. 227(4.1) of the *ITA* is a proprietary interest rather than a security interest because the text of s. 227(4.1) causes the unremitted source deductions to become the property of the Crown. There is no need to rely on the "notwithstanding clause" in s. 227(4.1) because the *ITA* and *CCAA* provisions work harmoniously; the priming charges can only attach to a company's property and s. 227(4.1) provides that the unremitted source deductions are beneficially owned by the Crown.

91 Second, the Crown submits in the alternative that, even if its interest is a security interest, it ranks ahead of the priming charges. This is because a priming charge under the *CCAA* is a security interest within the meaning of the *ITA*, and s. 227(4.1) specifically states that the deemed trust ranks ahead of all other security interests.

B. The Respondent Business Development Bank of Canada

92 The respondent BDBC, urges this Court to follow the approach taken by the courts below. It submits that the Crown's interest under the deemed trust is a security interest because (1) the enabling statute, the *ITA*, defines a deemed trust as a security interest; (2) this Court, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, characterized the deemed trust as a "floating charge", which is a security interest; and (3) the opposite conclusion, that it is a proprietary interest, would be at odds with commercial reality. As the definition of "secured creditor" in the *CCAA* includes the holder of a deemed trust, that Act contemplates that a priming charge can rank ahead of the Crown's deemed trust. Thus, ss. 11.2, 11.51 and 11.52 of the *CCAA* contemplate that a priming charge can rank ahead of the Crown's deemed trust.

C. The Respondent Ernst & Young, in its Capacity as Monitor

93 Both BDBC and Ernst & Young (together, Respondents) submit that the Crown's deemed trust is a security interest and that the statutes can be interpreted harmoniously to avoid a conflict. The Monitor submits that a court-ordered priming charge is not a security interest within the meaning of s. 227(4.1) of the *ITA* because it is not specifically listed in the definition of security interest under the *ITA*, and as a taxing statute, the *ITA* requires a strict, textual approach to interpretation.

94 The Monitor also highlights that the Crown is a unique creditor because it has immediate information available to it respecting remittance and can certify and pursue amounts owing immediately.

V. Issue

95 The issue on appeal is whether court-ordered priming charges under the *CCAA* can rank ahead of the Crown's deemed trust for unremitted source deductions, as created by s. 227(4.1) of the *ITA* and related provisions of the *CPP* and *EIA*. It is

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clear from the wording of s. 227(4.1) of the *ITA* that, if there is any conflict with a provision from another Act, s. 227(4.1) is to prevail. Accordingly, this appeal turns on whether, and to what extent, the *CCAA* regime conflicts with s. 227(4.1) of the *ITA*. In answering that question, I proceed in four steps:

1. What rights does s. 227(4.1) of the *ITA* confer on the Crown in respect of unremitted source deductions?

2. How is the Crown's deemed trust for unremitted source deductions treated in Parliament's insolvency regime?

3. Do ss. 11.2, 11.51 and 11.52 of the *CCAA* permit the court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions?

4. If not, does s. 11 of the *CCAA* allow the court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions?

VI. Analysis

A. What Rights Does Section 227(4.1) of the ITA Confer on the Crown in Respect of Unremitted Source Deductions?

(1) General Scheme and Background of Sections 227(4) and 227(4.1) of the ITA

96 Section 153(1) of the *ITA* requires employers to deduct and withhold amounts from their employees' wages (source deductions) and remit those amounts to the Receiver General by a specified due date. When source deductions are made, s. 227(4) deems that they are held separate and apart from the property of the employer and from property held by any secured creditor of the employer, notwithstanding any security interest in that property. Source deductions are deemed to be held in trust for Her Majesty for payment by the specified due date.

97 If source deductions are not paid by the specified due date, s. 227(4.1) extends the trust in s. 227(4). It deems that a trust attaches to the employer's property to the extent of any unremitted source deductions; that the trust existed from the moment the source deductions were made; and that the trust did not form part of the estate or property of the employer from the moment the source deductions were made (all regardless of whether the employer's property is subject to a security interest). It also deems that, to the extent of any unremitted source deductions, the employer's property is property "beneficially owned" by the Crown, notwithstanding any security interest in the employer's property:

> **(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 and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) 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 deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, 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 such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

98 The *ITA* defines "security interest" in s. 224(1.3):

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> ***security interest*** means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for ....

99 As emphasized by the Crown, ss. 227(4) and 227(4.1) were amended to their current form — excerpted above — to reverse the effect of this Court's decision in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411. The Crown submits that, in explicitly reversing *Sparrow Electric*'s result, Parliament meant to always give the Crown super-priority in an insolvency. I do not agree that such a broad conclusion can be drawn from this legislative history. In *Sparrow Electric*, the issue was who, between a lending bank and the Crown, had priority in the debtor's bankruptcy. The bank had a general security agreement over all of the debtor's property, which it entered into several months before successfully petitioning the debtor into bankruptcy. While the debtor also owed the Crown $625,990.86 in unremitted source deductions at the time of the bankruptcy, the first instance of non-remittance to the Crown was *after* the bank entered its general security agreement.

100 Iacobucci J., writing for a majority of the Court, held in favour of the bank. At that time, the deemed trust was worded differently, triggering only upon an event of "liquidation, assignment, receivership or bankruptcy", and the amount of the unremitted source deductions was only deemed to be held "separate from and form no part of the estate *in liquidation, assignment, receivership or bankruptcy*" (para. 13 (emphasis added)). The majority therefore concluded that the deemed trust did not attach to the debtor's property because, at the relevant time, that property was already "legally the [bank's]" (para. 98). Because the bank had a fixed and specific charge over all of the debtor's property, there was nothing left for the trust to attach to. The trust could not be effective unless there was some unencumbered asset in the bankruptcy out of which the trust could be deemed (para. 99).

101 After *Sparrow Electric*, Parliament amended the deemed trust to ensure that, in a case like *Sparrow Electric*, the deemed trust attached notwithstanding any security interest held in the debtor's property (*First Vancouver*, at para. 27). As Iacobucci J. explained in *First Vancouver*, Parliament intended "to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect" (para. 28). [1]

102 In this appeal, the Crown argues that a court-ordered priming charge under the *CCAA* is a security interest for the purposes of the Crown's deemed trust. I agree that the definition of "security interest" in s. 224(1.3) of the *ITA* is broad, capturing "any interest in ... property that secures payment or performance of an obligation and includes an interest ... created by or arising out of a ... charge ..., *however or whenever arising, created, deemed to arise or otherwise provided for*". However, Wood makes the observation that court-ordered charges are fundamentally different in nature from the security interests that arise by consensual agreement or by operation of law enumerated in s. 224(1.3) because "they are integrally connected to insolvency proceedings that operate for the benefit of the creditors as a group" (Wood (2020), at p. 98). As a result, he reasons that "it would be reasonable to expect that they would be specifically mentioned in the ITA definition of security interest if they were to be included" (p. 98).

103 While s. 227(4.1) undeniably operates notwithstanding any security interest — and priming charge — over the debtor's property, the legislative history post-*Sparrow Electric* says nothing about the Crown's specific right to unremitted source deductions, pursuant to the deemed trust, when a company undergoes restructuring under the *CCAA*. Even if, as the Crown insists, a priming charge under the *CCAA* is a security interest for the purposes of the Crown's deemed trust (and I do not settle that debate in these reasons), that does not define what *rights* the Crown has, in a *CCAA* restructuring, pursuant to its deemed trust. This Court has never considered how s. 227(4.1) of the *ITA* interacts with the *CCAA* regime in light of the seminal insolvency decisions in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, and *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271. This appeal calls on this Court to do so.

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(2) The Right of Beneficial Ownership in Section 227(4.1) of the ITA

104 The Crown argues that s. 227(4.1) creates a proprietary right in the Crown because it gives the Crown beneficial ownership of the amount of the unremitted source deductions. Because this is an *ownership* right, the amount of the unremitted source deductions is taken out of the debtor's estate, effectively giving the Crown super-priority. In other words, the Crown agrees with the dissent in the Court of Appeal: that property is the Crown's property and a *CCAA* judge cannot order a charge over it. The Respondents, in line with the Court of Appeal majority, submit that s. 227(4.1) creates a security interest and can therefore be subordinated to a priming charge under the *CCAA*.

105 These submissions rely heavily on characterizing the Crown's interest as either a "security interest" or as "proprietary" in nature. However, in my view, defining an entitlement as one or the other does not resolve the issues on appeal because neither characterization has essential features in the abstract. Rather, a statutory entitlement takes its character from the statutory provision. General concepts of "proprietary right" and "security interest" — or of "property," "trust" and "beneficial ownership" — are of limited assistance in this analysis.

106 This Court has noted that property is often understood as a "bundle of rights" and obligations (*Saulnier v. Royal Bank of Canada*2008 SCC 58, [2008] 3 S.C.R. 166, at para. 43). Depending on which rights someone holds, their "bundle of rights" can be viewed as a weak or robust proprietary interest. For this reason, the holder of a security interest has been described as having a proprietary right in its security. In *Sparrow Electric*, for example, both Iacobucci J., writing for the majority, and Gonthier J., writing for the dissent, explained the secured creditor in that case as having a proprietary right in, and effectively owning, the debtor's property that secured its debt (paras. 42 and 98).

107 Similarly, Ronald C. C. Cuming, Catherine Walsh and Roderick J. Wood state that, in the context of personal property security legislation, a secured creditor holds a proprietary right in collateral. This is because, for these authors, "[t]he defining characteristic of a proprietary right ... is that it is ... enforceable against the world", and the right of a secured creditor with a perfected security interest is enforceable against the world (*Personal Property Security Law* (2nd ed. 2012), at p. 613). Without an explanation for what the terms mean in a particular context, it is difficult to draw any conclusion from characterizing something as one or the other. (While there is a clear difference between a right *in rem* (available against the world at large) and a right *in personam* (available against a determinate set of individuals), whether the term "proprietary right" means a "right *in rem*" or the term "security interest" means a "right *in personam*" depends upon the statutory context. In any event, the submissions before this Court were not framed in these terms).

108 This Court explained in *Saulnier* that, when analyzing the definition of property under a statute, there is little use in considering property in the abstract or even under the common law because "Parliament can and does create its own lexicon" for particular purposes (para. 16; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*2009 SCC 49, [2009] 3 S.C.R. 286, at paras. 11-12). Indeed, "interests unknown to the common law may be created by statute" (*Wotherspoon v. Canadian Pacific Ltd.*, [1987] 1 S.C.R. 952, at p. 999, citing Ross J. in *Town of Lunenburg v. Municipality of Lunenburg*, [1932] 1 D.L.R. 386 (N.S.S.C.), at p. 390). As a result, caution is required before importing definitions from other contexts, relying on statements or description from cases out of context, and employing general concepts like "proprietary right" and "security interest". It is crucial in this appeal to stay within the bounds of the statutory provisions being interpreted.

109 Section 227(4.1) states that the amount of the unremitted source deductions is "beneficially owned" by the Crown. However, it does not follow that this right of beneficial ownership is absolute or that the term imports specific rights that flow from it. This is not a case where Parliament has used a term with an established legal meaning — leading to an inference that Parliament has given the term that meaning in the statute in question (*R. v. D.L.W.*2016 SCC 22, [2016] 1 S.C.R. 402, at para. 20). The concept of beneficial ownership does not have a precise doctrinal meaning in the common law of Canada, and it does not exist in the civil law of Quebec. It is also not used consistently in the *ITA*. The meaning of "beneficially owned" in s. 227(4.1) can only be understood in the specific, relevant statutory context in which it arises. To that end, while s. 227(4.1) uses the mechanism of a trust and confers some type of beneficial ownership on the Crown, it modifies even those features of beneficial ownership that are widely associated with it under the common law.

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110 As a federal statute with national application, the *ITA* rests on the private law of the provinces. This relationship of complementarity is codified in s. 8.1 of the *Interpretation Act*, R.S.C. 1985, c. I-21. However, the federal statute can derogate and dissociate itself from the private law when it legislates on a matter that falls within its jurisdiction: see M. Lamoureux, "*The Harmonization of Tax Legislation Dissociation: A Mechanism of Exception Part III*" (online). As I shall explain, the trust created by s. 227(4.1) disassociates itself from the requirements of a trust in both the provincial common law and civil law.

111 I proceed as follows: (1) there is no settled doctrinal meaning of the term beneficial ownership; and (2) s. 227(4.1) does not create a true trust because there is no certainty of subject matter. A lack of certainty of subject matters means that the Crown cannot, through tracing, claim appreciation of trust value and the trustee (tax debtor) is free to dispose of trust property. These features render the Crown's beneficial ownership weaker than generally understood at common law. The result is an interest "unknown to the common [or civil] law". We cannot, therefore, look at s. 227(4.1) in isolation to define the way in which the Crown's "beneficially owned" property under s. 227(4.1) should be treated in an insolvency — that clarification must come from, and indeed does come from, Parliament's insolvency legislation.

(a) No Settled Doctrinal Meaning

112 Beneficial ownership is most commonly used in the law of trusts to broadly distinguish between who has legal title to property (the trustee) and who has beneficial enjoyment of that property (the beneficiary). *Black's Law Dictionary* (11th ed. 2019), for example, defines a "beneficial owner" as "[o]ne recognized in equity as the owner of something because use and title belong to that person, even though legal title may belong to someone else, esp. one for whom property is held in trust" (p. 1331).

113 Despite this common usage, there is no clear definition of the rights flowing from the term "beneficial ownership" under the common law (see, e.g., C. Brown, "Beneficial Ownership and the Income Tax Act" (2003), 51 *Can. Tax J.* 401; M. D. Brender, "Beneficial Ownership in Canadian Income Tax Law: Required Reform and Impact on Harmonization of Quebec Civil Law and Federal Legislation" (2003), 51 *Can. Tax J.* 311, at p. 316). As well, the *Civil Code of Québec* does not have a concept of beneficial ownership (see *Canada (Attorney General) v. Caisse populaire d'Amos*2004 FCA 92, 324 N.R. 31, at paras. 48-49).

114 The term itself is also contentious within the academy, giving rise to a heated debate about whether a trust beneficiary should be thought of as an *owner* at all (see, e.g., D. W. M. Waters, "The Nature of the Trust Beneficiary's Interest" (1967), 45 *Can. Bar Rev.* 219; L. D. Smith, "Trust and Patrimony" (2008), 38 *R.G.D.* 379; B. McFarlane and R. Stevens, "The nature of equitable property" (2010), 4 *J. Eq.* 1; J. E. Penner, "The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust" (2014), 27 *Can. J.L. & Jur.* 473; Brender, at p. 316). The conventional view is that a trust beneficiary only has a right *in personam* against the trustee to enforce the terms of the trust, which is not a proprietary right in the trust property. A different view is that a trust beneficiary has equitable ownership of trust property, despite the existence of an intermediary with legal title (Brown, at pp. 413-14). Some suggest that there is a midway approach in Canada: depending on the context, a beneficiary's right is either a personal right against the trustee or a proprietary right in trust property (Brender, at p. 316).

115 In "Beneficial Ownership and the Income Tax Act", Brown notes the debate in the academy and analyzes how the terms "beneficial ownership", "beneficial owner", and "beneficially owned" are used in the *ITA*. After examining 26 provisions invoking beneficial ownership in the *ITA*, she concludes that its meaning is "no longer obvious" (p. 452).

116 This Court need not resolve the ongoing debate. However, it serves to highlight that "the real question is what is the nature of a beneficiary's interest in a trust when considered in the context of the legislation that is sought to be applied" (Brown, at p. 419). In the *ITA* context, Brown concludes that "the matter of what 'beneficial ownership' means for tax purposes must be settled within the structure of the ITA" (p. 435). Further, whether the beneficiary's rights within the *ITA* are *in rem* or *in personam* will often depend on a combination of factors, like the wording of the deeming provision, private law concepts, case law, and tax policy (see pp. 435-36).

117 In my view, the works cited above belie the notion that s. 227(4.1) of the *ITA*, and its use of the concept of beneficial ownership, is unequivocal in meaning. Not only is there no settled definition of beneficial ownership under the common law, there also appears to be no consistent meaning of the term in the *ITA*. And the concept does not exist in Quebec civil law. The

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meaning of beneficial ownership when used in a statute must always be construed within the context of the particular provision in which it occurs. What is necessary is careful scrutiny of s. 227(4.1), and specifically, the right of beneficial ownership it gives the Crown, particularly in the context of a statutory deemed trust with no specific subject matter.

(b) Section 227(4.1) Does Not Create a "True" Trust

118 A statutory deemed trust is a unique legal vehicle. Unlike an express trust, which can be created by contract, will, or oral and written declarations, and unlike a trust that arises by operation of law, a statutory deemed trust "is a trust that legislation brings into existence by constituting certain property as trust property and a certain person as the trustee of that property" (*Guarantee Company of North America v. Royal Bank of Canada*2019 ONCA 9, 144 O.R. (3d) 225, at para. 18; see also A. Grenon, "Common Law and Statutory Trusts: In Search of Missing Links" (1995), 15 *Est. & Tr. J.* 109, at p. 110).

119 Being a creature of statute, a statutory deemed trust does not have to fulfill the ordinary requirements of trust law, namely, certainty of intention, certainty of subject matter, and certainty of object (*British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; see also *Friends of Toronto Public Cemeteries Inc. v. Public Guardian and Trustee*2020 ONCA 282, 59 E.T.R. (4th) 174, at para. 163).

120 Section 227(4.1), for example, does not fulfill the ordinary requirements of the common law of trusts (see R. J. Wood and R. T. G. Reeson, "The Continuing Saga of the Statutory Deemed Trust: *Royal Bank v. Tuxedo Transportation Ltd.*" (2000), 15 *B.F.L.R.* 515, at pp. 522-24). There is no identifiable trust property and therefore no certainty of subject matter (*Henfrey*, at p. 35). To use the terminology in *Henfrey*, s. 227(4.1) is not a "true" trust (p. 34). Moreover, without specific property being transferred to the trust patrimony, s. 227(4.1) does not satisfy the requirements of an autonomous patrimony contemplated by the *Civil Code of Québec* in arts. 1260, 1261 and 1278: see *Bank of Nova Scotia v. Thibault*2004 SCC 29, [2004] 1 S.C.R. 758, at para. 31.

121 This departure from a standard requirement of trust formation — certainty of subject matter — results in at least two features of s. 227(4.1) that are at odds with the operation of ordinary trusts. First, through equitable tracing, the beneficiary of a trust can claim appreciation in trust value, but this advantage is impossible without identifiable trust property (*Rawluk v. Rawluk*, [1990] 1 S.C.R. 70, at pp. 79 and 92-93; *Foskett v. McKeown*, [2001] 1 A.C. 102 (H.L.), at pp. 129-31; L. D. Smith, *The Law of Tracing* (1997), at pp. 347-48). The tracing mechanism in s. 227(4.1) provides that the value of any unremitted source deductions continues to survive in the assets remaining in the tax debtor's hands. Section 227(4.1) traces the *value* of the unremitted source deductions, necessarily capping the Crown's right at that value. In *Sparrow Electric*, Gonthier J. explained that such a tracing mechanism is "antithetical to tracing in the traditional sense, to the extent that it requires no link at all between the subject matter of the trust and the fund or asset which the subject matter is being traced into" (para. 37; see also Wood and Reeson, at p. 518; Smith (1997), at pp. 310-20 and 347-48; R. J. Wood, "The Floating Charge in Canada" (1989), 27 *Alta. L. Rev.* 191, at p. 221).

122 While s. 227(4.1) gives the Crown beneficial ownership in the value of unremitted source deductions, it does not allow the Crown to claim more than the value of the source deductions. In other words, it gives the Crown the right of beneficial ownership without at least some of the advantages that beneficial ownership often entails.

123 Second, a trustee cannot normally dispose of trust property in the ordinary course of the trustee's business. Section 227(4.1), however, allows the tax debtor to dispose of its property, conveying clear title to property subject to the trust.

124 This was the point made by Iacobucci J. in *First Vancouver* when he likened the deemed trust in s. 227(4.1) to a floating charge. Because a floating charge is a security interest, the Respondents rely on Iacobucci J.'s analogy to argue that s. 227(4.1) only creates a security interest as opposed to a proprietary right. I disagree with the Respondents' submission — the limited analogy to a floating charge in that context cannot be relied on in this case to liken the Crown's interest to a security interest for the purposes of the *CCAA*.

125 One of the issues in *First Vancouver* was whether the deemed trust in s. 227(4.1) continued to attach to property that had been sold by the tax debtor to a third-party purchaser for value. The Court concluded that, in the event of a sale to a third

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party, "the trust property is replaced by the proceeds of sale of such property" (para. 40). This is because the deemed trust "does not attach specifically to any particular assets of the tax debtor so as to prevent their sale" and the tax debtor is thereby "free to alienate its property in the ordinary course" (para. 40). In this way, "the deemed trust is in principle similar to a floating charge over all the assets of the tax debtor" (para. 40). As a result, the deemed trust in s. 227(4.1) would not override the rights of third-party purchasers for value (para. 44).

126 In short, the deemed trust in s. 227(4.1) clearly "anticipate[s] that the character of the tax debtor's property will change over time" (*First Vancouver*, at para. 41). In making these statements, Iacobucci J. did not, however, equate the deemed trust in s. 227(4.1) to a floating charge for all purposes. Otherwise, the trust would not attach until an event of crystallization, and s. 227(4.1) clearly contemplates that the trust attaches from the moment source deductions are made or withheld (see s. 227(4.1)(a) and (b); see also A. Duggan and J. Ziegel, "Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security" (2007), 57 *U.T.L.J.* 227, at p. 246; Wood (1989), at p. 195).

127 The Court's limited analogy to a floating charge in *First Vancouver* helps explain why "beneficial ownership" in s. 227(4.1) again means something narrower than it does outside of that statutory context. The Crown's right of beneficial ownership does not prevent the trustee from disposing of trust property until the Canada Revenue Agency (CRA) enforces the deemed trust (Canada Revenue Agency, *Tax collections policies* (online); see also *ITA*, ss. 222, 223(1) to (3), (5) and (6) and 224(1)). Freely disposing of trust property, including for one's own business purposes, is obviously not something a trustee can do under the common law.

128 The Crown's reliance on s. 227(4.1)(b) of the *ITA* is misplaced for similar reasons. That clause specifies that the amount of the unremitted source deductions is deemed to "form no part of the estate or property of the person from the time the amount was so deducted or withheld". The Crown argues that this is further clarification that a *CCAA* judge cannot order a charge over that amount. Again, the deeming words of s. 227(4.1)(b) must be interpreted in the context of a trust without certainty of subject matter. To say that a certain *amount* does not form part of the debtor's estate or property reiterates that the Crown has an interest in that amount; it also clarifies that the debtor's interest in its estate is reduced by that amount. However, it does not change the *makeup* of the estate itself — it does not change the specific property that constitutes the debtor's estate. So long as the thing that is deemed not to form part of the debtor's estate or property is an amount or value of money rather than property with a specific subject matter, the debtor's estate remains unchanged and the debtor continues to have control over it.

129 To conclude, beneficial ownership under s. 227(4.1) is a manipulation of the concept of beneficial ownership under ordinary principles of trust law. The logical incoherence of s. 227(4.1) has prompted some scholars to criticize the provision as using inappropriate legal concepts. For example, Wood and Reeson state:

> ... we believe that the design of [s. 227(4.1) of the *ITA*] is deeply flawed.... In large measure, the difficulties have as their source the use of inappropriate legal concepts. The concept of a trust is used in the legislation, but in virtually every respect the characteristics of a trust are lacking. The employer is not actually required to hold the money separate and apart, the usual fiduciary obligations of a trustee are absent, and the trust exists without a *res*. The law of tracing is similarly corrupted. The tracing exercise does not seek to identify a chain of substitutions, and a proprietary claim is available without the need for a proprietary base.
>
> . . . . .
>
> The misuse of the trust concept and the perversion of conventional tracing principles empty these concepts of meaning and will pose a threat to the rationality of the law. [Footnote omitted; pp. 531-33.]

130 Others have similarly commented that, in substance, s. 227(4.1) only creates a security interest (J. S. Ziegel, "Crown Priorities, Deemed Trusts and Floating Charges: *First Vancouver Finance v. Minister of National Revenue*" (2004), 45 C.B.R. (4th) 244, at p. 248; Duggan and Ziegel, at pp. 239 and 245-46; M. J. Hanlon, V. Tickle and E. Csiszar, "Conflicting Case Law, Competing Statutes, and the Confounding Priority Battle of the Interim Financing Charge and the Crown's Deemed Trust for Source Deductions", in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 897).

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131 Similarly, in *Caisse populaire Desjardins de Montmagny*, this Court rejected the Crown's argument that s. 222(3) of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (*ETA*), which is nearly identical to s. 227(4.1) of the *ITA*, created a proprietary right in the Crown (paras. 20-27). In that case, the debtor companies owed goods and services tax (GST) at the time of their respective bankruptcies. As the Crown's GST claims are unsecured in bankruptcy, the tax authorities took the position that amounts owing up to the date of the bankruptcy were the Crown's property. This Court unanimously disagreed with that position, concluding that the manner and mechanism of collecting GST was not consistent with a proprietary right (paras. 21-23).

132 In any event, treating s. 227(4.1) as only effectively creating a security interest would not resolve the issues in this appeal without reference to how the Crown's interest arises under the *CCAA*. As noted above, broad general characterizations do not help in defining the specific attributes of this deemed trust. This Court must grapple with the fact that s. 227(4.1) is both structured as a security interest, like a charge, but also uses the mechanism of a deemed trust.

133 The takeaway for this appeal is that the structure of s. 227(4.1), on its own, does not shed light on what to do with the Crown's beneficial ownership of unremitted source deductions in the insolvency regimes. Although the provision is clear that the Crown's right operates notwithstanding other security interests, the content of that right for the purposes of insolvency cannot be inferred solely from the text of the *ITA*. The unique statutory device manipulates private law concepts and cannot be carried through to a logical conclusion for the purposes of insolvency. For this reason, it is not surprising that the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) and the *CCAA* specifically articulate how the deemed trust for unremitted source deductions should be treated.

134 I now turn to that half of the equation: Parliament's insolvency regime.

B. How Is the Crown's Deemed Trust for Unremitted Source Deductions Treated in Parliament's Insolvency Regime?

(1) Parliament's Insolvency Regime

135 There are three main statutes in Parliament's insolvency regime: the *CCAA*, which is at issue in this appeal, the *BIA* and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 (*WURA*). (The *WURA* covers insolvencies of financial institutions and certain other corporations, like insurance companies, and is not relevant to this appeal (s. 6(1); *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521, at para. 39)). In *Century Services*, Deschamps J., writing for the majority, described insolvency as

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

136 The *BIA* contains both a liquidation regime and a restructuring regime (*Century Services*, at paras. 13 and 78). The liquidation regime provides a detailed statutory scheme of distribution whereby the debtor's assets are liquidated and distributed to creditors. In contrast, the restructuring regime allows debtors to make proposals to their creditors for the adjustment and reorganization of debt. The *BIA* is available to debtors, either natural or legal persons, owing $1000 or more (s. 43(1)).

137 The *CCAA* is predominantly a restructuring statute and access is restricted to companies with liabilities in excess of $5 million (s. 3(1)). As Deschamps J. explained in *Century Services*, the purpose of the *CCAA* is remedial; it provides a means for companies to avoid the devastating social and economic consequences of commercial bankruptcies (paras. 15 and 59, quoting *Elan Corp. v. Comiskey*, (1990), 1 O.R. (3d) 289 (C.A.), at p. 306, per Doherty J.A., dissenting). Liquidations do not only harm creditors, but employees and other stakeholders as well. The *CCAA* permits companies to continue to operate, "preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all" (*Century Services*, at para. 77). In enacting a restructuring statute, Parliament recognized that companies have more value as going concerns, especially since they are "key elements in a complex web of interdependent economic relationships" (para. 18).

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138 Due to its remedial nature, the *CCAA* is famously skeletal in nature (*Century Services*, at paras. 57-62). It does not "contain a comprehensive code that lays out all that is permitted or barred" (para. 57, quoting *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, per Blair J.A.). Under s. 11, for example, the court may make any order that it considers appropriate in the circumstances, subject to the restrictions set out in the Act. Section 11 has been described as "the engine that drives this broad and flexible statutory scheme" (*Stelco Inc. (Re)*, (2005), 75 O.R. (3d) 5 (C.A.), at para. 36; see also *9354-9186 Québec inc.*, at para. 48). Deschamps J. observed in *Century Services* that these discretionary grants of jurisdiction to the courts have been key in allowing the *CCAA* to adapt and evolve to meet contemporary business and social needs. Although judicial discretion must always be exercised in furtherance of the *CCAA*'s remedial purpose, it takes many forms and has proven to be flexible, innovative, and necessary (paras. 58-61; *U.S. Steel Canada Inc., Re*2016 ONCA 662, 402 D.L.R. (4th) 450, at para. 102).

139 This is in contrast to the liquidation regime in the *BIA*, which has slightly different purposes. In *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, Gonthier J. explained that bankruptcy serves two goals: it "ensure[s] the equitable distribution of a bankrupt debtor's assets among the estate's creditors *inter se* [and it ensures] the financial rehabilitation of insolvent individuals" (para. 7; see also *9354-9186 Québec inc.*, at para. 46). Similarly, Sarra and Houlden and Morawetz JJ. describe the purposes of the *BIA* as permitting both "an honest debtor, who has been unfortunate, to secure a discharge so that he or she can make a fresh start and resume his or her place in the business community" and "the orderly and fair distribution of the property of a bankrupt among his or her creditors on a *pari passu* basis" (*The 2020-2021 Annotated Bankruptcy And Insolvency Act* (2020), at p. 2).

140 To realize its goals, the *BIA* is strictly rules-based and has a comprehensive scheme for the liquidation process (*Century Services*, at para. 13; *Husky Oil*, at para. 85). It "provide[s] an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules" (*Century Services*, at para. 15). The *BIA*'s comprehensive nature ensures, among other things, that there is a single proceeding in which creditors are placed on an equal footing and know their rights. It also ensures that, post-discharge, the bankrupt will have enough to live on and can have a fresh start (*Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Ltd.*2013 ONCA 769, 118 O.R. (3d) 161, at para. 41). While proposals under the *BIA*'s restructuring regime similarly serve a remedial purpose, "this is achieved through a rules-based mechanism that offers less flexibility" (*Century Services*, at para. 15).

141 Importantly, the specific goals of restructuring in the *CCAA*, in contrast to liquidation, result in the introduction of a key player: the interim lender. Interim financing, previously referred to as debtor-in-possession financing, is a judicially-supervised mechanism whereby an insolvent company is loaned funds for use during and for the purposes of the restructuring process. Before the 2009 amendments, there were no statutory provisions on interim financing in the *CCAA*, but the institution was well-established in the jurisprudence (L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. rev. (loose-leaf)), vol. 4, at N§93; see also *Century Services*, at para. 62). The 2009 amendments codified much of the existing jurisprudence, and I discuss the statutory provisions in detail below.

142 Interim financing is crucial to the restructuring process. It allows the debtor to continue to operate on a day-to-day basis while a workout solution is being arranged. A plan of compromise would be futile if, in the interim six months, the debtor was forced to close its doors. For this reason, Farley J., in *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. C.J. (Gen. Div.)), at para. 1, quoting *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. C.J. (Gen. Div.)), at para. 24, observed that interim financing helps "keep the lights ... on". Similarly, in *Indalex*, Deschamps J. explained that giving interim lenders super-priority "is a key aspect of the debtor's ability to attempt a workout" (para. 59, quoting J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). Without interim financing and the ability to prime (i.e., to give it priority) the interim lender's loan, the remedial purposes of the *CCAA* can be frustrated (para. 58).

143 With this background in mind, I turn now to consider the treatment of the Crown's deemed trust for unremitted source deductions in Parliament's insolvency regime.

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(2) The Deemed Trust for Unremitted Source Deductions in the BIA and CCAA

144 The statutes in this case are all federal statutes. The *ITA*, *BIA*, and *CCAA* make up a co-existing and harmonious statutory scheme, enacted by one level of government (see, e.g., R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 337, on the presumption of coherence). An example of this co-existence is when, in the insolvency regime, Parliament modifies entitlements that it otherwise grants the Crown outside of insolvency. For example, through s. 222(3) of the *ETA*, Parliament provides for a statutory deemed trust in favour of the Crown for unremitted GST. Parliament also renders that deemed trust, which is nearly identical in language to s. 227(4.1) of the *ITA*, ineffective in the *BIA* and *CCAA* (*BIA*, ss. 67(2) and 86(3); *CCAA*, s. 37(1); *Century Services*, at paras. 51-56). As I shall explain, Parliament also deals specifically with the deemed trust in s. 227(4.1) of the *ITA* in the *BIA* and *CCAA*, albeit in different ways.

145 In the *BIA*, the deemed trust for unremitted source deductions appears in s. 67(3). Section 67 is under the heading "Property of the Bankrupt". Section 67(1)(a) excludes property held in trust by the bankrupt from property of the bankrupt that is divisible among creditors. Section 67(2) provides that any provincial or federal deemed trust in favour of the Crown does not qualify as a trust under s. 67(1)(a) unless it would qualify as a trust absent the deeming provision (in other words, unless it would qualify as a common law or true trust) (see *Caisse populaire Desjardins de Montmagny*, at para. 15; *Urbancorp Cumberland 2 GP Inc. (Re)*2020 ONCA 197, 444 D.L.R. (4th) 273, at paras. 32-33). Section 67(3) states that s. 67(2) does not apply in respect of the Crown's deemed trust for unremitted source deductions under the *ITA*, *CPP* or *EIA*. Thus, while s. 67(2) provides in general terms an exception to s. 67(1)(a), that exception does not apply to the Crown's deemed trust for unremitted source deductions by virtue of s. 67(3).

146 The result of this scheme is that the debtor's estate — to the extent of the unremitted source deductions — is not "property of a bankrupt divisible among his creditors" (*BIA*, s. 67(1)). For the purposes of the *BIA*'s liquidation regime, it is effectively the Crown's *property*. Together, ss. 67(1)(a) and 67(3) give content to the Crown's right of beneficial ownership under s. 227(4.1) of the *ITA*: the amount of the unremitted source deductions is taken out of the pool of money that is distributed to creditors in a *BIA* liquidation.

147 In the *CCAA*, the Crown's deemed trust appears in ss. 37(2) and 6(3), alongside other deemed trusts and devices. Section 37(2) explicitly preserves the operation of s. 227(4.1) in *CCAA* proceedings:

> 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.
>
> **(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* (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*,

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> 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.

148 Due to this language, the Court in *Century Services* variously described the s. 227(4.1) trust as "surviv[ing]", "continu[ing]", and "remain[ing] effective" in the *CCCA* (see paras. 38, 45, 49, 53 and 79). The Crown relies on these observations to argue that the deemed trust remains fully intact in the *CCAA*, conferring a proprietary right on the Crown that cannot be subordinated to any other party.

149 In my view, the Crown's submission overextends the analysis in *Century Services*. The issue in that case was whether the deemed trust under s. 222(3) of the *ETA* for unremitted GST was effective in the *CCAA*. As mentioned, s. 222(3) is almost identical in wording to s. 227(4.1) of the *ITA*, providing that the deemed trust extends to property of the tax debtor equal in value to the amount of the unremitted GST and extends to property otherwise held by a secured creditor pursuant to a security interest. Section 222(3) of the *ETA* also provides that the deemed trust operates despite any other enactment of Canada, except the *BIA*. Thus, under the *BIA*, the Crown priority for unremitted GST is lost. However, under the *CCAA*, s. 37(1) provides that statutory deemed trusts in favour of the Crown should not be regarded as trusts unless they would qualify as trusts absent the deeming language. The Court in *Century Services* grappled with the apparent conflict between s. 222(3) of the *ETA* and s. 37(1) (then s. 18.3(1)) of the *CCAA*.

150 A majority of the Court reasoned that, through statutory interpretation, the apparent conflict could be resolved in favour of the *CCAA* (*Century Services*, at para. 44). Parliament had shown a tendency to move away from asserting Crown priority in insolvency. Under both the *BIA* and *CCAA*, it had enacted a general rule that deemed trusts in favour of the Crown are ineffective in insolvency. It had also explicitly carved out an exception to that general rule for unremitted source deductions. The logic of the *CCAA* suggested that only the deemed trust for unremitted source deductions survived (paras. 45-46).

151 Thus, while the Court emphasized that the deemed trust in s. 227(4.1) "survives" in the *CCAA*, it did not comment on *how* it survives. This Court has never considered the scope of the deemed trust under the *CCAA*, especially in light of the purposes of the *CCAA* and the equivocal nature of the beneficial ownership conferred through the deeming provision. For this appeal, it is necessary to probe into ss. 37(2) and 6(3) to determine *how* the *CCAA* construes the Crown's right to unremitted source deductions.

152 To that end, although s. 37(2) of the *CCAA* is almost identical to s. 67(3) of the *BIA*, it does not have the same effect because it is not nested under a provision like s. 67(1)(a). Section 37(2) of the *CCAA* carves out an exception to s. 37(1), which is different from s. 67(1)(a). While s. 67(1)(a) excludes trust property from property of the bankrupt divisible among creditors, s. 37(1) only provides that "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". Unlike the *BIA*, the *CCAA* is silent on how trust property should be treated and silent on what constitutes property of the debtor in a restructuring context — indeed, there is no definition of property in the *CCAA* at all. This is in keeping with the *CCAA*'s comparatively skeletal nature.

153 The result is that s. 37(2) provides that the Crown continues to beneficially own the debtor's property equal in value to the unremitted source deductions; the unremitted source deductions "shall ... be regarded as being held in trust for Her Majesty". However, although this signals that, unlike deemed trusts captured by s. 37(1), the Crown's deemed trust continues and confers a stronger right, s. 37(2) does not explain what to do with that right for the purposes of a *CCAA* proceeding. It does not, for example, provide that trust property should be put aside, as it would be in the *BIA* context. In keeping with the *CCAA*'s flexibility, s. 37(2) says little about what the Crown's unique right of beneficial ownership under s. 227(4.1) of the *ITA* requires. But as I shall explain, s. 11 gives the court broad discretion to consider and give effect to the Crown's interest recognized in s. 37(2).

154 In addition, s. 6(3) of the *CCAA* gives specific effect to the Crown's right under the deemed trust. Under that provision, the court cannot sanction a plan of compromise unless it pays the Crown in full for unremitted source deductions within six months of the plan's sanction (assuming the Crown does not agree otherwise):

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> **(3)** Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under
>
> (a) subsection 224(1.2) of the *Income Tax Act* ....

155 Pursuant to s. 6(3), then, the Crown's right under s. 227(4.1) includes a right *not to have to compromise*. The Crown can demand to be paid in full under the plan "in priority to all ... security interests". The right is therefore different in kind than a security interest. While there may be some risk to the Crown that the plan may fail, and the Crown may not be paid in full if the restructuring dissolves into liquidation and the estate is depleted in the interim, the *CCAA* recognizes that there is societal value in helping a company remain a going concern. This remedial goal is at the forefront of providing flexibility in preserving the Crown's right to unremitted source deductions in s. 37(2), and in giving a concrete effect to that right in s. 6(3) of the *CCAA*.

156 In my view, the reason for this difference between the *BIA* and *CCAA* is straightforward. The purpose of a *BIA* liquidation is to give the debtor a fresh start and pay out creditors to the extent possible. The debtor's property has to be divided according to the statute's rigid priority scheme. To begin the process of distribution, it is necessary to pool together the debtor's funds and determine what is, and is not, available for creditors. A comprehensive definition of property of the debtor is necessary, and no flexibility is needed in the regime to facilitate the liquidation process. There is also no other overarching goal, like facilitating the debtor's restructuring, that requires an institution like interim financing or requires modifying entitlements.

157 In a restructuring proceeding under the *CCAA*, however, there is no rigid formula for the division of assets. Certain debt might be restructured; other debt might be paid out. When a debtor's restructuring is on the table, the goal pivots, and interim financing is introduced to facilitate the restructuring. Entitlements and priorities shift to accommodate the presence of the interim lender — a new and necessary player who is absent from the liquidation scene.

158 The fact that the Crown's right under s. 227(4.1) of the *ITA* is treated differently between the two statutes is therefore consistent with the different schemes and purposes of the Acts. This is not a circumstance where Parliament attempted to harmonize entitlements across the regimes (see, e.g., *Indalex*, at para. 51, per Deschamps J.). The *CCAA* gives the deemed trust meaning for its purposes. The concrete meaning given is that a plan of compromise must pay the Crown in full within six months of approval.

C. Do Sections 11.2, 11.51 and 11.52 of the CCAA Permit the Court to Rank Priming Charges Ahead of the Crown's Deemed Trust for Unremitted Source Deductions?

159 In this case, the Initial Order subordinated the Crown's deemed trust to the Priming Charges. The courts below found that this authority is derived from ss. 11.2, 11.51 and 11.52 of the *CCAA*, which allow the court to order priming charges over a company's property in favour of interim lenders, directors and officers, and estate administrators. Priming charges can rank ahead of any other secured claim. For example, the relevant portions of s. 11.2, which are substantially similar to the relevant portions of ss. 11.51 and 11.52, read as follows:

> **11.2 (1)** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> **(2)** The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

160 As priming charges can "rank in priority over the claim of any secured creditor", the definition of "secured creditor" in s. 2(1) is key:

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> ***secured creditor*** means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds ....

161 The Respondents submit, in line with the courts below, that the Crown is a "secured creditor" under the *CCAA* in respect of its interest in unremitted source deductions because the enabling statute, the *ITA*, itself defines the holder of a deemed trust as holding a "security interest" (see *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274). The Respondents also rely on the analogy in *First Vancouver* likening the Crown's deemed trust to a floating charge (which is a security interest). Accordingly, the Respondents argue that ss. 11.2, 11.51 and 11.52 give the court authority to rank priming charges ahead of the Crown's deemed trust.

162 The Crown, like the dissent at the Court of Appeal, argues that the Crown is not a "secured creditor" because the definition of "secured creditor" in the *CCAA* does not list the holder of a deemed trust and because ss. 37 to 39 of the *CCAA* clearly draw a distinction between the Crown's deemed trust for unremitted source deductions, on the one hand, and the Crown's secured and unsecured claims on the other. Accordingly, the Crown argues that ss. 11.2, 11.51 and 11.52 do *not* give the court authority to rank priming charges ahead of the Crown's deemed trust.

163 As I shall detail, I conclude that ss. 11.2, 11.51 and 11.52 do not give the court the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions.

164 First, I agree with the Respondents that the general definition of security interest under the *ITA* includes the holder of a deemed or actual trust (s. 224(1.3)). However the reference to security interest in s. 227(4.1) is not to the Crown's interest but to others' interest in the debtor's property. In my view, any definition of security interest in the *ITA* is not relevant to defining the Crown's interest since it serves an entirely different purpose. What matters is whether the *CCAA* provisions give the court authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions. This is determined by interpreting the words of the *CCAA* and how the *CCAA* defines secured creditor.

165 I also agree with the Crown that the definition of "secured creditor" in the *CCAA* does not specifically list the holder of a deemed or actual trust. In addition, the Crown's interest cannot simply be called a "charge". As explained above, although the Crown's deemed trust has some parallels with a floating charge, the provision also employs some aspects of beneficial ownership. I would also hesitate to draw analogies with any of the other terms listed in the *CCAA* definition. The holders of several of these instruments are often described as having proprietary rights in their security. It was a legislative choice to define them as secured creditors for the purposes of the *CCAA*. It is difficult to shoehorn the Crown's deemed trust into the definition of "secured creditor" in the *CCAA*, particularly as the *CCAA* specifically refers to the deemed trust in s. 37(2).

166 Moreover, I agree with the Crown that ss. 37 to 39 of the *CCAA* treat the Crown's deemed trust and the Crown's secured claims as distinct interests. After s. 37 of the *CCAA*, dealing with deemed trusts, s. 38(1) provides a general rule that secured claims of the Crown rank as unsecured claims. Section 38(2) contains an exemption from s. 38(1) for consensual security interests that are granted to the Crown. Section 38(3) contains an exemption for the CRA's enhanced requirement to pay. Finally, s. 39(1) preserves the Crown's secured creditor status if it registers before the commencement of a *CCAA* proceeding, and s. 39(2) subordinates a Crown security or charge to prior perfected security interests.

167 As Wood notes, "[t]hese provisions adopt two distinct approaches — one that applies to a deemed trust, the other that applies when a statute gives the Crown the status of a secured creditor" (Wood (2020), at p. 96). If s. 227(4.1) of the *ITA* gave the Crown the status of a secured creditor, then the CRA would presumably need to comply with ss. 38 and 39 by registering its security interest. No one suggests that the Crown has to register its claim for unremitted source deductions. In my view, ss. 37

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to 39 draw a distinction between deemed trusts on the one hand and secured and unsecured claims on the other, and the Crown is not, therefore, a "secured creditor" under the *CCAA* for its right to unremitted source deductions.

168 This is dispositive for the purposes of ss. 11.2, 11.51 and 11.52 of the *CCAA*. These sections do not give the court the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions.

D. Does Section 11 of the CCAA Allow the Court to Rank Priming Charges Ahead of the Crown's Deemed Trust for Unremitted Source Deductions?

169 The remaining issue is whether another provision in the *CCAA*, namely s. 11, confers that jurisdiction. As noted above, s. 11 allows the court to make any order that it considers appropriate in the circumstances, subject to the restrictions set out in the Act:

> **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.

170 In *9354-9186 Québec inc.*, this Court explained that the discretionary authority in s. 11 is broad, but not boundless (para. 49). There are three "baseline considerations": (1) the order sought must be appropriate; (2) the applicant must be acting in good faith; and (3) the applicant must demonstrate due diligence (*Century Services*, at para. 70; *9354-9186 Québec inc.*, at para. 49). Appropriateness is assessed by inquiring whether the order sought advances the remedial objectives of the *CCAA*. The general language of s. 11 should not, however, be "restricted by the availability of more specific orders" (*Century Services*, at para. 70).

171 In keeping with its broad language, s. 11 of the *CCAA* has been used to make a wide array of orders. Most recently, for example, this Court clarified that it can be used to bar a creditor from voting on a plan where the creditor has acted for an improper purpose (*9354-9186 Québec inc.*, at paras. 56 and 66).

172 The issue in this case is whether s. 11 can be used to rank an interim lender's loan, or other priming charge, ahead of the Crown's deemed trust for unremitted source deductions. In my view, it can, for two reasons.

173 First, given my conclusion about the content of the Crown's right under s. 227(4.1) of the *ITA* for the purposes of the *CCAA* (requiring that it at least be paid in full under a plan of compromise), ranking a priming charge ahead of the Crown's deemed trust does not conflict with the *ITA* provision. So long as the Crown is paid in full under a plan of compromise, the Crown's right under s. 227(4.1) remains intact "notwithstanding any security interest" in the amount of the unremitted source deductions. For this reason, it is irrelevant whether a priming charge under ss. 11, 11.2, 11.51 or 11.52 of the *CCAA* is a "security interest" within the meaning of s. 227(4) and (4.1) of the *ITA*. The analysis above does not depend on finding that a priming charge is not captured within the *ITA* definition.

174 In addition, depending on the circumstances, such an order may further the remedial objectives of the *CCAA*. For example, interim financing is often crucial to the restructuring process. If there is evidence that interim lending cannot be obtained without ranking the interim loan ahead of the Crown's deemed trust, such an order could, again depending on the circumstances, further the remedial objectives of the *CCAA*. In general, the court should have flexibility to order super-priority charges in favour of parties whose function is to facilitate the proposal of a plan of compromise that, in any event, will be required to pay the Crown in full.

175 Second, I do not accept the Crown's argument that s. 11 is unavailable because other *CCAA* provisions, namely ss. 11.2, 11.51 and 11.52, confer more specific jurisdiction (see *9354-9186 Québec inc.*, at paras. 67-68).

176 While I agree that s. 11 is restricted by the provisions set out in the *CCAA* and cannot be used to violate specific provisions in the Act, s. 11 is not "restricted by the availability of more specific orders". The fact that specific provisions of the *CCAA* allow the court to rank priming charges ahead of a secured creditor does not mean that the court can *only* rank priming charges ahead

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of a secured creditor. Such an interpretation would amount to reading words into ss. 11.2, 11.51 and 11.52 that do not exist. An order that ranks a priming charge ahead of the beneficiary of the deemed trust is different in kind than the orders contemplated by ss. 11.2, 11.51 and 11.52, which contemplate the subordination of secured creditors. There is no provision in the *CCAA* stipulating what the court can do with trust property and no provision in the *CCAA* conferring more specific jurisdiction on whether a priming charge can rank ahead of the beneficiary of a deemed trust. So long as the order does not conflict with other provisions in the Act, namely ss. 37(2) and 6(3), and so long as it fulfills the "baseline considerations" of appropriateness, good faith, and due diligence, an order ranking a priming charge ahead of the Crown's deemed trust would fall under the jurisdiction conferred by s. 11 (*Century Services*, at para. 70; *9354-9186 Québec inc.*, at para. 49). As explained above, there would be no conflict with ss. 37(2) and 6(3) of the *CCAA*.

177 Both parties invoked policy concerns to assist in the interpretative exercise. I do not find it necessary to resort to such arguments. However, it is far from evident that interim lending would simply end if the Crown's deemed trust had super-priority in an appropriate case. It is also far from evident that the Crown would suffer significantly if the priming charges had super-priority in an appropriate case, given the existence of s. 6(3) of the *CCAA* requiring full payment, and the Crown's favourable treatment in the *BIA* liquidation regime in the event the restructuring failed. What is clear is that interim lending is crucial to the restructuring process, and the Crown's deemed trust for unremitted source deductions is crucial to tax collection. It will be up to the *CCAA* judge to weigh and balance the moving pieces.

178 To that end, s. 11 of the *CCAA* gives the court discretion and flexibility to weigh several considerations in ranking a priming charge ahead of the Crown's deemed trust for unremitted source deductions. It requires the court to take a focused look at the specific facts of a case to determine whether such an order is necessary and appropriate. Where relevant, the court will consider the Crown's interest in the deemed trust as a result of s. 37(2). Courts may no doubt look to the factors already listed in s. 11.2(4) — the likely duration of *CCAA* proceedings, plans for managing the company during those proceedings, views of the company's major creditors and the monitor, and the company's ability to benefit from interim financing, among others — for guidance. Section 11.2(4) of the *CCAA* states:

> **(4)** In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(b), if any.

179 In addition, it seems to me that courts may consider:

- whether the interim lender has indicated, in good faith, that it will not lend to the debtor without ranking ahead of the Crown's deemed trust;

- the relative amounts of the interim loan and the unremitted source deductions (if the amount of the unremitted source deductions is a small fraction of the amount of the interim loan, the interim lender may not be significantly prejudiced without super-priority);

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• whether, and for how long, the Crown allowed source deductions to go unremitted without taking action (see, e.g., Hanlon, Tickle and Csiszar); and

• finally, the prospects of success of a restructuring; and whether the *CCAA* is likely to be used to sell the debtor's assets.

180 Finally, different considerations will apply if a court is considering ranking a different party's charge, like the Monitor's or Directors' Charge, ahead of the Crown's deemed trust.

VII. Conclusion

181 I would dismiss the appeal and clarify that the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions is derived from s. 11 of the *CCAA* rather than ss. 11.2, 11.51 and 11.52. The Crown's interest under s. 227(4.1) of the *ITA* is a deemed trust interest, but beneficial ownership of deemed trust property is a manipulation of private law concepts, without settled meaning. Accordingly, the specific nature of beneficial ownership of deemed trust property must be determined in the relevant context in which it is asserted. Here, the Crown's right to unremitted source deductions in a *CCAA* restructuring is protected by both ss. 37(2) and 6(3). The former is flexible, requiring the Crown's deemed trust property to be considered when appropriate under the Act; the latter specifically requires that a plan of compromise provide for payment in full of the Crown's deemed trust claims within six months of the plan's approval. The Crown's right differs under the *BIA*, in keeping with the different goals and schemes of liquidation and restructuring. Given the content of the Crown's right to unremitted source deductions in a *CCAA* restructuring, there is no conflict between s. 227(4.1) of the *ITA* and s. 11 of the *CCAA*. The schemes of both federal Acts can be harmonized and the objectives of both statutes furthered.

182 The Respondents will have their costs in accordance with the tariff of fees and disbursements set out in Schedule B of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

The reasons of Abella, Brown and Rowe JJ. were delivered by

***Brown, Rowe JJ.* (dissenting) (Abella J. concurring):**

I. Overview

183 At issue in this appeal is whether the Crown's deemed trust claim for unremitted source deductions under s. 227(4) and (4.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), s. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"), and ss. 23(4) and 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*") (collectively, the "Fiscal Statutes"), have priority over court-ordered priming charges under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

184 The present iteration of the deemed trust provision, s. 227(4.1) of the *ITA*, was the result of a 1997 amendment enacted by Parliament directly in response to this Court's interpretation of the provision's predecessor in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (Department of Finance Canada, *Unremitted Source Deductions and Unpaid GST* (April 7, 1997)). That provision was itself the result of several amendments, beginning in 1942, with the amendment introducing the deemed trust in s. 92(6) and (7) of the *Income War Tax Act*, R.S.C. 1927, c. 97 (previously S.C. 1917, c. 28) (*An Act to amend the Income War Tax Act*, S.C. 1942-43, c. 28, s. 31). The provision and the historical amendments demonstrate Parliament's intention to safeguard its ability to collect employee source deductions under the relevant statutes, in priority to all other claims against a debtor's property.

185 The Crown appeals from the decision of the Court of Appeal of Alberta which, like the chambers judge, held that the *CCAA* court could subordinate the deemed trust claims under the Fiscal Statutes to the priming charges (2019 ABCA 314, 93 Alta. L.R. 29, aff'g 2017 ABQB 550, 60 Alta. L.R. (6th) 103). Having examined the pertinent provisions of the Fiscal Statutes, and for the reasons that follow, we find ourselves in respectful disagreement with that conclusion, and prefer the view of the dissenting judge, Wakeling J.A. The Crown's deemed trust claims under the Fiscal Statutes have ultimate priority and cannot be subordinated by priming charges.

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186 In our view, the text of the impugned provisions in the Fiscal Statutes is clear: the Crown's deemed trust operates "[n]otwithstanding ... any other enactment of Canada" (*ITA*, s. 227(4.1)).[2] Parliament used unequivocal language — indeed, *the very language suggested by this Court* in *Sparrow Electric* — to give ultimate priority to the Crown's claim. Further, and again in clear and unequivocal text, Parliament imposed limits on the broad grant of authority by which a court can prioritize priming charges, thereby making plain the superiority of deemed trust claims. Finally, no provision of the *CCAA* is rendered meaningless by this interpretation. Unlike in other contexts such as the legislative scheme governing the GST/HST, Parliament has left no room for subordinating the deemed trusts under the Fiscal Statutes in pursuit of other legislative objectives. We would, therefore, allow the appeal.

II. Analysis

A. General Comments on the Nature of the Deemed Trusts Under the Fiscal Statutes

187 The deemed trust created by the *ITA* is an essential instrument to collect source deductions (*First Vancouver Finance v. M.N.R.*2002 SCC 49, [2002] 2 S.C.R. 720, at para. 22). The *ITA* grants special priority to the Crown to collect unremitted source deductions, reflecting its status as an "involuntary creditor" (*First Vancouver*, at para. 23).

188 Section 227(4) and (4.1) of the *ITA* reads:

> (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.
>
> **(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 and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) 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 deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, 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 such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

189 These sections describe two relevant events. First, at the time of the deduction, a trust is deemed in favour of the Crown, binding every person (the "tax debtor") who collects source deductions in the amount withheld until the person remits the source deductions (*ITA*, s. 227(4)). Section 227(4) deems the tax debtor to hold the source deductions "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".

190 The second event occurs where the tax debtor has failed to remit the source deductions in accordance with the manner and time provided by the *ITA*. Section 227(4.1) extends the deemed trust to all "property of the person and property held by any secured creditor ... equal in value to the amount so deemed to be held in trust". This is achieved by deeming the source

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deductions to be held "in trust for Her Majesty" from the moment the amount was "deducted or withheld by the person, separate and apart from the property of the person". Parliament further provided that the unremitted source deductions under the Fiscal Statutes "form no part of the estate or property of the person" from the time of deduction or withholding, and is "property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests".

191 This Court has held that the deemed trust is a "creatur[e] of statute" and "is not in truth a real [trust], as the subject matter of the trust cannot be identified from the date of creation of the trust" (*Sparrow Electric*, at para. 31, per Gonthier J., citing D. W. M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at p. 117, and adopted in *First Vancouver*, at para. 37). This statement fuelled a debate in this appeal about whether the deemed trust is a security interest or a proprietary interest, with the respondents arguing that the Crown cannot hold a proprietary interest in the debtor's property because there is a lack of certainty in the subject matter.

192 We agree with each of our colleagues Justices Karakatsanis and Côté that the deemed trust is not a "true" trust and that it does not confer an ownership interest or the rights of a beneficiary on the Crown as they are understood at common law or within the meaning of the *Civil Code of Québec* (Karakatsanis J.'s reasons, at paras. 119-20; Côté J.'s reasons, at paras. 43 and 49). Respectfully, however, our colleagues miss the point of the *deemed* quality of the trust. The matters of a property interest, certainty of subject matter and autonomous patrimony that arise from attempts to describe the operation of the deemed trust are entirely irrelevant and do not assist in deciding this appeal, nor in understanding Parliament's intent. The deemed trust is a legal fiction, with *sui generis* characteristics that are described in s. 227(4) and (4.1) of the *ITA*. As noted in *First Vancouver*, at para. 34, "it is open to Parliament to characterize the trust in whatever way it chooses; it is not bound by restraints imposed by ordinary principles of trust law". While *First Vancouver* considered the contrast between a statutory trust and a common law trust, the same applies to our colleague Côté J.'s reference to the *Civil Code*(*Canada (Attorney General) v. Caisse populaire d'Amos*, 2004 FCA 92, 324 N.R. 31, at para. 49). What matters here is not *the characterization* of the deemed trust that is at issue, but its *operation*. And as we explain, it *operates* to give the Crown a statutory right of access to the debtor's property to the extent of its *corpus* and a right to be paid in priority to all security interests.

193 Further, no concerns regarding certainty of subject matter or autonomous patrimony arise here. It is of course true that, in common law Canada, for a trust to come into existence there must be certainty of intention, certainty of subject matter, and certainty of object (D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (4th ed. 2012), at p. 140; E. E. Gillese, *The Law of Trusts* (3rd ed. 2014), at p. 41). Similarly, under the Quebec civil law, "[t]hree requirements must ... be met in order for a trust to be constituted: property must be transferred from an individual's patrimony to another patrimony by appropriation; the property must be appropriated to a particular purpose; and the trustee must accept the property" (*Bank of Nova Scotia v. Thibault*2004 SCC 29, [2004] 1 S.C.R. 758, at para. 31). And, again, it is also true that the subject matter of the deemed trust under s. 227(4.1) cannot be identified from the date of creation of the trust and does not constitute an autonomous patrimony to which specific property is transferred.

194 But again, none of this remotely matters here. Statutory text, not ordinary principles of trust law, determines the nature of, and rights conferred by, deemed trusts (*First Vancouver*, at para. 34). And this Court has recognized that Parliament, through the trust deemed by s. 227(4.1) of the *ITA*, has "revitaliz[ed] the trust whose subject matter has lost all identity" (*Sparrow Electric*, at para. 31, per Gonthier J., adopted in *First Vancouver*, at para. 37). This is because the subject matter of the deemed trust is ascertained *ex post facto*, corresponding to the property of the tax debtor and property held by any secured creditor equal in value to the amount deemed to be held in trust by s. 227(4) that, but for the security interest, would be property of the tax debtor. In short, the subject matter is whatever assets the employer then has from which to realize the original trust debt. Hence Iacobucci J.'s description in *First Vancouver* of the operation of s. 227(4.1) as "similar in principle to a floating charge" (para. 4). Parliament also circumvented the traditional requirements of the *Civil Code* for constituting a trust by requiring the amount of the unremitted source deductions to be held "separate and apart from the property of the [debtor]" and to "form no part of the estate [*patrimoine*, in the French version] or property of the [debtor]" (s. 227(4.1)).

195 In short, the requirements of "true" trusts of civil and common law are irrelevant to ascertaining the operation of a statutorily deemed trust. Parliament did not legislate a "true" trust. Instead, it legislated a deeming provision which "artificially

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imports into a word or an expression an additional meaning which they would not otherwise convey beside the normal meaning which they retain where they are used" (*R. v. Verrette*, [1978] 2 S.C.R. 838, at p. 845).

196 On this point, and contrary to the view of the majority at the Court of Appeal, Iacobucci J. *did not* hold that the deemed trust *is* a floating charge — nor that it was "of the same nature" (Côté J.'s reasons, at para. 51) — but rather that it operated *similarly*, by permitting a debtor in the interim to alienate property in the normal course of business. They are distinct legal concepts; whereas the deemed trust takes "priority over existing and future security interests", a floating charge would be overridden by a subsequent fixed charge (*Toronto-Dominion Bank v. Canada*2020 FCA 80[2020] 3 F.C.R. 201, at para. 62; see also *First Vancouver*, at para. 28).

197 Significantly, the s. 227(4.1) deemed trust does not encompass the whole of the tax debtor's interest in property, but only the amount deemed to be held in trust by s. 227(4). But this does not mean the Crown cannot have a property interest in the debtor's property. It merely limits that interest to the extent of the unremitted source deductions. This makes sense. The Crown may collect only what it is owed.

B. The Deemed Trust Under the Fiscal Statutes Have Absolute Priority Over All Other Claims in CCAA Proceedings

198 The text, context, and purpose of s. 227(4.1) of the *ITA* support the conclusion that s. 227(4.1) of the *ITA* and the related deemed trust provisions under the Fiscal Statutes bear only one plausible interpretation: the Crown's deemed trust enjoys priority over all other claims, including priming charges granted under the *CCAA*. Parliament's intention when it amended and expanded s. 227(4) and (4.1) of the *ITA* was clear and unmistakable.

(1) The Deemed Trusts Apply Notwithstanding the Provisions of the CCAA

(a) Text of the Fiscal Statutes

199 The text of s. 227(4.1) of the *ITA* is determinative: the Crown's deemed trust claim enjoys superior priority over all "security interests", including priming charges under the *CCAA*. The amount subject to the deemed trusts is deemed "to be held ... separate and apart from the property of the person" and "to form no part of the estate or property of the person". It is "beneficially owned by Her Majesty", and the "proceeds of such property shall be paid ... in priority to all such security interests". The Crown's right pursuant to its deemed trust is clear: it is a right to be paid in priority to all security interests.

200 Parliament granted this unassailable priority by employing the unequivocal language of "[n]otwithstanding any ... enactment of Canada". This is a "blanket paramountcy clause"; it prevails over all other statutes (P. Salembier, *Legal and Legislative Drafting* (2nd ed. 2018), at p. 385). No similar "notwithstanding" provision appears in the *CCAA*, subordinating the claims under the deemed trusts of the Fiscal Statues to priming charges. Indeed, it is quite the opposite: unlike most deemed trusts which are nullified in *CCAA* proceedings by the operation of s. 37(1) of the *CCAA*, s. 37(2) *preserves* the deemed trusts of the Fiscal Statutes. This distinguishes the deemed trust at issue here from those discussed in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, which were nullified by the operation of what is now s. 37(1). Deschamps J. repeatedly contrasted the different deemed trusts and specified that "the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy" (para. 38). The *ITA* and *CCAA* thus operate without conflict.

(b) Legislative Predecessor Provisions

201 The predecessor provisions of a statutory provision form part of the "entire context" in which it must be interpreted (*Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*2005 SCC 70, [2005] 3 S.C.R. 425, at para. 28). And here, it confirms that, by enacting s. 227(4.1) of the *ITA*, Parliament intended for the deemed trusts arising from the Fiscal Statutes to have absolute priority over all secured creditors, as defined in s. 224(1.3) of the *ITA*.

202 As already noted, Parliament amended s. 227(4.1) of the *ITA* to its current form in response to this Court's decision in *Sparrow Electric*. In *Sparrow Electric*, both Royal Bank and the Minister claimed priority to the proceeds from the tax debtor's

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property. This Court held that the Bank had priority since the inventory was subject to the Bank's security before the deemed trust arose. In reaching this conclusion, Iacobucci J. invited Parliament to grant absolute priority to the Crown, and showed how this could be achieved:

> I wish to emphasize that it is open to Parliament to step in and assign absolute priority to the deemed trust. A clear illustration of how this might be done is afforded by s. 224(1.2) *ITA*, which vests certain moneys in the Crown "notwithstanding any security interest in those moneys" and provides that they "shall be paid to the Receiver General in priority to any such security interest". All that is needed to effect the desired result is clear language of that kind. In the absence of such clear language, judicial innovation is undesirable, both because the issue is policy charged and because a legislative mandate is apt to be clearer than a rule whose precise bounds will become fixed only as a result of expensive and lengthy litigation.
>
> [Emphasis added; para. 112.]

203 Parliament proceeded to do just that. It amended the Fiscal Statutes to reinforce its priority. The press release accompanying the amendments stated that the objective of the amendments was to "assert the *absolute priority* of the Crown's claim [for] unremitted source deductions [and to] ensure that tax revenue losses are minimised and that delinquent taxpayers and their secured creditors do not benefit from failures to remit source deductions and GST at the expense of the Crown" (Department of Finance Canada, at p. 1 (emphasis added)).

204 The purpose of these amendments was described by Iacobucci J. for this Court in *First Vancouver*. It was, he recognized, to grant priority to the deemed trusts and ensure the Crown's claim prevails over secured creditors, irrespective of when the security interest arose (paras. 28-29). "It is evident from these changes" he added, "that Parliament has made a concerted effort to broaden and strengthen the deemed trust in order to facilitate the collection efforts of the Minister" (para. 29). Parliament's intention could not have been clearer.

205 Indeed, our colleagues' view to the contrary leaves us wondering: if the all-encompassing scope of the notwithstanding clause of s. 227(4.1) of the *ITA* is *insufficient* to prevail over the priming charges, what language would possibly be *sufficient*? Courts must give proper effect to Parliament's plain statutory direction, and not strain to subvert it on the basis that Parliament's categorical language or "basket clause" did not itemize a particular security interest.

(2) The Priming Charges Are "Security Interests" Within the Meaning of the Fiscal Statutes

206 The priming charge provisions in ss. 11.2(1), 11.51(1) and 11.52(1) of the *CCAA* allow the supervising court to "make an order declaring that all or part of the company's property is subject to a security or charge" ("*charge ou sûreté*" in the French version). This does not, however, prevail over the deemed trust created by s. 227(4.1) of the *ITA*, which provides that the unpaid amounts of the deemed trust for source deductions have priority over all "security interests". That term is defined by s. 224(1.3) of the *ITA* as follows:

> ***security interest*** means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for; *(garantie)*

This makes clear that a "security interest" includes a "charge" (a "*sûreté*" in the French version). Further, ss. 11.2(1), 11.51(1) and 11.52(1) of the *CCAA* describe the priming charges as a "security or charge". There can be no doubt, therefore, that priming charges under the *CCAA* are security interests under the *ITA*.

207 Even were this insufficient, the definition of "security interest" in s. 224(1.3) of the *ITA* is sufficiently expansive to capture *CCAA* priming charges. The word "includes", and the categorical language of "encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for" could not be any more expansive. As Professor Sullivan explains, "[t]he purpose of a list of examples following the word 'including' is normally to emphasize the broad range of general

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language and to ensure that it is not inappropriately read down so as to exclude something that is meant to be included" (*Sullivan on the Construction of Statutes* (6th ed. 2014), at para. 4.39).

208 This Court has already recognized, in *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94, that Parliament chose "an expansive definition of 'security interest' ... in order to enable maximum recovery by the Crown" (para. 14), such that it captures any interest in the property of the debtor that secures payment or performance of an obligation:

> In order to constitute a security interest for the purposes of s. 227(4.1) *ITA* and s. 86(2.1) *EIA*, the creditor must hold "any interest in property that secures payment or performance of an obligation". The definition of "security interest" in s. 224(1.3) *ITA* does not require that the agreement between the creditor and debtor take any particular form, nor is any particular form expressly excluded. So long as the creditor's interest in the debtor's property secures payment or performance of an obligation, there is a "security interest" within the meaning of this section. While Parliament has provided a list of "included" examples, these examples do not diminish the broad scope of the words "any interest in property" ....
>
> [Emphasis added; para. 15.]

In that case, Rothstein J. held for the Court that a contract providing a right to compensation (or set-off at common law) could constitute a "security interest" under s. 224(1.3) of the *ITA*, *despite that it was not enumerated in the definition* and that it is *not traditionally understood as such* (paras. 37-40).

209 For all these reasons, the priming charges fall under the definition of "security interest", because they are "interest[s] in the debtor's property [that] secur[e] payment or performance of an obligation", i.e. the payment of the monitor, the interim lender, and directors. Consequently, the Crown's interest under the trust deemed created by s. 227(4.1) of the *ITA* enjoys priority over the priming charges.

210 Our colleague Côté J., however, sees the matter differently. In our respectful view, she disregards this Court's authoritative statement of the law in *Caisse populaire Desjardins de l'Est de Drummond*. Specifically, she concludes that priming charges are not "security interests" under the *ITA* because "[c]ourt-ordered charges are unlike conventional consensual and non-consensual security interests in that they are integrally connected to insolvency proceedings that operate for the benefit of the creditors as a group" (Côté J.'s reasons, at para. 62 (emphasis deleted), quoting R. J. Wood, "Irresistible Force Meets Immovable Object: *Canada v. Canada North Group Inc.*" (2020), 63 *Can. Bus. L.J.* 85, at p. 98). With respect, nothing in the definition of security interest in the *ITA* precludes the inclusion of an interest that is designed to operate to the benefit of all creditors.

211 Further, and irrespective of the nature of *CCAA* proceedings, our colleague's conclusion is irreconcilable with this Court's holding in *Caisse populaire Desjardins de l'Est de Drummond* and with the "expansive definition" Parliament adopted to maximize recovery (*Caisse populaire Desjardins de l'Est de Drummond*, at para. 14). The fact that the instrument is court-ordered and is for the presumed benefit of all creditors is irrelevant. It does not affect *the nature* of the priming charges — to secure the payment of an obligation — which is the only relevant criterion (para. 15). As for the express inclusion of "priming charges" in the definition and their creation by court order, we reiterate that "*sûreté*" and "*charge*" are explicitly included "*however* or whenever arising, *created*, deemed to arise or provided for" (*ITA*, s. 224(1.3)).

212 Nor is Professor Wood's commentary, and by extension, the reasoning in *DaimlerChrysler Financial Services (Debis) Canada Inc. v. Mega Pets Ltd.*, 2002 BCCA 242, 1 B.C.L.R. (4th) 237, and *Minister of National Revenue v. Schwab Construction Ltd.*, 2002 SKCA 6, 213 Sask. R. 278, of any avail to our colleague Karakatsanis J. (para. 102; see also Wood, at p. 98, fns. 51-52). While those judgments held that finance leases and conditional sales agreements did not fall under the definition of s. 224(1.3) of the *ITA* because they were not specifically listed, that reasoning was later squarely rejected in *Caisse populaire de l'Est de Drummond*. And, were that not enough, *Mega Pets* and *Schwab*, unlike the instant case, dealt with situations where property was not transferred to the debtor, which facts were treated as determinatively supporting the conclusion that the instruments in those cases were not "security interests". For example, under a conditional sales agreement, the seller does not have an interest

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in the debtor's property because ownership rests with the seller until performance of the obligation (*Mega Pets*, at para. 32). By contrast, the priming charges secure payment out of property that remains the debtor's.

213 Finally, this Court's interpretation of "security interest" in *Caisse populaire de l'Est de Drummond* is confirmed by the French version of the text. "*Sont en particulier des garanties*" is illustrative, not limitative. *Le Robert* (online) defines "*en particulier*" (in particular) as [TRANSLATION] "*particularly, among others*, especially, above all" (emphasis added). Unsurprisingly, the French version of s. 224(1.3) has been described as being [TRANSLATION] "as broadly worded as possible" (R. P. Simard, "Priorités et droits spéciaux de la couronne", in *JurisClasseur Québec — Collection droit civil — Sûretés* (loose-leaf), vol. 1, by P.-C. Lafond, ed., fasc. 4, at para. 20). There is no discordance between both versions of the text. The French version conforms perfectly to the English text's use of the verb "includes", and confirms the plain reading of the English version.

214 Respectfully, our colleagues Côté and Karakatsanis JJ. frustrate the clear will of Parliament. Clear, all-inclusive language should be treated as such, and not circumvented by straining to draw distinctions of no legal significance whatsoever or by searching for what is not specifically mentioned in order to avoid the otherwise inescapable conclusion that Parliament granted absolute priority to the deemed trusts.

(3) Conclusion

215 It is this simple:

1. the Fiscal Statutes give absolute priority to the deemed trusts for source deductions over all security interests notwithstanding the *CCAA*;

2. the priming charges are "security interests" within the meaning of the Fiscal Statutes; and

3. the *CCAA* does not subordinate the claims under the deemed trusts of the Fiscal Statutes to the priming charges.

216 This is sufficient to decide the appeal: the deemed trusts of the Fiscal Statutes have priority over the priming charges. However, in view of the respondents' submissions that such a finding leaves the deemed trust provisions in the Fiscal Statutes in conflict with the *CCAA*, and that recognizing the ultimate priority of the Crown's deemed trust renders certain provisions of the *CCAA* meaningless, we are compelled to explain why this is not so.

C. The CCAA and the Fiscal Statutes Operate Harmoniously

(1) The Broad Grant of Authority Under Section 11 of the CCAA Is Not Unlimited

217 It is not disputed that s. 11 of the *CCAA* contains a grant of broad supervisory discretion and the power to "make any order that it considers appropriate in the circumstances" to give effect to that supervisory role (see J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp. 18-19). What is in dispute, however, are the limits to this broad power.

218 A supervising judge's authority to grant priming charges was not always contained in the *CCAA*. Prior to the 2009 amendments, it was derived from the courts' inherent jurisdiction (*Temple City Housing Inc., Re*2007 ABQB 78642 C.B.R. (5th) 274, at para. 14; Q.B. reasons, at para. 105). While the amendments in some respects represented a codification of the past practice, they clarified how priming charges operated (*CCAA*, ss. 11.2, 11.51 and 11.52). Despite being "the engine driving the statutory scheme", s. 11's exercise was expressly stated by Parliament to be "*subject to the restrictions set out in this Act*" (see *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2021] 1 S.C.R. 521, at paras. 48-49, citing *Stelco Inc. (Re)*, (2005), 75 O.R. (3d) 5 (C.A.), at para. 36). Three such restrictions are significant here.

(a) The Continued Operation of the Deemed Trusts for Unremitted Source Deductions (Section 37(2))

219 The first restriction on the authority to grant priming charges is found in s. 37(2) of the *CCAA*. This provides for the continued operation of the deemed trusts under the Fiscal Statutes in a *CCAA* proceeding — a point this Court *repeatedly*

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highlighted in *Century Services*, at paras. 78-81. At the hearing of this appeal, the respondents argued that s. 37(1) nullifies the Crown's priority in respect of all deemed trusts under the *CCAA*, and that s. 37(2) acts merely to reincorporate the deemed trusts under the Fiscal Statutes into *CCAA* proceedings without their absolute priority. This tortured interpretation misconceives the effect of s. 37(1).

220 Section 37(1) provides that, despite any deemed trust provision in federal or provincial legislation, "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", but it is expressly made "[s]ubject to subsection (2)". Through s. 37(2), Parliament also preserved the operation of the deemed trusts under the Fiscal Statutes within *CCAA* proceedings by providing that "[s]ubsection (1) does not apply in respect of amounts deemed to be held in trust under [the Fiscal Statutes]". In the face of Parliament's clear direction that the deemed trusts operate "notwithstanding" any other enactment, and the express preservation of the deemed trusts in the *CCAA*, there is simply no basis whatsoever for reading s. 37 as invalidating the deemed trust provisions under the Fiscal Statutes only to revive them with a conveniently lesser priority. Such an interpretation finds no support in the text, context, or purpose of the statutory schemes. Rather, all those considerations support the view that the deemed trusts under the Fiscal Statutes are preserved in *CCAA* proceedings in both form and substance, along with their absolute priority.

221 Before turning to the second restriction, we note each of our colleagues Karakatsanis J. and Côté J. fail to give effect to Parliament's decision, expressed in clear statutory text, to "preser[ve] deemed trusts and asser[t] Crown priority only in respect of source deductions" under the *CCAA* (*Century Services*, at para. 45). For the same reason, the reliance they place on *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, is misconceived. There, the Court held that the deemed trust created by provincial legislation was not a "true trust" so as to fall outside the debtor's property under what is now s. 67(1)(a) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). That is not this case. Unlike the deemed trust in *Henfrey*, the deemed trusts of the Fiscal Statutes receive a particular treatment in bankruptcy and insolvency proceeding because they are preserved by s. 37(2) of the *CCAA* and s. 67(3) of the *BIA*. Further, while the Court in *Henfrey* concluded that the deemed trust was ineffective in bankruptcy because the commingling of assets rendered the money subject to the deemed trusts untraceable, this rationale has no application to s. 227(4.1). In *First Vancouver*, this Court noted that "by deeming the trust to be effective 'at any time' the debtor is in default, the amendments serve to strengthen the conclusion that the Minister is not required to trace its interest to assets which belonged to the tax debtor at the time the source deductions were made" (para. 37). Again, no conclusions regarding the nature of the deemed trusts flow from the fact that tracing is irrelevant under s. 227(4.1): the deemed trusts are statutory instruments and the question is one of operation, *not* characterization.

(b) Priming Charges Attach Only to the Property of the Debtor Company

222 The second restriction on the *CCAA*'s broad authority to grant priming charges is that the *CCAA* requires priming charges to attach only to "all or part" of the property of the debtor's company (s. 11.2(1); see also ss. 11.51(1) and 11.52(1)). Here, Parliament evinces a clear intent to preserve the ultimate priority it afforded the deemed trusts under the Fiscal Statutes. This is because, by operation of s. 227(4.1) of the *ITA* and s. 37(2) of the *CCAA*, the unremitted source deductions are deemed *not* to form part of the property of the debtor's company.

223 Parliament could not have been more explicit: the source deductions are deemed never to form part of the company's property and, if there is a default in remittances, the Crown is deemed to obtain beneficial ownership in the tax debtor's property in the amount of the unremitted source deductions that it can collect "notwithstanding" any other enactment or security interest. Whether this is a true ownership interest is irrelevant to this appeal as the legislation *deems* the Crown to obtain beneficial ownership for these purposes. It follows that the priming charges cannot supersede the Crown's deemed trust claim because they may attach *only* to *the property of the debtor's company*, of which Parliament took great care to ensure the source deductions were deemed to form no part. As Michael J. Hanlon explains:

> While it has been held that an interim financing charge may rank ahead of the deemed trusts existing in favour of the Canada Revenue Agency with respect to amounts owing on account of unremitted source deductions, this appears to be incorrect. Property deemed to be held in trust pursuant to the provisions creating the deemed trust are deemed not to form

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> part of the debtor's estate, and given that those deemed trusts with respect to source deductions, are preserved in a *CCAA* context, the interim financing charge would not attach to those assets.
>
> [Emphasis added; footnotes omitted.]
>
> (*Halsbury's Laws of Canada — Bankruptcy and Insolvency* (2017 Reissue), at HBI-376)

(c) The Definition of "Secured Creditor" (Section 2)

224 The third restriction on the *CCAA*'s broad authority to grant priming charges is that the court "may order that the security or charge rank in priority over the claim of *any secured creditor* of the company" (ss. 11.2(2), 11.51(2) and 11.52(2)). Also, the definition of "secured creditor" in s. 2(1) of the *CCAA* makes it manifestly clear that the Crown is not a "secured creditor" in respect of its deemed trust claims under the Fiscal Statutes:

> ***secured creditor*** means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds;

This definition highlights two relevant considerations. First, the definition should be read as encompassing two classes of creditors. And second, the use of the word "trust" must be given legal significance.

225 As to the first consideration, we accept the Crown's submission that the proper reading of the definition of secured creditor references only two classes of secured creditors: (i) holders of direct security, and (ii) holders of secured bonds. So understood, a secured creditor means either

> a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company,

or

> **a holder of any bond of a debtor company secured by** a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or **a trust in respect of, all or any property of the debtor company** ....

The reference to "trust" appears only in relation to an instrument securing a bond of the debtor company. The definition must be read as "secured creditor means ... a holder of any bond of a debtor company secured by ... a trust in respect of, all or any property of the debtor company". Accordingly, holders of an interest under a deemed trust are not a third class of creditors (A. Prévost, "Que reste-t-il de la fiducie réputée en matière de régimes de retraite?" (2016), 75 *R. du B*. 23, at p. 58).

226 While finding this interpretation "initially attractive", the majority of the Court of Appeal ultimately rejected this reading. It did so because, irrespective of whether the definition needs a third reference to a "holder of a trust" drafted in parallel to the first two classes of creditors, the Crown's interest could be classified as a "charge" and is therefore captured by the first class of secured creditors (C.A. reasons, at paras. 42-43). Respectfully, this is incorrect. Deemed trusts are not covered by the word "charge". To conclude that the word "charge" encompasses "deemed trusts" under the first class of secured creditors when "charge" and "trust" are listed distinctly under the second class of secured creditors (holders of secured bonds) would be incoherent and run contrary to legislative presumptions in statutory interpretation. Why would Parliament include a specific reference to *trusts* if they are already covered by *charge*? Parliament is presumed to avoid "superfluous or meaningless words, [and] phrases" (*Bristol-Myers Squibb Co. v. Canada (Attorney General)*2005 SCC 26, [2005] 1 S.C.R. 533, at para. 178). The deliberate and distinct text of "trust" and "charge" shows that it was not Parliament's intention to have holders of deemed trusts subsumed under "charge" such that the Crown in this circumstance would become a secured creditor.

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227 In any case, if there were only one class of creditor, the Crown would not be a secured creditor with respect to the deemed trust claim under the Fiscal Statutes. While Parliament distinguished between "deemed or actual trust[s]" in s. 224(1.3) of the *ITA*, it made no such distinction in the definition of secured creditor. Parliament is presumed to legislate with intent and chose its words carefully. Our role as a court with respect to legislation is interpretation, not drafting. We must ascribe legal significance to Parliament's choice of text — that is, to the words Parliament chose and *did not* choose.

(d) "Restrictions" Under Section 11 of the CCAA

228 Our colleague Karakatsanis J. agrees with our analysis of the priming charge provisions, but she does not seem to view them as "restrictions" within the meaning of s. 11 because "[t]he general language of s. 11 should not ... be 'restricted by the availability of more specific orders'" (Karakatsanis J.'s reasons, at para. 170, citing *Century Services*, at para. 70). With respect, as a matter of law and statutory interpretation this view is simply unavailable to our colleague. Neither s. 11 nor the court's inherent jurisdiction can "empower a judge ... to make an order negating the unambiguous expression of the legislative will" (*Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475, at p. 480; see also *R. v. Caron*2011 SCC 5, [2011] 1 S.C.R. 78, at para. 32). Parliament has imposed clear restrictions on the courts' power to give priority to priming charges. It is one thing to rely on s. 11 as a source of general authority even when other specific orders are available; it is another to misconstrue s. 11 as a source of unfettered authority to circumvent such unambiguous restrictions. While courts may use their general s. 11 power to create priming charges for purposes other than those that are specifically enumerated (see Wood, at pp. 90-91), Parliament has clearly expressed its intention to restrict any such charge in a critical way — it cannot take priority over the Crown's deemed trust.

229 For the same reason, we respectfully find untenable our colleague Justice Moldaver's suggestion that it is unclear whether there are restrictions *internal* to the *CCAA* itself that would prevent a court from using its power under s. 11 to order a priming charge in priority to the Crown's deemed trust claim. This statement does not account for Parliament's clear intention, recorded in s. 37(2), to preserve the Crown's right to be paid in absolute priority over all secured creditors in *CCAA* proceedings. It also renders superfluous the restrictions on the court's authority to prioritize priming charges under ss. 11.2(2), 11.51(2) and 11.52(2) of the *CCAA*.

230 Further, our colleague Moldaver J. says it is unnecessary to "define the particular nature or operation of the" deemed trust under the *ITA* (para. 255), and relies on the "notwithstanding" language of s. 227(4.1) of the *ITA* to determine whether the Crown's claim can have priority over priming charges. This interpretation effectively reads in a conflict in the statutory schemes, despite this Court's clear direction that "an interpretation which results in conflict should be eschewed unless it is unavoidable" (*Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, at para. 47). In any event, this is not an *unavoidable* conflict: there is simply *no* conflict. Parliament *avoided* any conflict between the *CCAA* and the *ITA* by imposing restrictions upon the court's authority under s. 11 of the *CCAA*.

(e) Structure of Crown Claims Under the CCAA

231 Finally, while not a "restrictio[n] set out in [the *CCAA*]", as specified in s. 11, the cogency of the statutory scheme as a whole depends on an interpretation where the Crown cannot be a secured creditor. This is so because classifying the Crown as "secured creditor" would disrupt the structure of Crown claims that the *CCAA* clearly defines at ss. 37 to 39 (Wood, at p. 98). Section 37 applies to deemed trust claims, with s. 37(1) providing that deemed trusts in favour of the Crown are ineffective under the *CCAA*, as a general rule, and s. 37(2) providing an exemption for the deemed trust for source deductions. Section 38(1) sets out the general rule that the Crown's secured claims rank as unsecured claims, with specific exemptions at s. 38(2) and (3). Finally, s. 39(1) preserves the Crown's secured creditor status if it registers before the commencement of the *CCAA* proceedings but, under s. 39(2), that security is subordinate to prior perfected security interests.

232 This leads us to question why Parliament would expressly "preserve" the deemed trusts of the Fiscal Statutes by operation of s. 37(2), only then to rank the Crown as an unsecured creditor by the operation of s. 38(1). Unlike the interpretation that affords the deemed trusts ultimate priority, allowing the Crown to be reduced to an unsecured creditor in respect of its deemed

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trust claims would render s. 37(2) almost meaningless. Further, this interpretation would require the Crown to register its claim under s. 39(1) to preserve its status because the deemed trust is not afforded the exemption under s. 38. It would be illogical for Parliament to confer greater protection on secured claims afforded an exemption under s. 38(2) or (3) than it conferred on deemed trusts for source deductions, when the clear objective was to confer "absolute priority" on the latter (*First Vancouver*, at paras. 26-28).

233 We note that Professor Wood is not alone in recognizing that "sections 38 and 39 of the CCAA govern the conditions upon which a Crown claim can be viewed as 'secured' for the purposes of the CCAA" (F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at §79.2). Since the deemed trusts for unremitted source deductions under the Fiscal Statutes do not meet the conditions of these sections, it follows that the Crown's claim is not "secured".

234 In our view, a plain reading of the definition of secured creditor within the context of the broader statutory scheme results in a single inescapable conclusion. That is, there are three classes of Crown claims under the *CCAA*: (1) claims pursuant to deemed trusts continued under the *CCAA*; (2) secured claims; and (3) unsecured claims. The claims for unremitted source deductions fall under the first type: claims pursuant to deemed trusts continued under the *CCAA*.

(2) Recognizing the Ultimate Priority of the Crown's Deemed Trust Does Not Defeat the Purpose of any Provision of the CCAA

235 For two further and related reasons, the majority at the Court of Appeal and the respondents resist the conclusion that the Crown's deemed trust enjoys absolute priority.

(a) Protection of Crown Claims Under Section 6(3)

236 First, the majority held that granting ultimate priority to the deemed trusts would render s. 6(3) of the *CCAA* meaningless. This provision prohibits the court from sanctioning a compromise or arrangement unless it provides for payment in full to the Crown, within six months of the sanction of the plan, of all amounts due to the Crown. The majority reasoned that if the Crown is always paid first for its deemed trust claims under the Fiscal Statutes, there would be no need to protect the Crown claims under s. 6(3).

237 Respectfully, this conclusion is erroneous. A review of the purpose and scope of s. 6(3) of the *CCAA* is clear: it operates only where there is an arrangement or compromise put to the court, and it protects the entirety of the Crown claim pursuant to s. 224(1.2) of the *ITA* and similar provisions of the Fiscal Statutes. This includes claims *not* subject to the deemed trusts under the Fiscal Statutes, such as income tax withholdings, employer contributions to employment insurance and CPP, interest and penalties. In contrast, the deemed trusts arise immediately and operate continuously "from the time the amount was deducted or withheld" from the employee's remuneration, and apply to *only those* deductions. It follows, then, that, without s. 6(3), the Crown would be guaranteed entitlement only to unremitted source deductions when the court sanctions a compromise or arrangement, and not to its other claims under s. 224(1.2) of the *ITA*. This is because most of the Crown's claims rank as unsecured under s. 38 of the *CCAA*.

238 It bears emphasizing that s. 6(3) does *not* apply where no arrangement is proposed or to *CCAA* proceedings which involve the liquidation of the debtor's assets. Such "liquidating CCAAs" are "now commonplace in the *CCAA* landscape" (*Callidus Capital Corp.*, at para. 42). The absolute priority of the deemed trusts under the Fiscal Statutes, continued by s. 37(2) of the *CCAA*, provides protection to the Crown's claim for unremitted source deductions in liquidating CCAAs. Each of our colleagues Côté and Karakatsanis JJ. deprive the Crown of its guaranteed entitlements in such cases, despite Parliament having unambiguously granted "absolute priority" to claims for unremitted source deductions (Department of Finance Canada).

239 We note that our colleague Karakatsanis J. does not conclude that s. 6(3) is rendered nugatory by our interpretation; rather, she says that, since the term "beneficial ownership" as it is used in the deemed trusts does not have the same meaning at common law, we must look to the *CCAA* to ascertain the Crown's rights. This "manipulation of private law concepts, without settled meaning", she further says, raises the question of *how* the deemed trust survives under the *CCAA* (para. 181). And the answer, she finds, is furnished by s. 6(3).

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240 This is wrong for three reasons. First, there is no question as to how the deemed trust survives. Section 37(2) operates to exempt the deemed trusts under the Fiscal Statutes from any change in form or substance under the *CCAA*; this continues the operation of s. 227(4.1), which confers absolute priority on the Crown's claim to the deemed trusts under the Fiscal Statutes. In other words, the deemed trust survives as it was under the Fiscal Statutes. It is unsurprising, therefore, that this Court did not opine on *how* the trust "survives" in *CCAA* proceedings in *Century Services*: it is, with respect, plain and obvious.

241 Secondly, our colleague Karakatsanis J.'s suggestion that the understanding of the rights conferred on the Crown under the deemed trust must arise from reading s. 6(3) of the *CCAA* entirely bypasses the text of the *ITA* which specifically sets out those rights. After providing that the Crown has "beneficial ownership" of the value of the unremitted source deduction, the *ITA* continues: " . . . the proceeds of such property shall be paid to the Receiver General in priority to all such security interests" (s. 227(4.1)). This is the right of the Crown under the deemed trust, and our colleague fails to give effect to this right.

242 Finally, as we have discussed, s. 6(3) protects different interests than those captured by the deemed trusts. If s. 6(3) were to exhaust the Crown's rights under the *CCAA*, our colleague Karakatsanis J. correctly observes that "there may be some risk to the Crown that the plan [under s. 6(3)] may fail, and the Crown *may not be paid in full* if the restructuring dissolves into liquidation and the estate is depleted in the interim" (para. 155 (emphasis added)). This, however, only supports our interpretation. The right "not to have to compromise" under s. 6(3) is a right independent of the Crown's right under deemed trusts (para. 155 (emphasis deleted)).

(b) Power to Stay the Crown's Garnishment Right (Section 11.09)

243 Secondly, the majority at the Court of Appeal and the respondents say that giving effect to the clear statutory wording would be contrary to the purpose of s. 11.09 of the *CCAA*, which grants courts the power to stay the Crown's garnishment right under the *ITA* (C.A. reasons, at para. 54). This demonstrates, the argument goes, Parliament's intent to have the court exercise control over the Crown's interests while monitoring the restructuring proceedings. On this view, granting absolute priority to the deemed trusts under the Fiscal Statutes necessarily implies that s. 11.09 of the *CCAA* does not apply to the deemed trust claim.

244 Again respectfully, this is not so. A court-ordered stay of garnishments under s. 11.09 of the *CCAA* *can* apply to the Crown's deemed trust claims under the Fiscal Statutes because the deemed trust provisions and s. 11.09 each serve different purposes: the deemed trusts grant a priority to the Crown, while s. 11.09 imposes conditions on when and how the Crown can enforce its garnishment rights under s. 224(1.2) of the *ITA*. In other words, s. 11.09 permits the Court to stay the Crown's ability to enforce its claims under the deemed trusts, but it does not remove its priority.

245 The critical point is this: giving effect to Parliament's clear intent to grant absolute priority to the deemed trust does not render s. 6(3) or s. 11.09 meaningless. To the contrary, s. 6(3) and s. 11.09 respect the ultimate priority of the deemed trusts under the Fiscal Statutes by allowing for the ultimate priority of the Crown claim to persist, while not frustrating the remedial purpose of the *CCAA*.

(3) Conclusion

246 As with our discussion of the deemed trust's absolute priority, the harmonious operation of the *CCAA* and the Fiscal Statutes can be summarized as follows:

1. the *CCAA* preserves the Crown's right to be paid in priority to all security interests for its claims for source deductions under the Fiscal Statutes;

2. under the *CCAA*, the Crown is not a "secured creditor" in respect of its deemed trust claims under the Fiscal Statutes;

3. as priming charges can attach only to the debtor's property, and as Parliament has made it clear that unremitted source deductions form no part of the debtor's property, the Crown's interest under the deemed trust is not subject to the priming charges;

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4. section 6(3) of the *CCAA*, which operates only where there is an arrangement or compromise put to the court, protects the entirety of the Crown claim under s. 224(1.2) of the *ITA* and similar provisions of the Fiscal Statutes; and

5. the deemed trust's grant of priority to the Crown is unaffected by s. 11.09, which instead imposes conditions on when and how the Crown can enforce its garnishment rights under s. 224(1.2) of the *ITA*.

D. Policy Reasons Do Not Support a Different Interpretation

247 The majority of the Court of Appeal and the respondents place significant weight on what they view as the potentially "absurd consequences" that would result from concluding that the deemed trusts under the Fiscal Statutes have priority over the priming charges. The same point implicitly underlies our colleague Côté J.'s reasons. Indeed, the majority at the Court of Appeal went as far as to warn that, under this interpretation, interim financing would "simply end", an assertion that "almost certainly goes too far" (C.A. reasons, at para. 50; Wood, at p. 99). It added that it would lead to more business failures and, in turn, undermine tax collection (paras. 48 and 50). We disagree.

248 The "absurd consequences" identified by the majority at the Court of Appeal rest on faulty premises. The conclusion that interim financing would "simply end" was not supported by the record. The majority extrapolated from admittedly incomplete and dated data about interim financing drawn from a textbook which does not indicate the presence of a deemed trust claim. This sweeping statement elides cases where there is no interim lending and cases, such as this one, where the debtor's assets are sufficient to satisfy both the interim lending and the Crown's deemed trust claim. This is an omission that cannot be readily ignored as there are usually enough funds available to satisfy both the Crown claim *and* the court-ordered priming charges (Wood, at p. 100). Equally unfounded is the majority's claim that confirming the priority of the deemed trusts of the Fiscal Statutes would "inject an unacceptable level of uncertainty into the insolvency process" (C.A. reasons, at para. 51). A company applying under the *CCAA* is required to provide its financial statements (s. 10(2)(c)), which include the source deductions owed to the Crown. Interim lenders can rely on this information to evaluate the risk of providing financing.

249 Moreover, the majority at the Court of Appeal did not consider that Parliament can, and did, choose to prioritize the integrity of the tax system over the interests of secured creditors. Indeed, and with respect, the majority's own interpretation arguably itself produces absurd results, whereby employees' gross remuneration are conscripted as a subsidy to secure interim financing and the services of insolvency professionals.

250 We therefore do not remotely see the consequences of our interpretation as rising to the level of absurdity. And Parliament has unambiguously struck the balance it considered appropriate in pursuit of the dual objectives of collecting unremitted source deductions, which are not the property of the debtor, and avoiding the "devastating social and economic effects of bankruptcy" (*Century Services*, at para. 59, quoting *Elan Corp. v. Comiskey*, (1990), 1 O.R. (3d) 289 (C.A.), at p. 306, per Doherty J.A., dissenting). Whether s. 227(4.1) of the *ITA* is an effective means to protect the fiscal base or whether "the Crown is biting off the hand that feeds it" are not questions that this Court has the competence or legitimacy to answer (C.A. reasons, at para. 48).

251 In any event, even were there evidence that giving priority to the deemed trusts under the Fiscal Statutes over the priming charges produced absurd results, our conclusion would be no different. The presumption against absurdity is exactly that: a presumption. Nothing more. Illogical consequences flowing from the application of a statute do not give rein to courts to disregard clear legislative intent. As Lamer C.J. noted in *R. v. McIntosh*[1995] 1 S.C.R. 686, at para. 41, "Parliament ... has the right to legislate illogically (assuming that this does not raise constitutional concerns). And if Parliament is not satisfied with the judicial application of its illogical enactments, then Parliament may amend them accordingly."

252 Here, Parliament's intention to give absolute priority to the deemed trust of the Fiscal Statutes is unequivocal. Our role is to give effect to this intention.

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III. Disposition

253 We would allow the appeal. The respondents should be entitled to costs in accordance with "Schedule B" to the regulations (*Rules of the Supreme Court of Canada*, SOR/2002-156). There are no exceptional circumstances that would justify enhanced costs. Despite the appeal being moot, it was not improper for the Crown to seek the correct interpretation of the Fiscal Statutes.

The following are the reasons delivered by

***Moldaver J.* (dissenting):**

254 I have had the benefit of reading the reasons of my colleagues, Justice Côté, Justice Karakatsanis, and Justices Brown and Rowe. While I substantially agree with the analysis and conclusions of Brown and Rowe JJ., there are two points that I wish to address.

255 First, unlike Brown and Rowe JJ., I see no reason to define the particular nature or operation of the Crown's interest under s. 227(4.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), in the context of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). While a future appeal may require this Court to determine exactly how the Crown's interest under s. 227(4.1) "survives", and whether it amounts to some form of ownership interest in the debtor's property, as Brown and Rowe JJ. maintain, some form of security interest in that property, or something else entirely (e.g., a right not to have to compromise, as Karakatsanis J. maintains), such an inquiry is not necessary in this case. Properly interpreted, the relevant provisions of the *CCAA* and *ITA* work in harmony to direct that the Crown's interest — in whatever form it takes — must be given priority over court-ordered priming charges. This conclusion is sufficient to dispose of the appeal.

256 In my view, to the extent that Brown and Rowe JJ. conclude that the Crown's interest under s. 227(4.1) affords the Crown beneficial ownership over the source deductions such that "the source deductions are deemed never to form part of the company's property", they have effectively decided the appeal by two paths — first, by way of the Crown's absolute priority under s. 227(4.1), and second, by way of the Crown's beneficial ownership over any unremitted source deductions (para. 223). As they note, if the Crown's interest amounts to an ownership interest and unremitted source deductions do not form part of the debtor company's property, priming charges could never attach to those source deductions, whether ordered under the specific priming charge provisions or the court's broad power under s. 11 of the *CCAA* (paras. 222-23). If this is indeed the case, it is not clear that the issue of competing priority between the Crown's interest and court-ordered priming charges ever arises, as the source deductions would be simply inaccessible to anyone other than the Crown. As I am not necessarily convinced that the Crown's interest under s. 227(4.1) amounts to an ownership interest, and as the Crown's absolute priority does not depend on this conclusion, I would leave the question of the nature of the Crown's interest to another day.

257 Second, while I agree with Brown and Rowe JJ. that s. 37(2) of the *CCAA* can be interpreted as an internal restriction on s. 11, I hesitate to accept this conclusion, as it strikes me that in order to give proper effect to Parliament's intention for s. 11 to serve as "the engine" that drives the *CCAA* and empowers supervising judges to further its remedial objectives, any restrictions on that discretionary power should be explicit and unambiguous (*9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521, at para. 48, citing *Stelco Inc. (Re)*, (2005), 75 O.R. (3d) 5 (C.A.), at para. 36). With respect, s. 37(2) does not amount to such an explicit and unambiguous restriction. Rather, s. 37(2) is a simple exception to s. 37(1), which serves to nullify the effect of any statutory provision that deems property to be held in favour of the Crown:

> **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.
>
> **(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* ....

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258 In effect, then, the function of s. 37(2) is merely to preserve the Crown's deemed trust under s. 227(4.1) from extinguishment under s. 37(1). In preserving the Crown's interest, however, "s. 37(2) does not explain what to do with that right for the purposes of a *CCAA* proceeding", nor does it say anything that would limit the court's power under s. 11 to order priming charges in priority to the Crown's deemed trust claim (Karakatsanis J.'s reasons, at para. 153). Indeed, as Karakatsanis J. notes, "[t]here is no provision in the *CCAA* stipulating what the court can do with trust property and no provision in the *CCAA* conferring more specific jurisdiction on whether a priming charge can rank ahead of the beneficiary of a deemed trust" (para. 176). Rather, it is only when one looks to s. 227(4.1) that the absolute priority of the Crown's interest — and the resulting limitations on s. 11 — become apparent. It is thus not entirely clear that interpreting s. 37(2) as an internal restriction accords with the function of s. 37(2) or the leeway that Parliament intended for the scope of powers under s. 11. In other words, the relationship between ss. 11 and 37(2) may not be as clear-cut as my colleagues seem to suggest. Accordingly, while I ultimately agree with Brown and Rowe JJ. that s. 37(2) can be interpreted as an internal restriction so as to avoid a conflict between the *CCAA* and *ITA*, I feel it important to explain that, if this interpretation is mistaken, s. 11 is nonetheless restricted by the external text of s. 227(4.1).

259 If s. 37(2) does not amount to an internal restriction on s. 11, using s. 11 to prioritize priming charges over the Crown's deemed trust claim would put the provision in direct conflict with s. 227(4.1) which, as my colleagues Brown and Rowe JJ. have explained, requires that the Crown's claim be ranked in priority to all security interests, including priming charges. The direct conflict would trigger the "[n]otwithstanding" language in s. 227(4.1), which states that "[n]otwithstanding ... any other enactment of Canada", the Crown's claim is to have priority. This language thus imposes an external restriction on the court's power under s. 11. Indeed, the supremacy of s. 227(4.1) is implicitly acknowledged by the text of s. 11 as, unlike s. 227(4.1), which operates despite "any other enactment of Canada", s. 11 only operates "[d]espite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*", but not despite anything in the *ITA*. Accordingly, while the court's discretionary authority under s. 11 could, in theory, empower a court to subordinate the Crown's interest in unremitted source deductions, that power is ultimately stopped short by the express language of s. 227(4.1).

260 In outlining this position, I consider it important to contextualize this Court's statement in *Callidus* that "the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be 'appropriate in the circumstances'" (para. 67). The focus in *Callidus* was on the discretionary authority of supervising *CCAA* judges within the confines of the *CCAA* itself; it was not on addressing the question of the authority of *CCAA* judges to apply s. 11 in the face of overriding federal legislation. Respectfully, where, as here, Parliament has expressly indicated the supremacy of a statute over the provisions of the *CCAA*, the court's power under s. 11 is correspondingly restricted.

261 The Crown's deemed trust claim must thus take priority over all court-ordered priming charges, whether they arise under the specific priming charge provisions, or under the court's discretionary authority.

262 A necessary consequence of the absolute supremacy of the Crown's deemed trust claim over court-ordered priming charges is that the Crown's interest under s. 227(4.1) cannot be given effect by s. 6(3) of the *CCAA*. Section 6(3) of the *CCAA* provides that

> [u]nless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under
>
> (a) subsection 224(1.2) of the *Income Tax Act* ....

263 In my view, there are two reasons why s. 6(3) cannot represent the Crown's interest under s. 227(4.1). First, the focus of s. 6(3) is to establish a timeframe for payment to the Crown of certain outstanding debts in the event that the debtor company succeeds in staying viable as a going concern. By contrast, s. 227(4.1) is focused on ensuring the *priority* of the Crown's claim. The key point of distinction here is that, under s. 6(3), the Crown could be ranked last, so long as it is paid within six months of

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any arrangement. Such an outcome would be plainly inconsistent with the absolute priority of the Crown's claim, as established by the *CCAA* and *ITA*. Second, as s. 6(3) applies only where a compromise or plan of arrangement is reached, the Crown's deemed trust claim would not operate in the event that a liquidation occurred under the *CCAA*, thereby depriving the Crown of its priority over security interests in such circumstances. Again, this potential consequence would be at odds with the clear intention of the *CCAA* and *ITA*.

264 Before concluding, I would note that it cannot be doubted that Parliament considered the potential consequences of its legislative actions, including any consequences for *CCAA* proceedings. If circumstances do arise in which the priority of the Crown's claim threatens the viability of a particular restructuring, it clearly lies with the Crown to be flexible so as to avoid any consequences that would undermine the remedial purposes of the *CCAA*.

265 I would, therefore, allow the appeal. The respondents are entitled to costs in this Court in accordance with Schedule B of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 It bears noting, however, that ss. 227(4) and 227(4.1) of the *ITA* do not give the Crown priority over all creditors. They explicitly carve out an exception for the rights of unpaid suppliers (*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 81.1) and the rights of farmers, fisherman, and aquaculturists (s. 81.2). In addition, s. 227(4.2) of the *ITA* carves out an exception for a prescribed security interest, defined in the *Income Tax Regulations*, C.R.C., c. 945, s. 2201. Broadly, a prescribed security interest is a mortgage in land or a building which is registered before the failure to remit the source deductions at issue (Regulatory Impact Analysis Statement, SOR/99-322, *Canada Gazette*, Part II, vol. 133, No. 17, August 18, 1999, at pp. 2041-42).

2 The wording of the deemed trust provisions in the relevant provisions of the Fiscal Statutes is materially identical. This decision focuses on the deemed trusts in s. 227(4) and (4.1) of the *ITA*. The reasoning herein, however, applies with equal force to each of the other statutes.

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Alberta Court of Queen's Bench

Canadian Airlines Corp., Re

2000 CarswellAlta 622, [2000] A.W.L.D. 666, [2000] A.J. No. 1692, 19 C.B.R. (4th) 1

In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.

The Bank of Nova Scotia Trust Company of New York, As Trustee for the Holders of Senior Secured Notes and Montreal Trust Company of Canada, As Collateral Agent for the Holders of Senior Secured Notes, Plaintiffs and Canadian Airlines Corporation, Canadian Airlines International Ltd., Canadian Regional Airlines Ltd., Canadian Regional Airlines (1998) Ltd. and Canadian Airlines Fuel Corporation Inc., Defendants

Paperny J.

Judgment: May 4, 2000
Docket: Calgary 0001-05071, 0001-05044

Counsel: *G. Morawetz*, *A.J. McConnell* and *R.N. Billington*, for Bank of Nova Scotia Trust Co. of New York and Montreal Trust Co. of Canada.
A.L. Friend, Q.C., and *H.M. Kay, Q.C.*, for Canadian Airlines.
S. Dunphy, for Air Canada and 853350 Alberta Ltd.
R. Anderson, Q.C., for Loyalty Group.
H. Gorman, for ABN AMRO Bank N.V.
P. McCarthy, for Monitor - Price Waterhouse Cooper.
D. Haigh, Q.C., and *D. Nishimura*, for Unsecured noteholders - Resurgence Asset Management.
C.J. Shaw, for Airline Pilots Association International.
G. Wells, for NavCanada.
D. Hardy, for Royal Bank of Canada.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.a Grant and length of stay
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.7 Miscellaneous
Headnote
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings
Senior secured noteholders brought application for appointment of receiver over collateral on same day that airline was granted CCAA protection — Noteholders constituted separate class that intended to vote against plan and had voted to realize on security — Noteholders brought application for order lifting stay of proceedings against them to allow for appointment of receiver and manager over assets and property charged in their favour, and for order appointing court officer with exclusive right to negotiate sale of assets or shares of airline's subsidiary — Application dismissed — In determining whether stay should be lifted, court had to balance interests of all parties who stood to be affected — This would include general public, which would be affected by collapse of airline — Evidence indicated that liquidation would be inevitable were noteholders to realize on collateral —

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Objective of stay was not to maintain literal status quo but to maintain situation that was not prejudicial to creditors while allowing airline "breathing room" — It was premature to conclude that plan would be rejected or that proposal acceptable to noteholders could not be reached — Evidence indicated that airline was moving to effect compromises swiftly and in good faith — Appointment of receiver to manage collateral would negate effect of stay and thwart purposes of Act — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Senior secured noteholders brought application for appointment of receiver over collateral on same day that airline was granted CCAA protection — Noteholders constituted separate class that intended to vote against plan and voted to realize on security — Noteholders brought application for order lifting stay of proceedings against them to allow for appointment of receiver and manager over assets and property charged in their favour, and for order appointing court officer with exclusive right to negotiate sale of assets or shares of airline's subsidiary — Application dismissed — Proposal that airline make interim payments for use of security was not viable — Suggestion that other airline financially supporting plan should pay out airline's debts to noteholders was without legal foundation — Existence of solvent entity financially supporting plan with view to obtaining economic benefit for itself did not create obligation on that entity to pay airline's creditors — Noteholders could not require sale of assets or shares of airline's subsidiary — Subsidiary was not debtor company but was itself property of airline — Marketing of subsidiary's assets would constitute "proceeding in respect of petitioners' property" within meaning of s. 11 of Act — Even if marketing of subsidiary's assets did not so qualify, court has inherent jurisdiction to grant stays in relation to proceedings against third parties where exercise of jurisdiction is important to reorganization process — In deciding whether to exercise inherent jurisdiction, court weighs interests of insolvent corporation against interests of parties who would be affected by stay — Threshold of prejudice required to persuade court not to exercise inherent jurisdiction to grant stay is lower than threshold required to persuade court not to exercise discretion under s. 11 of Act — Noteholders failed to meet either threshold — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Table of Authorities

Cases considered by *Paperny J.*:

Alberta-Pacific Terminals Ltd., Re (1991), 8 C.B.R. (3d) 99 (B.C. S.C.) — considered

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339 (Ont. Gen. Div.) — considered

Citibank Canada v. Chase Manhattan Bank of Canada (1991), 5 C.B.R. (3d) 165, 2 P.P.S.A.C. (2d) 21, 4 B.L.R. (2d) 147 (Ont. Gen. Div.) — referred to

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

Meridian Development Inc. v. Toronto Dominion Bank, [1984] 5 W.W.R. 215, 52 C.B.R. (N.S.) 109, 32 Alta. L.R. (2d) 150, 53 A.R. 39, 11 D.L.R. (4th) 576 (Alta. Q.B.) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 72 C.R. (N.S.) 20 (Alta. Q.B.) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282 (Ont. C.A.) — referred to

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) — considered

Philip's Manufacturing Ltd., Re (1992), 9 C.B.R. (3d) 25, 67 B.C.L.R. (2d) 84, 4 B.L.R. (2d) 142 (B.C. C.A.) — considered

Philip's Manufacturing Ltd., Re (1992), 15 C.B.R. (3d) 57 (note), 143 N.R. 286 (note), 70 B.C.L.R. (2d) xxxiii (note), 15 B.C.A.C. 240 (note), 27 W.A.C. 240 (note), 6 B.L.R. (2d) 149 (note) (S.C.C.) — referred to

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 80 C.B.R. (N.S.) 98 (B.C. S.C.) — considered

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257 (B.C. S.C.) — considered

Statutes considered:

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

Generally — referred to

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

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Generally — considered

s. 11 — considered

s. 11(4) — considered

APPLICATION by holders of senior secured notes in corporation for order lifting stay of proceedings against them in *Companies' Creditors Arrangement Act* proceeding to allow for appointment of receiver and manager over assets and property charged in their favour and for order appointing court officer with exclusive right to negotiate sale of assets or shares of corporation's subsidiary.

Paperny J. **(orally):**

1 Montreal Trust Company of Canada, Collateral Agent for the holders of the Senior Secured Notes, and the Bank of Nova Scotia Trust Company of New York, Trustee for the holders of the Senior Secured Notes, apply for the following relief:

1. In the CCAA proceeding (Action No. 0001-05071) an order lifting the stay of proceedings against them contained in the orders of this court dated March 24, 2000 and April 19, 2000 to allow for the court-ordered appointment of Ernst & Young Inc. as receiver and manager over the assets and property charged in favour of the Senior Secured Noteholders; and

2. In Action No. 0001-05044, an order appointing Ernst & Young Inc. as a court officer with the exclusive right to negotiate the sale of the assets or shares of Canadian Regional Airlines (1998) Ltd.

2 Canadian Airlines Corporation ("CAC") is a Canadian based holding company which, through its majority owned subsidiary Canadian Airlines International Ltd. ("CAIL") provides domestic, U.S.-Canada transborder and international jet air transportation services. CAC also provides regional transportation through its subsidiary Canadian Regional Airlines (1998) Ltd. ("Canadian Regional"). Canadian Regional is not an applicant under the CCAA proceedings.

3 The Senior Secured Notes were issued under an Indenture dated April 24, 1998 between CAC and the Trustee. The principal face amount is $175 million U.S. As well, there is interest outstanding. The Senior Secured Notes are directly and indirectly secured by a diverse package of assets and property of the CCAA applicants, including spare engines, rotables, repairables, hangar leases and ground equipment. The security comprises the key operational assets of CAC and CAIL. The security also includes the outstanding shares of Canadian Regional and the $56 million intercompany indebtedness owed by Canadian Regional to CAIL.

4 Under the terms of the Indenture, CAC is required to make an offer to purchase the Senior Secured Notes where there is a "change of control" of CAC. It is submitted by the Senior Secured Noteholders that Air Canada indirectly acquired control of CAC on January 4, 2000 resulting in a change of control. Under the Indenture, CAC is then required to purchase the notes at 101 percent of the outstanding principal, interest and costs. CAC did not do so. According to the Trustee, an Event of Default occurred, and on March 6, 2000 the Trustee delivered Notices of Intention to Enforce Security under the Bankruptcy and Insolvency Act.

5 On March 24, 2000, the Senior Secured Noteholders commenced Action No. 0001-05044 and brought an application for the appointment of a receiver over their collateral. On the same day, CAC and CAIL were granted CCAA protection and the Senior Secured Noteholders adjourned their application for a receiver. However, the Senior Secured Noteholders made further application that day for orders that Ernst & Young be appointed monitor over their security and for weekly payments from CAC and CAIL of $500,000 U.S. These applications were dismissed.

6 The CCAA Plan filed on April 25, 2000, proposes that the Senior Secured Noteholders constitute a separate class and offers them two alternatives:

1. To accept repayment of less than the outstanding amount; or

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2. To be unaffected by the CCAA Plan and realize on their security.

7 On April 26th, 2000, the Senior Secured Noteholders met and unanimously rejected the first option. They passed a resolution to take steps to realize on the security.

8 The Senior Secured Noteholders argue that the time has come to permit them to realize on their security. They have already rejected the Plan and see no utility in waiting to vote in this regard on May 26th, 2000, the date set by this court.

9 The Senior Secured Noteholders submit that since the CCAA proceedings began five weeks ago, the following has occurred:

-interest has continued to accrue at approximately $2 million U.S. per month;

-the security has decreased in value by approximately $6 million Canadian;

-the Collateral Agent and the Trustee have incurred substantial costs;

-no amounts have been paid for the continued use of the collateral, which is key to the operations of CAIL;

-no outstanding accrued interest has been paid; and- they are the only secured creditor not getting paid.

10 The Senior Secured Noteholders emphasize that one of the end results of the Plan is a transfer of CAIL's assets to Air Canada. The Senior Secured Noteholders assert that the Plan is sponsored by this very solvent proponent, who is in a position to pay them in full. They are argue that Air Canada has made an economic decision not to do so and instead is using the CCAA to achieve its own objectives at their expense, an inappropriate use of the Act.

11 The Senior Secured Noteholders suggest that the Plan will not be impacted if they are permitted to realize on their security now instead of after a formal rejection of the Plan at the court-scheduled vote on May 26, 2000. The Senior Secured Noteholders argue that for all of the preceding reasons lifting the stay would be in accordance with the spirit and intent of the CCAA.

12 The CCAA is remedial legislation which should be given a large and liberal interpretation: See, for example, *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3d) 165 (Ont. Gen. Div.). It is intended to permit the court to make orders which will effectively maintain the status quo for a period while the struggling company attempts to develop a plan to compromise its debts and ultimately continue operations for the benefit of both the company and its creditors: See for example, *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.), and *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.).

13 This aim is facilitated by the power to stay proceedings provided by Section 11 of the Act. The stay power is the key element of the CCAA process.

14 The granting of a stay under Section 11 is discretionary. On the debtor's initial application, the court may order a stay at its discretion for a period not to exceed 30 days. The burden of proof to obtain a stay extension under Section 11(4) is on the debtor. The debtor must satisfy the court that circumstances exist that make the request for a stay extension appropriate and that the debtor has acted, and is acting, in good faith and with due diligence. CAC and CAIL discharged this burden on April 19, 2000. However, unlike under the Bankruptcy and Insolvency Act, there is no statutory test under the CCAA to guide the court in lifting a stay against a certain creditor.

15 In determining whether a stay should be lifted, the court must always have regard to the particular facts. However, in every order in a CCAA proceeding the court is required to balance a number of interests. McFarlane J.A. states in his closing remarks of his reasons in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]):

> In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and problems.

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16 Also see Blair J.'s decision in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.P.C. (3d) 339 (Ont. Gen. Div.), for another example of the balancing approach.

17 As noted above, the stay power is to be used to preserve the status quo among the creditors of the insolvent company. Huddart J., as she then was, commented on the status quo in *Re Alberta-Pacific Terminals Ltd.* (1991), 8 C.B.R. (3d) 99 (B.C. S.C.). She stated:

> The status quo is not always easy to find... Nor is it always 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.

18 Further commentary on the status quo is contained in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98 (B.C. S.C.). Thackray J. comments that the maintenance of the status quo does not mean that every detail of the status quo must survive. Rather, it means that the debtor will be able to stay in business and will have breathing space to develop a proposal to remain viable.

19 Finally, in making orders under the CCAA, the court must never lose sight of the objectives of the legislation. These were concisely summarized by the chambers judge and adopted by the British Columbia Court of Appeal in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]):

> (1) The purpose of the CCAA is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and court.
>
> (2) The CCAA is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and employees.
>
> (3) During the stay period, the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.
>
> (4) The function of the court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.
>
> (5) The status quo does not mean preservation of the relative pre-stay debt status of each creditor. Since the companies under CCAA orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, the preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.
>
> (6) The court has a broad discretion to apply these principles to the facts of th particular case.

20 At pages 342 and 343 of this text, Canadian Commercial Reorganization: Preventing Bankruptcy (Aurora: Canada Law Book, looseleaf), R.H. McLaren describes situations in which the court will lift a stay:

> 1. When the plan is likely to fail;
>
> 2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
>
> 3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);

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4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;

6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

21 I now turn to the particular circumstances of the applications before me.

22 I would firstly address the matter of the Senior Secured Noteholders' current rejection of the compromise put forward under the Plan. Although they are in a separate class under CAC's Plan and can control the vote as it affects their interest, they are not in a position to vote down the Plan in its entirety. However, the Senior Secured Noteholders submit that where a plan offers two options to a class of creditors and the class has selected which option it wants, there is no purpose to be served in delaying that class from proceeding with its chosen course of action. They rely on the *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.) at 115, as just one of several cases supporting this proposition. *Re Philip's Manufacturing Ltd.* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.) at pp. 27-28, leave to appeal to S.C.C. refused (1992), 15 C.B.R. (3d) 57 (note) (S.C.C.), would suggest that the burden is on the Senior Secured Noteholders to establish that the Plan is "doomed to fail". To the extent that Nova Metal and Philip's Manufacturing articulate different tests to meet in this context, the application of either would not favour the Senior Secured Noteholders.

23 The evidence before me suggests that progress may still be made in the negotiations with the representatives of the Senior Secured Noteholders and that it would be premature to conclude that any further discussions would be unsuccessful. The parties are continuing to explore revisions and alternative proposals which would satisfy the Senior Secured Noteholders.

24 Mr. Carty's affidavit sworn May 1, 2000, in response to these applications states his belief that these efforts are being made in good faith and that, if allowed to continue, there is a real prospect for an acceptable proposal to be made at or before the creditors' meeting on May 26, 2000. Ms. Allen's affidavit does not contain any assertion that negotiations will cease. Despite the emphatic suggestion of the Senior Secured Noteholders' counsel that negotiations would be "one way", realistically I do not believe that there is no hope of the Senior Secured Noteholders coming to an acceptable compromise.

25 Further, there is no evidence before me that would indicate the Plan is "doomed to fail". The evidence does disclose that CAC and CAIL have already achieved significant compromises with creditors and continue to work swiftly and diligently to achieve further progress in this regard. This is reflected in the affidavits of Mr. Carty and the reports from the Monitor.

26 In any case, there is a fundamental problem in the application of the Senior Secured Noteholders to have a receiver appointed in respect of their security which the certainty of a "no" vote at this time does not vitiate: It disregards the interests of the other stakeholders involved in the process. These include other secured creditors, unsecured creditors, employees, shareholders and the flying public. It is not insignificant that the debtor companies serve an important national need in the operation of a national and international airline which employs tens of thousands of employees. As previously noted, these are all constituents the court must consider in making orders under the CCAA proceeding.

27 Paragraph 11 of Mr. Carty's May 1, 2000 affidavit states as follows:

In my opinion, the continuation of the stay of proceedings to allow the restructuring process to continue will be of benefit to all stakeholders including the holders of the Senior Secured Notes. A termination of the stay proceedings as regards the security of the holders of the Senior Secured Notes would immediately deprive CAIL of assets which are critical to its operational integrity and would result in grave disruption of CAIL's operations and could lead to the cessation of operations. This would result in the destruction of value for all stakeholders, including the holders of the Senior Secured Notes. Furthermore, if CAIL ceased to operate, it is doubtful that Canadian Regional Airlines (1998) Ltd. ("CRAL98"), whose shares form a significant part of the security package of the holders of the Senior Secured Notes, would be in a

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> position to continue operating and there would be a very real possibility that the equity of CAIL and CRAL, valued at approximately $115 million for the purposes of the issuance of the Senior Secured Notes in 1998, would be largely lost. Further, if such seizure caused CAIL to cease operations, the market for the assets and equipment which are subject to the security of the holders of the Senior Secured Notes could well be adversely affected, in that it could either lengthen the time necessary to realize on these assets or reduce realization values.

28 The alternative to this Plan proceeding is addressed in the Monitor's reports to the court. For example, in Paragraph 8 of the Monitor's third report to the court states:

> The Monitor believes the if the Plan is not approved and implemented, CAIL will not be able to continue as a going concern. In that case, the only foreseeable alternative would be a liquidation of CAIL's assets by a receiver and manager and/or by a trustee. Under the Plan, CAIL's obligations to parties it considers to be essential in order to continue operations, including employees, customers, travel agents, fuel, maintenance, catering and equipment suppliers, and airport authorities, are in most cases to be treated as unaffected and paid in full. In the event of a liquidation, those parties would not, in most cases, be paid in full and, except for specific lien rights, statutory priorities or other legal protection, would rank as ordinary unsecured creditors. The Monitor estimates that the additional unsecured claims which would arise if CAIL were to cease operation as a going concern and be forced into liquidation would be in excess of $1.1 billion.

29 This evidence is uncontradicted and flies in the face of the Senior Secured Noteholders' assertion that realizing on their collateral at this point in time will not affect the Plan. Although, as the Senior Secured Noteholders heavily emphasized the Plan does contemplate a "no" vote by the Senior Secured Noteholders, the removal of their security will follow that vote. 9.8(c) of the Plan states that:

> If the Required Majority of Affected Secured Noteholders fails to approve the Plan, arrangements in form and substance satisfactory to the Applicants will have been made with the Affected Secured Noteholders or with a receiver appointed over the assets comprising the Senior Notes Security, which arrangements provide for the transitional use by [CAIL], and subsequent sale, of the assets comprising the Senior Notes Security.

30 On the other side of the scale, the evidence of the Senior Secured Noteholders is that the value of their security is well in excess of what they are owed. Paragraph 15(a) of the Monitor's third report to the court values the collateral at $445 million. The evidence suggests that they are not the only secured creditor going unpaid. CAIL is asking that they be permitted to continue the restructuring process and their good faith efforts to attempt to reach an acceptable proposal with the Senior Secured Noteholders until the date of the creditors meeting, which is in three weeks. The Senior Secured Noteholders have not established that they will suffer any material prejudice in the intervening period.

31 The appointment of a receiver at this time would negate the effect of the order staying proceedings and thwart the purposes of the CCAA.

32 Accordingly, I am dismissing the application, with leave to reapply in the event that the Senior Secured Noteholders vote to reject the Plan on May 26, 2000.

33 An alternative to receivership raised by the Senior Secured Noteholders was interim payment for use of the security. The Monitor's third report makes it clear that the debtor's cash flow forecasts would not permit such payments.

34 The Senior Secured Noteholders suggested Air Canada could make the payments and, indeed, that Air Canada should pay out the debt owed to them by CAC. It is my view that, in the absence of abuse of the CCAA process, simply having a solvent entity financially supporting a plan with a view to ultimately obtaining an economic benefit for itself does not dictate that that entity should be required to pay creditors in full as requested. In my view, the evidence before me at this time does not suggest that the CCAA process is being improperly used. Rather, the evidence demonstrates these proceedings to be in furtherance of the objectives of the CCAA.

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35 With respect to the application to sell shares or assets of Canadian Regional, this application raises a distinct issue in that Canadian Regional is not one of the debtor companies. In my view, Paragraph 5(a) of Chief Justice Moore's March 24, 2000 order encompasses marketing the shares or assets of Canadian Regional. That paragraph stays, inter alia:

> ...any and all proceedings ... against or in respect of ... any of the Petitioners' property ... whether held by the Petitioners directly or indirectly, as principal or nominee, beneficially or otherwise...

36 As noted above, Canadian Regional is CAC's subsidiary, and its shares and assets are the "property" of CAC and marketing of these would constitute a "proceeding ... in respect of ... the Petitioners' property" within the meaning of Paragraph 5(a) and Section 11 of the CCAA.

37 If I am incorrect in my interpretation of Paragraph 5(a), I rely on the inherent jurisdiction of the court in these proceedings.

38 As noted above, the CCAA is to be afforded a large and liberal interpretation. Two of the landmark decisions in this regard hail from Alberta: *Meridian Development Inc. v. Toronto Dominion Bank*, supra, and *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.). At least one court has also recognized an inherent jurisdiction in relation to the CCAA in order to grant stays in relation to proceedings against third parties: *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.). Tysoe J. urged that although this power should be used cautiously, a prerequisite to its use should not be an inability to otherwise complete the reorganization. Rather, what must be shown is that the exercise of the inherent jurisdiction is important to the reorganization process. The test described by Tysoe J. is consistent with the critical balancing that must occur in CCAA proceedings. He states:

> In deciding whether to exercise its inherent jurisdiction, the court should weigh the interests of the insolvent company against the interests of 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 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 Section 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).

39 The balancing that I have described above in the context of the receivership application equally applies to this application. While the threshold of prejudice is lower, the Senior Secured Noteholders still fail to meet it. I cannot see that it is important to the CCAA proceedings that the Senior Secured Noteholders get started on marketing Canadian Regional. Instead, it would be disruptive and endanger the CCAA proceedings which, on the evidence before me, have progressed swiftly and in good faith.

40 The application in Action No. 0001-05044 is dismissed, also with leave to reapply after the vote on May 26, 2000.

41 I appreciate that the Senior Secured Noteholders will be disappointed and likely frustrated with the outcome of these applications. I would emphasize that on the evidence before me their rights are being postponed and not eradicated. Any hardship they experience at this time must yield to the greater hardship that the debtor companies and the other constituents would suffer were the stay to be lifted at this time.

Application dismissed.

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2009 CarswellOnt 4806
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 4806, 179 A.C.W.S. (3d) 801, 57 C.B.R. (5th) 232, 76 C.C.P.B. 307

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 NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Morawetz J.

Heard: June 16, 2009
Judgment: August 18, 2009
Docket: 09-CL-7950

Counsel: Alan Merskey for Nortel Networks Corp. et al
Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited
Leanne Williams for Flextronics Inc.
J. Pasquariello for Monitor, Ernst & Young Inc.
B. Wadsworth for CAW-Canada
Thomas McRae for Recently Severed Calgary Employees
A. McKinnon for Former Employees
Mary Arzoymanidis for Bell Canada
Alex MacFarlane for Unsecured Creditors' Committee
Gavin Finlayson for Noteholders
Tina Lie for Superintendent of Financial Services of Ontario
Steven Graff, Ian Aversa for Current and Former Employees

Subject: Insolvency
Related Abridgment Classifications
Civil practice and procedure
XVI Disposition without trial
XVI.3 Stay or dismissal of action
XVI.3.f Removal of stay
Headnote
Civil practice and procedure --- Disposition without trial — Stay or dismissal of action — Removal of stay
Action was commenced in United States which involved alleged breach by named defendants of their statutory duties under Employee Retirement Income Security Act, 1974 (ERISA) — ERISA litigation was at discovery stage, which entailed review and production of millions of pages of electronic documents and numerous depositions — Stay was contained in Amended and Restated Initial Order (initial order) — Applicants brought motion for order extending stay — Current and former employees of N Inc. who were participants in long-term investment plan sponsored by N Inc. (moving parties) brought motion for order

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lifting stay of proceedings — Motion by applicants granted — Motion by moving parties dismissed — D&O stay under initial order did cover D&O defendants in ERISA litigation and it was not appropriate to lift stay at this time — Effect of stay would be merely to postpone ERISA litigation — Allegations against named defendants were not restricted to defendants acting in their capacity as fiduciaries — In expanding scope of litigation to include broad allegations as against directors, moving parties had brought ERISA litigation within terms of D&O stay — Restructuring was at critical stage and energies and activities of board should be directed towards restructuring — To permit ERISA litigation to continue at that time would result in significant distraction and diversion of resources at time when that could be least afforded — Further postponement of claim for relatively short period of time would not be unduly prejudicial to moving parties.

Table of Authorities

Cases considered by *Morawetz J.*:

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339, 1992 CarswellOnt 185 (Ont. Gen. Div.) — referred to

Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc. (2008), 2008 CarswellOnt 1427, *(*sub nom. *Morneau Sobeco Ltd. Partnership v. AON Consulting Inc.)* 237 O.A.C. 267, 65 C.C.L.I. (4th) 159, 2008 ONCA 196, 40 C.B.R. (5th) 172, 65 C.C.P.B. 293, *(*sub nom. *Slater Steel Inc. (Re))* 2008 C.E.B. & P.G.R. 8285, 291 D.L.R. (4th) 314 (Ont. C.A.) — distinguished

SNV Group Ltd., Re (2001), 95 B.C.L.R. (3d) 116, 2001 BCSC 1644, 2001 CarswellBC 2662 (B.C. S.C.) — referred to

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (B.C. S.C.) — referred to

Statutes considered:

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

Generally — referred to

s. 11.5 [en. 1997, c. 12, s. 124] — considered

s. 11.5(1) [en. 1997, c. 12, s. 124] — considered

s. 11.5(2) [en. 1997, c. 12, s. 124] — referred to

Employee Retirement Income Security Act, 1974, 29 U.S.C.

Generally — referred to

Rules considered:

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

R. 21 — referred to

MOTION by applicants for order extending stay in action; MOTION by moving parties for order lifting stay of proceedings.

***Morawetz J.*:**

1 This endorsement relates to two motions.

2 The first is brought by the Applicants for an order extending the stay contained at paragraphs 14 - 15 and 19 of the Amended and Restated Initial Order (the "Initial Order") to the individual defendants (the "Named Defendants") in the action commenced in the United States District Court, Middle District of Tennessee, Nashville District (the "ERISA Litigation").

3 The second is brought by the current and former employees of Nortel Networks Inc. ("NNI") who are or were participants in the long-term investment plan sponsored by NNI (the "Moving Parties") for an order, if necessary, lifting the stay of proceedings provided for in the Initial Order for the purpose of allowing the Moving Parties to continue with the ERISA Litigation.

4 For the following reasons, the motion of the Applicants is granted and the motion of the Moving Parties is dismissed.

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Background

5 The motion of the Applicants is supported by the Board of Directors of Nortel Networks Corp. ("NNC") and Nortel Networks Ltd. ("NNL"), the Monitor, the Unsecured Creditors' Committee and the Bondholders.

6 The ERISA Litigation involves the alleged breach by the Named Defendants of their statutory duties under the *Employee Retirement Income Security Act, 1974* ("ERISA") regarding the management of NNI's defined contribution retirement plan (the "Plan"). It is alleged that, among others, the Named Defendants breached their duty by imprudently offering NNC stock for investment in the Plan.

7 The ERISA Litigation is currently at the discovery stage, which entails a review and production of millions of pages of electronic documents and numerous depositions. The ERISA Litigation plaintiffs are entitled to conduct up to 60 depositions.

8 Counsel to the Moving Parties explained that the defendants in ERISA cases are typically the individuals who managed the plan, being the "fiduciaries" in the language of ERISA. The fiduciaries may include the corporate entity itself, senior management employees, human resources employees and/or other personnel, entities or persons outside the company, or any combination of same. Counsel submits that under ERISA, the status of an individual as a fiduciary depends on the plan documents and the actual management and practice relating to the plan, not an individual's official corporate status as an officer and/or director of the plan's sponsor.

9 Although the intent of the ERISA action may be aimed at the individuals in their capacity as independent ERISA fiduciaries, it seems to me that the Second Amended Complaint ("SAC") as filed in the action has a much broader impact.

10 At paragraph 15 of his factum, Mr. Barnes makes the following submission:

> It is simply untenable to suggest that the D&O Defendants [referred to herein as the "Named Defendants"] are only being sued in their capacity as independent ERISA fiduciaries. This claim is belied by the Plaintiff's own pleadings. The Second Amended Consolidated Class Action Complaint ("SAC") repeatedly asserts claims against the Named Defendants that specifically relate to the obligations of the company, where the defendants are alleged to be liable in their capacities as directors or officers. For example, the Plaintiffs allege that Nortel "necessarily acts through its Board of Directors, officers and employees", and assert that the "directors-fiduciaries act on behalf of [Nortel]". The SAC further claims that the Named Defendants are liable as "co-fiduciaries" alongside the company. It is inescapable that some of the claims for which the plaintiffs seek to recover against the individual Named Defendants relate to obligations of Nortel, because, as is evident from multiple allegations in the SAC, Nortel can only act derivatively through its directors and officers.

11 Mr. Barnes cites references to the SAC at page 5, paragraph 14; page 6, paragraph 19; pages 24, 52, 54 and paragraphs 50 - 109, 114; and pages 26 and 35 and paragraphs 58 and 66.

12 Mr. Barnes goes on to submit that as a result, the allegations in the ERISA Litigation against the Named Defendants and the allegations against the corporate defendants are invariably intertwined, raising several identical questions of fact and law.

13 Mr. Barnes also made reference to paragraph 147 of the SAC which sets out the additional theory of liability against some of the Defendants and alleges in the alternative that the said defendants are liable as non-fiduciaries who knowingly participated in the fiduciary breaches of the other Plan fiduciaries described herein, for which said Defendants are liable pursuant to ERISA.

14 Although the ERISA Litigation may be aimed at the Named Defendants in their capacities as "fiduciaries" it seems to me that this distinction is somewhat blurred such that it is arguable that the Named Defendants only have fiduciary status under ERISA as a consequence of their position as directors or officers of the company.

15 The Moving Parties concede that the ERISA Litigation against NNI, NNC and NNL is stayed as a result of the Chapter 11 proceeding, the Initial Order, and the Chapter 15 proceedings. The Moving Parties seek to continue the action as against the Named Defendants and carry on with the discovery process.

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16 The Moving Parties stated intention in continuing with the ERISA Litigation is to pursue insurance proceeds. The Moving Parties have filed evidence of an offer to settle made within the limits of the applicable policies but the offer has not been accepted.

17 The Moving Parties take the position that the ERISA Litigation is not stayed as against the Named Defendants pursuant to the stay because the Named Defendants are "not being sued in their capacity as officers and directors of the two Canadian corporations, but in their capacities as fiduciaries of an American 401(k) Plan". The Applicants take the position that it is, however, as a result of their employment by the Applicants that the Named Defendants had any capacity as fiduciaries for an American 401(k) Plan.

18 The Moving Parties take the position that a continuation of the ERISA Litigation will have a minimal effect on the Applicants because, among other things:

(a) the documentary discovery can be managed by the lawyers without the extensive involvement of any Nortel personnel;

(b) the bulk of documentary discovery issues have been worked out;

(c) they will accommodate individual defendants involved in the restructuring efforts by scheduling the remaining steps in the ERISA Litigation so that they are not distracted from the restructuring efforts; and

(d) they will agree that any determination or adjudication shall be without prejudice to the Canadian applicants in the claims process.

19 The Applicants take the position that they do not wish to be drawn into the conflict over the insurance proceeds as this would result in prejudice to their restructuring efforts. At this time, the Applicants are at a critical stage of their restructuring and submit that their efforts should be directed towards the restructuring.

20 Mr. Barnes submits that, if the ERISA Litigation is allowed to continue, it will detract significant attention and resources from Nortel's restructuring. The Moving Parties are seeking continued discovery of millions of pages of electronic documents in the company's possession and are expected to conduct dozens depositions. Mr. Barnes further submits it is simply not the case that continued litigation has a minimal effect on the company as negotiating a discovery agreement and collecting and providing the documents in question requires considerable time and resources in preparing past and current directors and officers for the depositions which will necessitate significant attention and focus for management and the board. In addition, he submits that addressing the strategic issues raised by the litigation, including the prospect of settlement, requires the attention of management and the board. Further, as the questions of fact and law at issue in the ERISA Litigation are practically identical as between the corporate defendants and the D&O Defendants, he submits there is a serious risk of the record being tainted if the action proceeds without the Applicants' participation, which could have corresponding effects on any claims process.

21 It is also necessary to take into account the effect of a stay of the ERISA Litigation on the Moving Parties.

22 As counsel to the Applicants points out, the Moving Parties have also stated that their primary interest in continuing the ERISA Litigation is to pursue an insurance policy issued by Chubb. The Moving Parties have noted that the insurance proceeds are a "wasting policy", starting at U.S. $30 million and declining for defence costs.

23 Counsel to the Applicants submits that in the event that the stay continues, few defence costs will be incurred against the insurance proceeds and the Moving Parties will maintain the value of their within limits offer.

24 Further, as Mr. Barnes points out, staying the entire ERISA Litigation would not significantly harm the Moving Parties as it does not preclude their action, but merely postpones it.

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Analysis

25 Section 11.5 of the CCAA authorizes the court to make an order under the CCAA to provide for a stay of proceedings against directors. Section 11.5(1) states:

> 11.5(1) An order made under section 11 may provide that no person may commence or continue any action against a director of the debtor company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company where directors are under any law liable within their capacity as directors for the payment of such obligations, unless a compromise or arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

26 Section 19 of the Initial Order provides as follows:

> THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.5(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, unless a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the applicant or this Court (the "D&O" stay).

27 It is also argued by both counsel to the Applicants and the Board that this statutory power is augmented by the court's inherent jurisdiction to grant a stay in appropriate circumstances. (See: *SNV Group Ltd., Re*, [2001] B.C.J. No. 2497 (B.C. S.C.).) Counsel to the Applicants and the Board also submit that the CCAA is remedial legislation to be construed liberally and in these circumstances, it should be recognized that the purpose of the stay is to provide a debtor with its opportunity to negotiate with its creditors without having to devote time and scarce resources to defending legal actions against it. It is further submitted that given that a company can only act through its management and board, by extension, the purpose of the stay provision is to provide management and the board with the opportunity to negotiate with creditors and other stakeholders without having to devote precious time, resources and energy to defending against legal actions.

28 Mr. Barnes submits that the ERISA Litigation falls squarely within the terms of the D&O Stay as it is a claim against former and current directors and officers under a U.S. statute that arose prior to the date of filing. Further, the Named Defendants are only exposed to this liability as a consequence of their position with the company.

29 It is on this last point that Mr. Graff, on behalf of the Moving Parties, takes issue. He submits that the litigation is not stayed against the individual defendants because they are not being sued in their capacities as officers and directors of two Canadian corporations, but in their capacities as fiduciaries of an American 401(k) Plan. As such, he submits that the stay ought not to extend to the ERISA Litigation. He submits that the named defendants' liability is not a derivative of the Applicants' liability, if any, as a fiduciary. He further submits that the corporate defendants have claimed in the ERISA Litigation that the corporate entities are not fiduciaries at all and need not even have been named in the ERISA Litigation.

30 Mr. Graff further submits that the Applicants' submission and the Board's submission is flawed and that following the reasoning of the Court of Appeal in *Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc.* (2008), 40 C.B.R. (5th) 172 (Ont. C.A.), the fact that the management of the Plan has always been performed by the Applicants' employees, officers and directors is moot. Mr. Graff submits that the *Morneau* case is on "all fours" with this case.

31 With respect, I do not find that the *Morneau* case is on "all fours" with this case. Mr. Graff submits that in *Morneau*, the Court of Appeal opined on the applicable legal questions: When are directors and officers not directors and officers?

32 In my view, while the Court of Appeal may have commented on the issue referenced by Mr. Graff, it was not in a context which is similar to that being faced on this motion. In *Morneau*, the Court of Appeal was faced with an interpretation issue

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arising out of the scope and terms of a release. The consequences of an interpretation against Morneau would have resulted in a bar of the claim. This distinction between *Morneau* and the case at bar is, in my view, significant.

33 The *Morneau* case can also be distinguished on the basis that Gillese J.A. was examining a release and, in particular, how far that release went. That is not an issue that is before me. There is no determination that is being made on this motion that will affect the ultimate outcome of the ERISA Litigation. There is no issue that a denial of the stay will result in the action being barred. Rather, the effect of the stay would be merely to postpone the ERISA Litigation.

34 This is not a Rule 21 motion and accordingly, the pleadings do not have to be reviewed on the basis as to whether it is "plain, obvious and beyond doubt" that the claim could not succeed. In this case, there is no "bright line" in the pleadings. As I have noted above, the allegations against the Named Defendants are not restricted to the defendants acting in their capacity as fiduciaries. In expanding the scope of the litigation to include broad allegations as against the directors, the Moving Parties have brought the ERISA Litigation, in my view, within the terms of the D&O Stay.

35 Having determined that the ERISA Litigation falls within the terms of the D&O Stay, the second issue to consider is whether the stay should be lifted so as to permit the ERISA Litigation to continue at this time.

36 In my view, the Nortel restructuring is at a critical stage and the energies and activities of the Board should be directed towards the restructuring. I accept the argument of Mr. Barnes on this point. To permit the ERISA Litigation to continue at that time would, in my view, result in a significant distraction and diversion of resources at a time when that can be least afforded. It is necessary in considering whether to lift the stay, to weigh the interests of the Applicants against the interests of those who will be affected by the stay. Where the benefits to be achieved by the applicant outweighs the prejudice to affected parties, a stay will be granted. (See: *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.).)

37 I also note the comments of Blair J. (as he then was) in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) at paragraph 24 where he stated:

> In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with - at least for the purposes of that proceeding in the CCAA proceeding itself.

38 The prejudice to be suffered by the Moving Parties in the ERISA Litigation is a postponement of the claim. In view of the fact that the ERISA Litigation was commenced in 2001, I have not been persuaded that a further postponement for a relatively short period of time will be unduly prejudicial to the Moving Parties.

Disposition

39 Under the circumstances, I have concluded that the D&O Stay under the Initial Order does cover the D&O Defendants in the ERISA Litigation and that it is not appropriate to lift the stay at this time.

40 It is recognized that the ERISA Litigation will proceed at some point. The plaintiffs in the ERISA Litigation are at liberty to have this matter reviewed in 120 days.

41 To the extend that I have erred in determining that the ERISA Litigation is not the type of action directly contemplated by the D&O Stay, I would exercise this Court's inherent power to stay the proceedings against non-parties to achieve the same result.

Motion by applicants granted; motion by moving parties dismissed.

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KeyCite treatment
Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): AlphaBow Energy Ltd (Re) | 2026 ABCA 35, 2026 CarswellAlta 264, [2026] A.W.L.D. 910 | (Alta. C.A., Feb 9, 2026)

2025 ABKB 622
Alberta Court of King's Bench

AlphaBow Energy Ltd. (Re)

2025 CarswellAlta 2551, 2025 ABKB 622, [2025] A.W.L.D. 4521, 2025 A.C.W.S. 5118, 23 C.B.R. (7th) 30

In the Matter of the Companies' Creditors Arrangement Act, RSC 1985, c C-36, as amended

And in the matter of the compromise or arrangement of AlphaBow Energy Ltd.

M.H. Bourque J.

Heard: September 22, 2025
Judgment: October 29, 2025
Docket: Calgary 2401-05179

Counsel: Keely Cameron, Sophie Fiddes, for AlphaBow Energy Ltd.
James W. Reid, Dakota Bailey, for Alberta Energy Regulator
Jeffrey Oliver, for Monitor, KSV Restructuring Inc.
Ryan Zahara, for Orphan Well Association
Emily Paplawski, for Canadian Natural Resources Limited
Michael Swanberg, for Red Deer County and Municipal District of Greenview
Greg Plester, for Flagstaff County, Lamont County, Starland County, County of Stettler No. 6, County of Warner No. 5, Municipal District of Provost, Ponoka County, County of Paintearth No. 18

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Effect of arrangement
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement
Debtor was private energy company that engaged in acquiring, developing and producing oil and natural gas in Alberta — Regulatory body became concerned with debtor's behaviour and issued compliance order, which company did not follow — Licenses and sites of debtor were suspended — Debtor entered protection under Companies' Creditors Arrangement Act — Regulator required debtor to make security deposit as condition for approval of transfer of energy licenses agreed to in arrangement, to meet environmental obligations — Debtor brought application for declaration that any request for deposit be stayed — Application dismissed — Stay of Proceedings under Act did not apply to regulatory body by operation of s. 11.1(2) of Act — Deposit as condition for transfer of licenses was not enforcement of rights as creditor, but was regulatory measure for common good — While purpose of Act is to maintain status quo among creditors requiring security deposit arises because of statutory mandate to enforce public duties, not as a creditor — Stay of proceedings did not apply to deposit — While order sought might technically lead to viable arrangement or compromise, it nonetheless would leave debtor with over 3,000 inactive wells, of which only 184 were economically viable, income from which would be insufficient to meet ongoing environmental obligation Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s 11.1(2).

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Table of Authorities

Cases considered by *M.H. Bourque J.*:

BZAM Ltd. Plan of Arrangement (2024), 2024 ONSC 1645, 2024 CarswellOnt 3802 (Ont. S.C.J. [Commercial List]) — considered

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

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

Re Just Energy Corp. (2021), 2021 ONSC 1793, 2021 CarswellOnt 3724 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

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

Generally — referred to

s. 11.1(1) [en. 1997, c. 12, s. 124] — referred to

s. 11.1(2) [en. 1997, c. 12, s. 124] — considered

s. 11.1(3) [en. 1997, c. 12, s. 124] — considered

s. 11.1(4) [en. 2007, c. 29, s. 106(2)] — referred to

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

Liabilities Management Statutes Amendment Act, 2020, S.A. 2020, c. 4

Generally — referred to

Oil and Gas Conservation Act, R.S.A. 2000, c. O-6

s. 103 — considered

s. 103(1) — considered

s. 103(2) — referred to

Responsible Energy Development Act, S.A. 2012, c. R-17.3

Generally — referred to

Proceeding

Motion/Application for Declaration.

APPLICATION by creditor for declaration regarding regulatory deposit ordered as condition on arrangement.

***M.H. Bourque J.*:**

Reasons for Decision

1 AlphaBow Energy Ltd. (**AlphaBow**) seeks a declaration that any future request of the Alberta Energy Regulator (**AER**) requiring AlphaBow to provide a security deposit is stayed so long as these proceedings are ongoing. For the reasons set forth below, AlphaBow's application is dismissed.

I. Context

2 AlphaBow is a private energy company that was in the business of acquiring, developing and producing oil and natural gas in Alberta.

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3 The AER is a corporation established by the *Responsible Energy Development Act*, SA 2012, c R-17.3 and is the sole regulator of oil and gas activities in Alberta.

4 AlphaBow has been on the AER's radar screen since at least 2019, when the AER became concerned with AlphaBow's continued failure to meet its regulatory obligations. After depleting its arsenal of less intrusive compliance measures in 2022, the AER limited AlphaBow's ability to acquire new licenses.

5 In March 2023, the AER issued an order requiring AlphaBow to submit a Reasonable Care and Measures Plan covering a range of operational matters, an abandonment plan for all mineral lease expired wells, updated information, including proof of insurance and financial information, and to post security of $15,374,050 (then representing 10% of its then inactive license liability). Because AlphaBow failed to comply with the March 2023 Order, the AER issued a Suspension Order in June 2023, suspending AlphaBow's licenses and sites, as a temporary measure, until AlphaBow could comply with the March 2023 order and submit an acceptable plan to reactivate its sites safely. On February 28, 2024, the AER dismissed AlphaBow's appeals and confirmed both orders.

6 In the meantime, on September 6, 2023, the AER directed the Orphan Well Association (**OWA**) to provide reasonable care and measures of AlphaBow's licenses and sites and to suspend all of its sites. AlphaBow did not appeal this order. As of September 18, 2025 (the hearing date, and presumably as of today's date), all AlphaBow sites remain suspended and under the safe care and custody of the OWA.

7 On March 28, 2024, one month after the AER confirmed the March 2023 and June 2023 orders, AlphaBow filed a Notice of Intention to Make a Proposal. Then, on April 26, 2024, those proceedings were continued under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (**CCAA**) and a sale and investment solicitation process order was granted. Between that time and December 19, 2024, several sale transactions have been approved.

8 On December 19, 2024, Justice Jeffrey granted AlphaBow's applications for approval and vesting orders, with respect to several transactions, including sale agreements between AlphaBow and 2628071 Alberta Ltd. (**071 AB**) and between AlphaBow and 2628069 Alberta Ltd. (**069 AB**). Justice Jeffrey also granted an approval and reverse vesting order (**RVO**), approving the transfer of all of the common shares of AlphaBow to 2628071 (**Corporate Transaction**) pursuant to an Amended and Restated Subscription Agreement dated December 16, 2024 (**Subscription Agreement**).

9 In its Sixth Report, the Monitor, KSV Advisory Inc., describes the Corporate Transactions as "a sale involving a significant number of assets and assumed environmental liabilities to 071 AB (**RVO Transaction**), with certain assets being transferred by way of an asset sale to an affiliated party, 069 AB. As a result, the RVO Transaction is comprised of several separate transactions: a) the Subscription Agreement; and b) the Related Asset Transactions."

10 Pursuant to the Subscription Agreement, the Transferred Assets and the Transferred Liabilities (as those terms are defined in the Subscription Agreement) will be transferred to the AlphaBow Energy Residual Trust, for the benefit of AlphaBow's creditors, after which the Corporate Transaction will close. The Related Asset Transactions are those outlined in Asset Purchase and Sale Agreements between AlphaBow and 069 AB (**069 Transaction**) and between AlphaBow and 071 AB (**071 Transaction**). The Monitor explains that closing of the 069 Transaction and the 071 Transaction are conditions of the RVO Transaction.

11 On March 4, 2025, the AER received a license transfer application from AlphaBow to Cascade Capture Ltd. (**Cascade**). Cascade is the nominee purchaser in respect of the 069 and 071 Transactions.

12 On July 10, 2025, the AER conditionally approved the license transfer applications (**Conditional Approval Decision**). The approval conditions are set out in two letters, including the condition for the payment of security. In the first letter, the AER requires Cascade to pay security of $4,930,964.60 within 30 calendar days of acceptance of the condition; in the second letter, the AER requires AlphaBow to pay security of $20,551,822.60 within 30 calendar days.

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13 The AER's affiant in this application explains that "AlphaBow was required to post security [in that amount] representing only 10% of its estimated inactive liability calculated applying regional liability estimates set out in Directive 011 of $205,518,226". The AER's affiant further explained that "following the proposed License Transfer Application and Related Asset Transactions, AlphaBow will be left with over 3000 inactive wells, of which only 184 are economically viable if reactivated." Regarding post-RVO AlphaBow, the AER affiant acknowledges the parties' intention "to have the company re-emerge as a going concern. However, the income from the remaining licensed assets, if reactivated, would be markedly insufficient to meet AlphaBow's ongoing environmental obligations."

14 On July 14, 2025, AlphaBow's counsel wrote to the AER requesting that the AER rescind the Conditional Approval Decision and schedule a meeting with AlphaBow and the Monitor as soon as possible. On July 16, 2025, the AER responded that "application decisions are final and the amount of security . . . calculated ... will not be negotiated or adjusted". On July 17, 2025, Cascade wrote to the AER advising that it was withdrawing the license transfer application "effective immediately".

15 Despite Cascade's withdrawal, on August 8, 2025, AlphaBow's counsel requested a regulatory appeal of the Conditional Approval Decision (**Regulatory Appeal Request**) by submitting a letter to the Regulatory Appeal Coordinator, Law Branch at the AER. Although the Monitor indicated in the Eleventh Report that the regulatory appeal was "declared invalid by the AER", the AER affiant avers that the decision on the Regulatory Appeal Request is pending and that a decision is expected before January 16, 2026. However, he acknowledges that given Cascade's withdrawal of the transfer application, "the Regulatory Appeal Request may not matter, since there is no underlying license transfer application before the AER".

16 In its application, AlphaBow seeks the following relief:

> A declaration that *any* request by the AER for a security deposit from AlphaBow is stayed and the failure by AlphaBow to pay security cannot be relied upon for the purposes of considering whether to approve a license transfer application.
>
> [emphasis added]

17 AlphaBow's written brief and oral submissions focused exclusively on the first part of the relief sought, and it made no submissions regarding the latter part of the relief sought that "the failure by AlphaBow to pay security cannot be relied upon for the purposes of considering whether to approve a license transfer application."

18 AlphaBow advances two arguments in support of its application. First, AlphaBow argues that the request for a security deposit is contrary to the stay in the Amended and Restated Initial Order (**ARIO**). Alternatively, if the request for a security deposit is a regulatory action, AlphaBow argues that the Court should stay any such request pursuant to subsection 11.1(2) of the CCAA.

II. Analysis

A. Statutory Framework

19 Section 11.02 of the CCAA is the authority upon which either the initial 10-day or subsequent stay of proceedings, such as in the ARIO, is granted (**CCAA Stay of Proceedings**). Subsection 11.1(2) provides that a CCAA Stay of Proceedings does not apply to the actions of a regulatory body (**Regulatory Exception**), except if the action relates to the enforcement of a payment ordered by the regulatory body. If there is "a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor", subsection 11.1(4) provides a mechanism for judicial determination of the question.

20 If a regulatory body is not seeking to enforce its rights as a creditor, a regulatory action may nonetheless be subject to the CCAA Stay of Proceedings but only if the Court is satisfied that: (a) a viable compromise or arrangement could not be made unless the CCAA Stay of Proceedings was enforced against the regulatory action; and (b) it would not be contrary to the public interest that the regulatory body be subject to the CCAA Stay of Proceedings.

21 There is no dispute that the AER is a regulatory body within the meaning of section 11.1(1) of the CCAA.

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B. Is the AER request for a security deposit stayed by the ARIO?

22 In its brief, AlphaBow characterizes the AER's action as follows:

> By refusing to transfer licenses until and unless AlphaBow pays money, the AER is in violation of [paragraph 17 of the ARIO] and section 11.1 of the CCAA, as it is seeking to enforce a monetary obligation.

23 In my view, the AER's requirement that AlphaBow make a security deposit as a condition for the transfer of AlphaBow's licenses is not properly characterized as the enforcement of the AER's rights as a creditor. AlphaBow's argument is flawed as it conflates the enforcement by a regulatory body of a monetary obligation *simpliciter* with the enforcement by a regulatory body of rights *as a creditor*.

24 In any event, what the AER seeks to enforce is a monetary payment condition imposed on a discretionary license transfer approval, calculated as a percentage of AlphaBow's end-of-life obligations. The Supreme Court and the Court of Appeal have characterized payments of this nature as public duties owed, not to a creditor, but to "fellow citizens". They are not "provable claims". (***Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 (*Redwater*)**, at 135; see also: ***Panamericana de Bienes y Servicios S.A. v Northern Badger Oil & Gas Ltd*, , 1991 ABCA 181 at 33**).

25 I am also not persuaded by AlphaBow's argument that changes to the AER's statutory and regulatory framework make ***Redwater*** distinguishable. AlphaBow points to the 2020 amendments of section 103 of the *Oil and Gas Conservation Act*, RSA 2000 c O-6 (**OGCA**). According to AlphaBow:

> Since the issuance of *Redwater*, the AER [*sic*] has amended its legislation to expand its statutory lien to capture requests by the AER for security.
>
> The effect of the security deposit requirement is to not only create a debt but also priority for the AER that did not previously exist. This is contrary to the stay of proceedings, which is intended to maintain the status quo amongst creditors.

26 Section 103 of the OGCA is nothing more than an enforcement mechanism that creates a statutory lien in favour of the AER for unpaid "costs, levy, fee, penalty, deposit or other form of security or other amount". All that the legislature accomplished with the 2020 amendments was to add the words "deposit or other form of security" to the scope of the statutory lien: *Liabilities Management Statutes Amendment Act, 2020*, SA 2020 c 4. Any such lien burdens the "debtor's" property, including wells, facilities and pipelines, land or interests in land, equipment and petroleum substances, and the lien "has priority over all other liens, charges, rights of set-off, mortgages and other security interests" (*OGCA*, s 103(2)). The defined term "debtor" in subsection 103(1) is used "in this section" to mean the person indebted to the AER. That the legislature has defined the indebted party as a "debtor" does not transform the underlying unpaid amounts or obligation in question, whether costs, levy, fees, penalty, deposit or other form of security, into a debt for all purposes.

27 While I accept that the purpose of a CCAA Stay of Proceedings may be to maintain the *status quo* among creditors, here, the AER's action of requiring a security deposit arises because of its statutory mandate to enforce AlphaBow's public duties, not as a creditor. As in ***Redwater***, the AER is acting in a *bona fide* regulatory capacity and does not stand to benefit financially. That the effect of the AER's enforcement actions is to prioritize AlphaBow's end-of-life obligations over the rights of its creditors does not alter the priority scheme among AlphaBow's creditors (***Redwater***, paras 122, 131, 159).

28 For these reasons, the AER's request for a security deposit in the exercise of its regulatory mandate to enforce AlphaBow's public duties does not constitute the enforcement of the AER's rights as a creditor.

C. Should the CCAA Stay of Proceedings apply to the AER's Request for a Security Deposit?

29 As I noted earlier, AlphaBow also applies, pursuant to subsection 11.1(3) of the CCAA, for an order staying the Regulatory Exception in respect of the requested security deposit. To be successful, AlphaBow must persuade me that the two statutory preconditions are met, namely that a viable compromise or arrangement could not be made if the Regulatory Exception to the

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CCAA Stay of Proceedings were to apply, and that it is not contrary to the public interest that the AER be affected by the CCAA Stay of Proceedings.

30 The essence of AlphaBow's position is set out in paragraphs 23 and 24 of its brief:

> 23. As with the forgoing cases, a stay is necessary as the harm will be amplified rather than avoided if the AER is permitted to require AlphaBow to post security. Requiring the payment of security will:
>
> (a) either frustrate AlphaBow's restructuring efforts should the AER continue to request security in amounts that AlphaBow is unable to pay, preventing over $200 million in environmental liabilities from leaving the OWA and resuming production for the benefit of Alberta; or
>
> (b) Result in a reordering of priorities through enabling the AER to scoop funds that would otherwise be distributable to AlphaBow's creditors, resulting in a windfall for AlphaBow's purchaser who would ultimately be the beneficiary of any security posted which would be held in AlphaBow's name.
>
> 24. A stay in these circumstances is not contrary to the public interest, but rather will enhance it, through enabling the transfer applications to proceed, so that assets can be moved out of the OWA and resume production - creating jobs and providing for revenue to pay associated obligations.

31 In support of the proposition in paragraph 23, AlphaBow relies on several cases. In my view, the facts and circumstances of those cases are distinguishable from those present here and do not assist AlphaBow.

32 In staying the Regulatory Exception during the initial 10-day CCAA Stay of Proceedings in ***Re Just Energy Corp*, , 2021 ONSC 1793**, Koehnen J noted the emergent and possibly temporary state of affairs leading to the stayed regulatory action (at para 82): "it would appear to me to be unjust to take regulatory steps that might shut down [an] entire business when the financial concerns that prompt those steps may turn out to be unjustified", and that "it may be appropriate for regulators to consider whether Just Energy should be shut down because of a temporary liquidity crisis and whether Just Energy should be given a window of opportunity to work out its liquidity crunch", concluding that "it strikes me, however, that the circumstances of this case warrant at least a 10 day period to allow all parties to assess the issue with the benefit of more reflection than the instant application of a regulatory policy may afford".

33 Moreover, given the possibility that the regulator might cancel or suspend the debtor company's licenses before the hearing of the initial application, Koehnen J stayed the Regulatory Exception even though the regulators had not been served. The Court noted the potential for (at para 86) "substantial disruption to the marketplace as a whole and to Just Energy in particular" if the regulators were permitted to cancel or suspend the debtor company's license to operate, including the possible termination of upstream power supply contracts or the loss of retail customers.

34 In ***BZAM Ltd. Plan of Arrangement*, 2024 ONSC 1645**, a CCAA proceeding involving companies operating in the cannabis industry, Osborne J notes that (at para 49): "[the] cannabis licences of the Applicants are among their most valuable assets. Just as importantly, they are required to permit the Applicants to continue operating their underlying business. The expiry or cancellation of licences will suspend or terminate completely the operation and delivery of products by the Applicants with the result that the ability of the applicants to restructure or continue as a going concern business will in all probability be eliminated."

35 Similarly, in the matter of an initial CCAA Stay of Proceedings involving ***Abbey Resources Corp*** (13 August 2021), Saskatoon QBG 733 of 2021 (SKQB), though the debtor corporation initially did not seek a stay of the Regulatory Exception, it did so (at para 77) "when the Minister advised that it would be issuing orders for Abbey to cease operations if it did not deposit the security for potential decommissioning liabilities within 14 days." In granting the stay, Meschishnick J noted that the impugned regulatory actions had (at para 79) "no element of protection of the public, property or the environment associated with those actions".

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36 In AlphaBow's case, the AER's actions are not the result of an emergent issue or a possibly temporary liquidity crisis: AlphaBow is 19 months deep into insolvency and restructuring proceedings. Nor has the AER indicated any intent to cancel AlphaBow's license to operate. Indeed, AlphaBow's licenses and sites have been in the care of the OWA for over two years. In none of the cases cited by AlphaBow did the Court stay the Regulatory Exception beyond the initial 10-day period.

37 In my view, staying the Regulatory Exception in this case benefits only the parties to the 069 and 071 Transactions and allows for the successful completion of the RVO Transaction, and presumably, AlphaBow's subsequent exit from the CCAA proceedings. While that result might technically qualify as a viable arrangement or compromise, it nonetheless leaves a post-CCAA AlphaBow with over 3,000 inactive wells, of which only 184 are economically viable if reactivated, the income of which "would be markedly insufficient to meet AlphaBow's ongoing environmental obligations".

38 Even if the Regulatory Exception were stayed during the currency of these CCAA proceedings, upon exiting, AlphaBow will no longer benefit from a stay of proceedings, and, as AlphaBow's counsel acknowledged, it will have no money to satisfy the AER's security deposit requirements. Post-CCAA AlphaBow will fail. It will not resume production. It will not create any jobs. It will not generate any revenue to pay its associated end-of-life obligations. AlphaBow's remaining inactive wells will end up right back with the OWA.

39 For these reasons, AlphaBow has not persuaded me that the statutory pre-conditions in subsection 11.1(3) have been satisfied, and I decline to stay the Regulatory Exception. Even if AlphaBow had met the statutory pre-conditions, I would not have granted the *carte blanche* relief sought to stay *any* future security deposit request made by the AER. To do so would improperly fetter the Court's supervisory role in insolvency proceedings.

III. Disposition

40 AlphaBow's application is dismissed.

Application dismissed.

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2022 ONSC 3338
Ontario Superior Court of Justice

MJardin Group, Inc. (Re)

2022 CarswellOnt 7797, 2022 ONSC 3338, 2022 A.C.W.S. 1899

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT INVOLVING MJARDIN GROUP, INC., GROWFORCE HOLDINGS INC., 8586985 CANADA CORPORATION AND HIGHGRADE MMJ CORPORATION

PRICEWATERHOUSECOOPERS INC., IN ITS CAPACITY AS COURTAPPIONTED RECEIVER AND MANAGER OF BRIDGING FINANCE INC. AND CERTAIN RELATED ENTITIES AND INVESTMENT FUNDS (APPLICANT) and MJARDIN GROUP, INC., GROWFORCE HOLDINGS INC., 8586985 CANADA CORPORATION AND HIGHGRADE MMJ CORPORATION (RESPONDENTS)

G.B. Morawetz C.J. Ont. S.C.J.

Heard: June 2, 2022
Judgment: June 3, 2022
Docket: 22-00678813-00CL

Counsel: Rebecca Kennedy, Adam Driedger, for Applicant
Chris Armstrong, Andrew Harmes, for Proposed Court-appointed Monitor, KSV Restructuring Inc.
Aiden Nelms, for Proposed CRO

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.d Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous
Creditor lent funds to group of debtors, who were indebted in amount of approximately $178 million — Receiver was appointed over certain debtor companies — Receiver brought creditor initiated application for initial order under Companies' Creditors Arrangement Act — Application granted — Each respondent was corporation incorporated under laws of Ontario or Canada and constituted company, and also debtor company under Act — Appropriate to grant stay of proceedings under Act — Monitor appointed — Charges granted for administration, debtor in possession lender, and directors.
Table of Authorities
Cases considered by *G.B. Morawetz C.J. Ont. S.C.J.*:
Miniso International Hong Kong Limited v. Migu Investments Inc. (2019), 2019 BCSC 1234, 2019 CarswellBC 2208, 71 C.B.R. (6th) 250 (B.C. S.C.) — referred to
Statutes considered:
Cannabis Act, S.C. 2018, c. 16
Generally — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

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s. 2(1) "debtor company" — referred to

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

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

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

s. 11.52 [en. 2005, c. 47, s. 128] — referred to
Securities Act, R.S.O. 1990, c. S.5
s. 129 — referred to

APPLICATION by receiver for initial order under *Companies' Creditors Arrangement Act*.

***G.B. Morawetz C.J. Ont. S.C.J.*:**

1 PricewaterhouseCoopers Inc. ("PwC"), court-appointed receiver and manager of Bridging Finance Inc. ("BFI") and certain related entities and investment funds (in such capacity, the "Bridging Receiver") brings this creditor initiated application for an initial order (the "Initial Order") pursuant to the *Companies' Creditors Arrangement Act* (the "CCAA") in respect of MJardin Group, Inc. ("MJar"), and together with its direct and indirect subsidiaries, (the "MJar Group"), Growforce Holdings Inc. ("Growforce"), 8586985 Canada Corporation ("858") and Highgrade MMJ Corporation ("Highgrade" and, together with MJar, Growforce and 858, the "Respondents"). All capitalized terms are as defined in the Affidavit of Graham Page, sworn June 1, 2022.

2 By orders dated April 30, 2021, May 3, 2021 and May 14, 2021, PwC was appointed as the Bridging Receiver pursuant to s. 129 of the *Securities Act (Ontario)*.

3 One group of loans within Bridging's portfolio are those made by Bridging to certain entities in the MJar Group, in respect of which each of the Respondents is either a borrower or guarantor. The Respondents are in the cannabis cultivation and cannabis management services businesses, and their business represents the core remaining business of the MJar Group.

4 Pursuant to the Canadian Loan Agreement among Growforce, as borrower, BFI, as agent, the Bridging investment funds from time to time acting as lenders (the "Lenders"), and each of MJar, Highgrade, and 858 as obligors, the Lenders made available to Growforce a revolving demand loan (the "Canadian Loan"). The total amount outstanding under the Canadian Loan Agreement is approximately $135 million. The obligations of the Respondents under the Canadian Loan Agreement are secured.

5 Pursuant to the U.S. Loan Agreement, the Lenders made available to the U.S. Borrowers certain demand loans (the "U.S. Loans" and together with the Canadian Loan, the "Loans"). The U.S. borrowers are indirect subsidiaries of MJar and no relief is being sought in respect of the U.S. Borrowers at this time. The total amount outstanding under the U.S. Loan Agreement is approximately $44 million.

6 The Respondents and other entities in the MJar Group are indebted to Bridging in the amount of approximately $178 million under the Loans.

7 The Respondents are in default of their obligations to Bridging under the Loan Agreements and the Loans are past maturity.

8 On March 23, 2022, the Bridging Receiver sought and obtained the Receivership Order appointing KSV Restructuring Inc. ("KSV") as receiver and manager of MJar (in such capacity, the "MJar Receiver").

9 The principal mandate of the MJar Receiver was to review and consider available options to monetize and maximize the value of the MJar Group. The MJar Receiver filed a report dated June 1, 2022 with respect to its activities. The MJar Receiver determined that the best path for the MJar Group would be to develop and implement an operational restructuring of

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the Respondents' business and, ultimately implement a restructuring transaction that will preserve and maximize value for the benefit of Bridging and other stakeholders of the Respondent.

10 The Bridging Receiver and the MJar Receiver are of the view that the CCAA provides the most appropriate forum to achieve such a result. As a result, the Bridging Receiver brought this creditor initiated application for the Initial Order. The Initial Order contemplates the appointment of KSV as the monitor of the Respondents.

11 The Bridging Receiver has advised that, at the Comeback Hearing, it will seek the appointment of Howards Capital Corp. ("HCC") to act as chief restructuring officer of the Respondents (in such capacity, the "CRO"). It is proposed that the CRO will lead the restructuring efforts on behalf of the Respondents.

12 MJar is a corporation incorporated under the laws of Ontario. MJar is the parent company of the MJar Group and is the direct parent company of Growforce.

13 Growforce is a corporation incorporated under the laws of Ontario and is a borrower under the Canadian Loan Agreement and is a guarantor of the U.S. Loans. Growforce is wholly owned by MJar and is the direct parent company of Highgrade and 858.

14 Each of Highgrade and 858 are corporations incorporated under the laws of Canada. Highgrade and 858 each hold cannabis licenses under the *Cannabis Act*. Each of Highgrade and 858 is a guarantor of the Loans.

15 The Respondents employ approximately 75 employees, who are primarily located in Ontario.

16 According to the most recent financial statements, the Respondents are stated to have total assets with a book value of $85.9 million and total liabilities of $208.2 million.

17 After the granting of the Receivership Order, the Bridging Receiver, on behalf of the Lenders, advanced approximately $2.54 million to the MJar Receiver.

18 The Bridging Receiver understands that the Respondents have arrears on excise taxes and HST, which, as at March 22, 2022, totalled approximately $650,615 and $325,920, respectively.

19 As noted above, the Bridging Receiver, in consultation with the MJar Receiver, determined that the best available option to maximize the value of the Respondents' business and assets and to pursue certain operational restructuring initiatives under the CCAA.

20 The MJar Receiver supports the filing of this application and also consents to its appointment as monitor. Counsel has indicated that an order will be sought discharging the MJar Receiver immediately following the granting of the Initial Order.

21 It is well-established that creditors may bring an application for an initial order under the CCAA in respect of a debtor company. (*Miniso International Hong Kong Limited vMigu Investments Inc.*, 2019 BCSC 1234 (B.C. S.C.) ("*Miniso*").

22 Counsel to the Applicant submits that the Lenders are the senior secured creditors of the Respondents and are the primary stakeholders with an economic interest in the Respondents, which justifies bringing this application.

23 In order to qualify for CCAA protection, each of the Respondents must be a "debtor company" whose liabilities exceed $5 million. A "debtor company" is defined in the CCAA to include a "company" that is "insolvent" or that has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* ("BIA").

24 Each of the Respondents is a corporation incorporated under the laws of Ontario or Canada and therefore constitutes a "company" and having reviewed the record and hearing submissions, I am satisfied that each of the Respondents is a "debtor company" to which the CCAA applies.

25 I am also satisfied that it is appropriate to grant a stay of proceedings pursuant to the CCAA.

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26 I am also satisfied that it is appropriate to appoint KSV as Monitor. In arriving at this conclusion, I have taken into account that the Receivership Order provides that KSV is authorized and empowered to act as Monitor of MJar and any of its subsidiaries in any CCAA proceeding.

27 The Bridging Receiver also requests an order that grants a super-priority administration charge, pursuant to s. 11.52 of the CCAA, in favour of the Monitor and the Monitor's independent legal counsel in the amount of $100,000 (the "Administration Charge"). The only creditors who are likely to be impacted by the Administration Charge are the Lenders. The Bridging Receiver, on behalf of the Lenders, is of the view that the priority and quantum of the Administration Charge are reasonable and appropriate in the circumstances.

28 I am satisfied that it is appropriate to grant the Administration Charge.

29 The Bridging Receiver also requests that the DIP Term Sheet and the DIP Lender's Charge be approved. The statutory authority to approve same is set out in s. 11.2 of the CCAA and s. 11.2(2) provides the court with the express statutory authority to order that the DIP Lender's Charge rank in priority to the claim of any secured creditor of the debtor company.

30 The Bridging Receiver requests that the court grant a super-priority charge in favour of the DIP Lender in the amount of $250,000 (the "DIP Lender's Charge"). I am satisfied that this amount is required to ensure that the Respondents can continue operating their business through the Initial Stay Period and the DIP Lender's Charge will not initially prime any secured creditor of the Respondents who did not received notice of the application for the Initial Order.

31 In my view, it is appropriate to approve the DIP Term Sheet and the DIP Lender's Charge. In arriving at this conclusion, I have taken into account that the record establishes that the Respondents have urgent liquidity needs and without the DIP Financing, the Respondents would be unable to continue in business and make payroll in the near term. The record also establishes that the quantum of the DIP Financing is reasonable and appropriate having regard to the cash flow forecast and that the amounts involved amount to what is reasonably necessary in the circumstances and, finally, the only creditors likely to be impacted by the DIP Lender's Charge are the Lenders, who are providing the DIP Financing.

32 The Bridging Receiver also requests that the court grant a super-priority charge in favour of the Respondents' directors and officers in the initial amount of $355,000 (the "Directors' Charge") to secure the indemnity provided to the Respondents' directors and officers in respect of any liabilities they may incur during the CCAA proceedings. The authority to grant such a charge is set out in s. 11.51 of the CCAA. The Bridging Receiver submits that the Respondents will benefit from the active and committed involvement of the current and future directors and officers and that the directors and officers cannot be certain whether the existing insurance will respond to any claims made against them. Further, the only creditors who are likely to be impacted by the Directors' Charge are the Lenders, who consent to, and seek approval of, the Directors' Charge.

33 In the circumstances, I am satisfied that it is appropriate to grant the Directors Charge in the requested amount.

34 In the result, the Initial Order is granted. A Comeback Hearing has been scheduled for Thursday, June 9 commencing at 10:45 AM.

Application granted.

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2012 BCSC 1459
British Columbia Supreme Court

Great Basin Gold Ltd., Re

2012 CarswellBC 2996, 2012 BCSC 1459, [2012] B.C.J. No. 2028, [2013] 1 W.W.R. 515, 220 A.C.W.S. (3d) 62, 38 B.C.L.R. (5th) 383, 94 C.B.R. (5th) 228

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

And In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44

In the Matter of Great Basin Gold Ltd.

Fitzpatrick J.

Heard: September 26-27, 2012
Judgment: October 1, 2012
Docket: Vancouver S126583

Counsel: P.J. Reardon, J.L. Cockbill, W. Rostom for Petitioner
J. McLean, Q.C., A. MacFarlane, R. Adlington, P.J. Reynolds for Monitor
P.L. Rubin, K. McEachern, D. O'Donnel, M. Chow for Credit Suisse AG
J.R. Sandrelli, C. Cheuk, R. Jacobs, S. Kukulowicz, K. Mak, B. Grossman for Ad Hoc Group of Convertible Debenture Holders
M. Stewart for CIBC

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial; Criminal
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.7 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Qualifying company
Mining company G Ltd. operated via 22 subsidiary companies (collectively G group) — G group had gold mines in South Africa (S.A.) and U.S. — G Ltd. and some subsidiaries experienced "cash flow insolvency" — G Ltd. sought protection of Companies' Creditors Arrangement Act (CCAA) — Secured lenders (C group) and group of senior unsecured convertible debenture holders (A group) both sought to provide DIP financing — Initial order approved C group's DIP financing proposal — A group alleged that terms of C group's DIP facility would result in criminal interest rate — A group applied to set aside parts of initial order; to add U.S. subsidiaries G Inc., A Inc. and R Inc., as parties; and to have its own DIP financing proposal approved — Application dismissed — A group's proposal required adding G Inc., A Inc. and R Inc. as parties — G Inc., A Inc. and R Inc. had no assets in Canada and were, therefore, not debtor companies as defined in CCAA — There was no jurisdictional basis upon which to add G Inc., A Inc. and R Inc. to CCAA proceedings so as to allow A group's proposal to go forward — Critical pre-condition of A group's proposal could not be satisfied — In any event, there was substantial risk and uncertainty associated with A group's proposal — A group's submissions as to criminal interest rate issue did not need to be addressed at present and, based on certain set of circumstances, might never need to be addressed — It was appropriate to leave C group DIP financing proposal in place, subject to concessions agreed to at outset of hearing.
Table of Authorities
Cases considered by *Fitzpatrick J.*:
Affordable Payday Loans v. Beaudette (2004), 2004 CarswellOnt 3210 (Ont. S.C.J.) — referred to

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ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 45 B.L.R. (4th) 201, 2008 CarswellOnt 2652, 42 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List]) — referred to

Ayrton v. PRL Financial (Alberta) Ltd. (2005), 2005 CarswellAlta 550, 2005 ABQB 311, 11 C.P.C. (6th) 28, [2006] 2 W.W.R. 536, 370 A.R. 141, 52 Alta. L.R. (4th) 106 (Alta. Q.B.) — referred to

Ayrton v. PRL Financial (Alberta) Ltd. (2006), 2006 ABCA 88, 2006 CarswellAlta 319, 384 A.R. 1, 367 W.A.C. 1, 265 D.L.R. (4th) 240, [2006] 7 W.W.R. 36, 57 Alta. L.R. (4th) 1, 26 C.P.C. (6th) 203 (Alta. C.A.) — referred to

Bearcat Explorations Ltd., Re (2004), 3 C.B.R. (5th) 173, (sub nom. *Bearcat Explorations Ltd. (Bankrupt), Re)* 368 A.R. 339, 2004 ABQB 601, 2004 CarswellAlta 1052 (Alta. Q.B.) — referred to

Boyd v. International Utility Structures Inc. (2002), 2002 BCCA 438, 167 C.C.C. (3d) 173, 27 B.L.R. (3d) 1, 2002 CarswellBC 1818, 216 D.L.R. (4th) 139, 171 B.C.A.C. 269, 280 W.A.C. 269 (B.C. C.A.) — considered

Brehnan v. Outback Products Inc. (2003), 2003 CarswellBC 1074, 2003 BCSC 703 (B.C. S.C. [In Chambers]) — referred to

Crystallex International Corp., Re (2012), 2012 CarswellOnt 7329, 2012 ONCA 404, 91 C.B.R. (5th) 207, 293 O.A.C. 102 (Ont. C.A.) — followed

Crystallex International Corp., Re (2012), 2012 CarswellOnt 11931, 2012 CarswellOnt 11932 (S.C.C.) — referred to

De Wolf v. Bell ExpressVu Inc. (2009), 97 O.R. (3d) 1, 60 B.L.R. (4th) 193, 247 C.C.C. (3d) 258, 2009 CarswellOnt 5216, 2009 ONCA 644, 311 D.L.R. (4th) 68, 264 O.A.C. 262 (Ont. C.A.) — referred to

Degelder Construction Co. v. Dancorp Developments Ltd. (1998), 165 D.L.R. (4th) 417, 113 B.C.A.C. 1, 184 W.A.C. 1, 129 C.C.C. (3d) 129, [1998] 3 S.C.R. 90, 58 B.C.L.R. (3d) 1, 1998 CarswellBC 2246, 1998 CarswellBC 2247, [1999] 5 W.W.R. 797, 231 N.R. 122, 5 C.B.R. (4th) 1, 20 C.R. (5th) 77, 20 R.P.R. (3d) 165 (S.C.C.) — followed

Fawcett v. Western Canadian Coal Corp. (2010), [2010] 8 W.W.R. 431, 283 B.C.A.C. 182, 480 W.A.C. 182, 3 B.C.L.R. (5th) 13, 2010 CarswellBC 306, 2010 BCCA 70, 67 B.L.R. (4th) 165 (B.C. C.A.) — referred to

Garland v. Consumers' Gas Co. (1998), 114 O.A.C. 1, 40 O.R. (3d) 479 (headnote only), 165 D.L.R. (4th) 385, 129 C.C.C. (3d) 97, [1998] 3 S.C.R. 112, 1998 CarswellOnt 4053, 1998 CarswellOnt 4054, 231 N.R. 1, 20 C.R. (5th) 44, 49 M.P.L.R. (2d) 77 (S.C.C.) — considered

Garland v. Consumers' Gas Co. (2001), 2001 CarswellOnt 4244, 19 B.L.R. (3d) 10, 152 O.A.C. 244, 57 O.R. (3d) 127, 208 D.L.R. (4th) 494 (Ont. C.A.) — considered

J.D.M. Capital Ltd. v. Smith (1998), 58 B.C.L.R. (3d) 272, 116 B.C.A.C. 288, 190 W.A.C. 288, 1998 CarswellBC 2828, 43 B.L.R. (2d) 190, [1999] 6 W.W.R. 687 (B.C. C.A.) — referred to

Kilroy v. A OK Payday Loans Inc. (2006), 59 B.C.L.R. (4th) 78, [2006] 12 W.W.R. 626, 2006 CarswellBC 2039, 2006 BCSC 1213, 21 B.L.R. (4th) 42, 273 D.L.R. (4th) 255 (B.C. S.C.) — considered

Kilroy v. A OK Payday Loans Inc. (2007), 218 C.C.C. (3d) 467, 240 B.C.A.C. 151, 398 W.A.C. 151, 2007 BCCA 231, 2007 CarswellBC 842, 278 D.L.R. (4th) 193, [2007] 8 W.W.R. 480, 30 B.L.R. (4th) 87, 66 B.C.L.R. (4th) 360 (B.C. C.A.) — referred to

Mira Design Co. v. Seascape Holdings Ltd. (1981), 1981 CarswellBC 382, [1982] 1 W.W.R. 744, 34 B.C.L.R. 55, 22 R.P.R. 193 (B.C. S.C.) — considered

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — considered

Terracan Capital Corp. v. Pine Projects Ltd. (1993), 75 B.C.L.R. (2d) 256, 18 C.B.R. (3d) 54, (sub nom. *TerraCan Capital Corp. v. Pine Projects Ltd.)* 23 B.C.A.C. 133, (sub nom. *TerraCan Capital Corp. v. Pine Projects Ltd.)* 39 W.A.C. 133, 100 D.L.R. (4th) 431, [1993] 3 W.W.R. 724, 30 R.P.R. (2d) 119, 1993 CarswellBC 534 (B.C. C.A.) — referred to

Transport North American Express Inc. v. New Solutions Financial Corp. (2004), 2004 SCC 7, 2004 CarswellOnt 512, 2004 CarswellOnt 513, 17 R.P.R. (4th) 1, 235 D.L.R. (4th) 385, 183 O.A.C. 342, [2004] 1 S.C.R. 249, 18 C.R. (6th) 1, 70 O.R. (3d) 255 (note), 40 B.L.R. (3d) 18, 316 N.R. 84 (S.C.C.) — referred to

William E. Thomson Associates Inc. v. Carpenter (1989), 61 D.L.R. (4th) 1, 44 B.L.R. 125, 34 O.A.C. 365, 1989 CarswellOnt 128, 69 O.R. (2d) 545 (Ont. C.A.) — referred to

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Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 11 — referred to

Chapter 15 — referred to

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

Generally — referred to

s. 2(1) "company" — considered

s. 2(1) "debtor company" — considered

s. 3(1) — considered

s. 4 — considered

s. 5 — considered

s. 11 — considered

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

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

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4)(a) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4)(b) [en. 2005, c. 47, s. 128] — referred to

s. 11.2(4)(c) [en. 2005, c. 47, s. 128] — referred to

s. 11.2(4)(d) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4)(e) [en. 2005, c. 47, s. 128] — referred to

s. 11.2(4)(f) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4)(g) [en. 2005, c. 47, s. 128] — considered

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 347 — referred to

s. 347(1)(a) — considered

s. 347(1)(b) — considered

s. 347(2) "credit advanced" — considered

s. 347(2) "criminal rate" — considered

s. 347(2) "interest" — considered

s. 347(4) — referred to

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s. 374 — considered

Rules considered:

Supreme Court Civil Rules, B.C. Reg. 168/2009

R. 6-2 — considered

R. 6-2(7)(b) — considered

R. 6-2(7)(c) — considered

R. 6-2(10) — considered

Words and phrases considered:

interest

The definition of "interest" [in s. 357 of the Criminal Code of Canada] . . . encompasses "many types of fixed payments which would not be considered interest proper at common law or under general accounting principles".: Garland v. Consumers Gas Co., [1998] 3 S.C.R. 112 at para. 27. Any fees, fines, penalties, commissions or other similar charges or expenses are captured by this provision insofar as they are, in accordance with the definition of "interest", "paid or payable for the advancing of credit under an agreement or arrangement". . . . "[I]nterest" under s. 347 is a broadly defined term that encompasses many different types of fees and charges, and has included: royalty payments, legal fees, monitoring fees, standby fees, facility fees, commitment fees, brokerage fees, late fees, initial loan fees, fees for extensions, administrative fees and processing fees.

APPLICATION by A group to add parties; to set aside portions of Initial Order approving C group's DIP financing proposal; and for order approving A group's alternate DIP financing proposal.

***Fitzpatrick J.*:**

Introduction

1 The petitioner, Great Basin Gold Ltd. ("GBG"), is a publicly-traded international mining company engaged in the exploration, development and operation of gold properties. From its head office in South Africa, it operates through 22 subsidiary companies. Collectively, I will refer to the group as the "GBG Group". The assets of the GBG Group comprise, for the most part, certain gold mines located in South Africa and Nevada, U.S.A.

2 For reasons that will be described in more detail below, various members of the GBG Group, including GBG, have found themselves in a severe liquidity crisis or as management describes it, a "cash — flow insolvency". The insolvency of GBG, and various of its subsidiaries, has resulted in restructuring proceedings being commenced in South Africa. Most recently, these proceedings were commenced by GBG last week on September 19, 2012. The subsidiaries of GBG are not petitioners in this proceeding.

3 In the midst of this economic chaos, the two most significant stakeholders in the GBG Group have emerged and have now collided in terms of many issues arising in these restructuring proceedings. Their battleground, at least at this point in time, relates to debtor-in-possession or "DIP" financing required by the GBG Group; in particular, who will be allowed to provide that DIP financing and on what terms.

4 In one corner stands Credit Suisse AG and Standard Chartered Bank (who I will collectively refer to as "Credit Suisse"), who are existing secured lenders with respect to loans advanced in relation to both mining operations.

5 In the other corner stand the holders of certain senior unsecured convertible debentures, the majority of whom are represented by counsel on this application. I will refer to this majority as the "Ad Hoc Group". The debenture holders have advanced significant monies to GBG.

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6 I granted an initial order in favour of GBG in these proceedings on September 19, 2012 (the "Initial Order"). In addition, by that same order, I approved certain DIP financing that was to be provided by Credit Suisse. My reasons are attached as Appendix "A".

7 I heard this application on September 26 and 27, 2012, and advised counsel of the results, with written reasons to follow. These are those reasons.

8 The Ad Hoc Group now applies to set aside the portions of the Initial Order approving the Credit Suisse DIP financing. The Ad Hoc Group also seeks an order approving its own alternate proposal for DIP financing.

9 Accordingly, there is no dispute on this application but that GBG was entitled to seek protection from this Court pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") for the purpose of restructuring its affairs and that the restructuring efforts will, of necessity, include the mining operations in South Africa and Nevada. The Ad Hoc Group does not challenge the granting of the Initial Order. Further, there is no dispute as between GBG, Credit Suisse and the Ad Hoc Group that, given the undisputed insolvency of GBG and many other members of the GBG Group, DIP financing is required.

10 The contest is therefore about who should provide the DIP financing. Both Credit Suisse and the Ad Hoc Group have presented proposals that no doubt best serve their own interests in the circumstances. The proposals represent strategic choices made by each, again to serve their respective interests. Their strategies have the potential of affecting the course of this restructuring. Each proposal has its own particular strengths and weaknesses. In addition to the financial terms of each proposal, factors such as timing, prejudice, risk and uncertainty play a central role in assessing each proposal. There is also an overarching argument advanced by the Ad Hoc Group that the Credit Suisse DIP financing proposal is invalid in any event as it results in a criminal rate of interest being paid.

11 This Court approved the DIP facility of Credit Suisse on an *ex parte* basis. The debenture holders were not served with notice of the application for the Initial Order, although counsel for the Ad Hoc Group appeared on the application and made certain submissions. In these circumstances, having now received evidence from the Ad Hoc Group, further evidence from GBG, and after hearing submissions from all counsel and the Monitor, I approach this application on a *de novo* basis such that the proposed DIP facility from Credit Suisse is to be looked at afresh and in the context of the now competing DIP financing proposal by the Ad Hoc Group.

12 The applicable statutory authority with respect to DIP financing was recently addressed in *Crystallex International Corp., Re*, 2012 ONCA 404 (Ont. C.A.), leave to appeal ref'd [2012] S.C.C.A. No. 254 (S.C.C.). In the first instance, the Court adopted certain comments of the Supreme Court of Canada in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) concerning s. 11 of the *CCAA* and the basis upon which the court will exercise its discretion in approving such financing:

> [63] The Supreme Court of Canada had occasion to interpret the CCAA for the first time in *Century Services*. It used that opportunity to make clear that the CCAA gives the courts broad discretionary powers. Those powers must, however, be exercised in furtherance of the CCAA's purposes: para. 59. Section 11, in particular, was drafted in broad language which provides that a supervising judge "may, subject to the restrictions set out in this Act ... make any order that it considers appropriate in the circumstances". For the majority in *Century Services*, Deschamps J. wrote:
>
> > [69] The *CCAA* also explicitly provides for certain orders...
> >
> > [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

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> successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

13 Interim or DIP financing is specifically authorized under s. 11.2 of the *CCAA*: Interim financing

> **11.2** (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> . . .
>
> **Factors to be considered**
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(*b*), if any.

14 While the factors in s. 11.2(4) of the *CCAA* are more usually addressed in the context of whether a particular DIP financing proposal will be approved, I consider that the above factors are equally applicable in deciding *who* shall be the DIP lender and on what terms the DIP financing is to be provided. The factors set out in this subsection do not represent the entirety of the factors that may be considered by a judge on this issue - the subsection specifically refers to "among other things". There may, of course, be further factors beyond those enumerated in s. 11.2(4), such as were raised on this application, which are relevant and will be considered by the court in the exercise of its discretion under this section.

15 I will comment at the outset that the competing DIP proposals here are complex and must be considered within the equally complex circumstances faced by the GBG Group. There are certain preliminary matters to be addressed in relation to both proposals, and the resolution of those issues affects the viability of those proposals. Even assuming that both proposals are viable, the court must determine which proposal is most appropriate and most importantly, which will best serve the interests of the stakeholders of the GBG Group as a whole by enhancing the prospects of a successful restructuring.

Circumstances of the GBG Group

16 As stated above, the principal assets of the GBG group include two gold mines: firstly, the Burnstone Property located in South Africa; secondly, the Hollister Property in Nevada, U.S.A.

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(i) The Burnstone Property

17 The Burnstone Property is located approximately 80 kilometers southeast of Johannesburg. Mining development work has been underway at Burnstone since 2007. The mine commenced production in January 2011. There is an estimated 6.4 million gold ounces in reserve and the mine has an estimated life of 25 years.

18 The mine properties and operations are owned by and operated through various South African subsidiaries, with the principal operating subsidiary being Southgold Exploration (Pty) Ltd. ("Southgold"). The GBG Group employs some 1,275 employees world-wide, approximately 1,032 of which are employed at the Burnstone mine or the South African offices.

19 Due to some unforeseen ramp-up challenges, the Burnstone mine failed to meet certain production amounts. This, in turn, led to working capital deficits. As a result, GBG announced that it was suspending operations at the Burnstone mine on September 11, 2012. It immediately commenced a care and maintenance program to preserve the value of the mine.

20 On September 14, 2012, Southgold filed for creditor protection under the applicable South African legislation. Peter van den Steen was appointed as a "business rescue practitioner" in those proceedings (a position which I assume would be akin to a chief restructuring officer in Canadian proceedings) on September 19, 2012.

21 The costs associated with the mine shut-down, the care and maintenance program and the restructuring proceedings in South Africa all required immediate funding. Some of those immediate costs included employee severance payments for the approximately 1,000 miners who were laid off upon the mine shut-down.

22 During the hearing on September 19, 2012, it was recognized that the most urgent matter was funding US$10 million into the South African operations for the purpose of addressing these immediate cash requirements. I am advised that Credit Suisse did advance this amount late last week and that it advanced such amount under the existing Credit Suisse loan facilities relating to the South African operations. The DIP financing proposal of Credit Suisse, which was approved by my earlier order, requires that this US$10 million emergency advance be repaid at the time of the initial advance under their DIP facility.

23 In support of GBG's position that DIP financing remains urgent at this time, Mr. van den Steen has provided a letter dated September 26, 2012 in which he indicates that Southgold is in urgent need of DIP financing in respect of its debt restructure efforts. Mr. van den Steen also states that due to such urgency, any delay in the flow of funds will put the viability of Southgold's restructuring efforts (and hence the Burnstone mine) at risk.

24 One of the questions addressed - but not answered - on this application is what is the present value of the Burnstone mine? Unfortunately, the estimated values of the mine are widely divergent and accordingly, are not particularly helpful. The book value of the mine is US$643 million on a going concern basis, although the Monitor understandably commented that this figure was "not necessarily reflective of near term realization values". In addition, GBG has received a number of estimates of value with respect to the mine, ranging from US$190 million to as much as US$1.76 billion.

25 In addition, the Board of Directors of GBG has concluded that the value of the Burnstone mine should be well in excess of the obligations owed to Credit Suisse in respect of the Burnstone in any reasonable realization process of customary length.

(ii) The Hollister Property

26 The Hollister property is a trial mine located in Nevada. Feasibility work was completed in mid-2007. The Hollister mine has a reserve of approximately 500,000 ounces of gold. Since that time, GBG has focused on obtaining permits, preparing for commercial production and conducting additional underground and surface drilling. I understand that Hollister, while not fully operational, is producing some gold.

27 Like Burnstone, Hollister has had its share of operational difficulties that have negatively affected its financial performance. For example, whereas management expected surplus cash from operations, Hollister only maintained a break even cash flow

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for the first six months of 2012. As a result, the Hollister operations have required additional funding from time to time. At this time, Hollister requires ongoing financing in respect of its operations.

28 The Hollister mining assets and operations are owned by various U.S. subsidiaries. The U.S. holding company is Great Basin Gold Inc. ("GBG Inc."), a wholly owned subsidiary of GBG. The mining operations are conducted through various wholly owned U.S. subsidiaries of GBG Inc., being Rodeo Creek Gold Inc. ("Rodeo") and Antler Peak Gold Inc. ("Antler").

29 There are 250 employees at the Hollister Property.

(iii) Liabilities

(A) Credit Suisse

30 Credit Suisse is owed a US$150 million term debt arising from direct advances to the South African subsidiaries, including Southgold, in relation to the Burnstone Property. I am also advised that there is a hedging facility owed to Credit Suisse of approximately US$14 million. GBG, as the parent company, has given an unsecured guarantee of these obligations. It was disclosed at the earlier application that some South African approvals that are required in respect of the security against the South African assets in favour of Credit Suisse had not yet been obtained. The evidence indicated that that process was underway at the time of the hearing last week and that it is anticipated to be finalized in fairly short order. In any event, there was no serious contention on this or the earlier application to the effect that Credit Suisse was not validly secured against the South African mining assets.

31 Credit Suisse has also advanced monies in respect of the Hollister Property, being a term debt of approximately US$43 million and a hedging facility of approximately US$10 million. In addition to direct security over the underlying U.S. assets, Credit Suisse holds guarantees from both GBG and GBG Inc. in respect of amounts owing.

32 It is of some importance on this application that there is no cross-collateralization between the Burnstone and the Hollister loan facilities in favour of Credit Suisse, except that both facilities represent an unsecured obligation owing by GBG.

(B) The Ad Hoc Group

33 GBG issued unsecured convertible debentures on November 19, 2009 in the principal amount of US$126 million. The debentures bear an interest rate of 8% per annum through to maturity on November 30, 2014. The Ad Hoc Group represents a certain portion (65%) of the debenture holders who are owed approximately US$82 million of the total face amount of the debentures.

34 The trust indenture does not include any negative pledge or restriction on GBG granting any new security. Nor does it appear to prevent the U.S. subsidiaries from granting guarantees or security with respect to their assets.

35 In addition, the debenture holders hold guarantees from several of the South African subsidiaries, including Southgold.

(iv) Events Leading to the Filings

36 The urgency or need of GBG to obtain DIP financing was addressed by this court on the earlier application last week. Urgency remains a factor on this application, although the major stakeholders disagree as to just how urgent those financing needs are at present.

37 That being so, it is important to understand the circumstances leading up to the insolvency filings.

38 Given the operational difficulties arising with respect to both mines, GBG was faced with a working capital deficit of approximately US$23 million as of June 30, 2012. Earlier, in May 2012, GBG had received an unsolicited offer to enter into merger negotiations with another publicly-traded gold company. The Board of Directors immediately formed a special committee to consider strategic alternatives, including a sale of GBG's assets, a merger with a third-party and a reorganization

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or restructuring of GBG. GBG engaged CIBC World Markets at that time and steps were taken to develop a "data room" and solicit interested parties. Unfortunately, these events did not move quickly enough and the increasing liquidity problems faced by GBG required it to take action. I am advised that GBG's solicitation efforts continue at the present time.

39 The action taken included the insolvency filing in South Africa on September 14, 2012, to which I have already referred.

40 The view of the Board of Directors is that this is a "cash flow insolvency" as opposed to a "balance sheet insolvency". The GBG Group has consolidated assets on a net book value of approximately US$888 million as against consolidated liabilities of approximately US$403 million. The Board believes that the underlying value of GBG's assets is likely well in excess of GBG's outstanding liabilities. Accordingly, the insolvency filings have been made principally to ensure that the subsidiaries have sufficient working capital for their ongoing business operations while GBG attempts to restructure its business operations. It is well acknowledged that those attempts will include a sale of some or all of the GBG Group's assets.

41 In conjunction with this strategy, the Board of Directors realized quite quickly that interim financing would be necessary. Inevitability, they were also faced with the question as to who could provide the necessary DIP financing on a fairly urgent basis. Not surprising, the Board, while making efforts to find the necessary financing, appears to have gravitated to its existing secured lender, Credit Suisse, to provide that financing.

42 The Board's degree of due diligence and its negotiation efforts with respect to obtaining a DIP financing proposal have been a matter of some dispute on this application. Mr. van Vuuren, the Chief Executive Officer and director of GBG, stated on September 19:

> Discussions have also taken place regarding debt financing for the Company including debtor-in-possession loan facilities secured against the Nevada operations and the Burnstone operations. Difficulties arose with considering proposals from interested parties, relative to, among other things, implementation structure, due diligence requirements, transaction risk and timing issues. The Board of Directors after consultation with legal counsel concluded that the only financing proposal received that was truly viable was the proposal received from the Existing Lenders.

43 I will return later in these reasons to the due diligence of the Board of Directors in relation to the DIP financing and, in particular, the Credit Suisse DIP loan proposal.

44 In any event, it was the conclusion of the Board that the Credit Suisse DIP loan proposal was the only real option available to GBG and its subsidiary companies in the circumstances.

(v) The Credit Suisse DIP Proposal

45 The Initial Order provides for the approval of the Credit Suisse DIP facility pursuant to a term sheet dated September 19, 2012.

46 The initial Credit Suisse DIP proposal contemplated a maximum advance of the principal amount of US$35 million, with an initial term of six months that may, at the discretion of the lenders, be extended up to three times by one-month extension periods, subject to payment of a 1% extension fee. Up to US$25 million was to be allocated in respect of the Southgold or Burnstone operations with, as earlier stated, US$10 million to be repaid in respect of the emergency loan already advanced last week. Up to US$10 million was to be advanced to Rodeo and Antler in respect of the Hollister operations.

47 The Credit Suisse DIP loan proposal incorporates a number of other fees and interest, including:

(a) interest at a rate of LIBOR + 10% per annum;

(b) an upfront fee equal to 2% of the Principal;

(c) a commitment fee equal to 4% of the Principal, payable monthly in arrears over six months on the unadvanced portion;

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(d) a requirement that Southgold (who is intended to be a guarantor under the DIP loan) enter into an "Advisory Agreement" with Credit Suisse, under which the Initial DIP Lenders will earn a 15% fee (the "Advisory Fee") on the sale of the Burnstone mine in South Africa, net of (i) the repayment of the Credit Suisse loan relating to the Burnstone Property, current outstanding in the amount of US$150 million, and (ii) certain other expenses; and

(e) a requirement that GBG Inc. (who is also intended to be guarantor under the DIP loan) provide a guarantee with respect to GBG's obligations under the Credit Suisse loan in relation to the Burnstone Property, together with super priority over all of GBG Inc.'s assets as security for the GBG Inc. Guarantee (I will collectively refer to this as the "GBG Inc. Guarantee").

48 The last two requirements of this proposal results in an "either or" proposition. The GBG Inc. Guarantee is called upon only in the event there is a shortfall in respect of Credit Suisse's recovery of its existing Burnstone facility, and in such an event, no Advisory Fee is paid. Conversely, if the Advisory Fee is payable, which presupposes that Credit Suisse recovers all amounts owing under the Burnstone facility, no claim on the GBG Inc. Guarantee would be made.

The Applications

49 The Ad Hoc Group now applies for various relief, as follows:

(1) An order adding GBG Inc., Antler and Rodeo as Petitioners to these proceedings;

(2) Setting aside those portions of the Initial Order which relate to approval of a loan offered by Credit Suisse pursuant to the term sheet dated September 19, 2012;

(3) Declaring that the terms of the Credit Suisse term sheet amount to an agreement to receive interest at a criminal rate, and will result in Credit Suisse receiving a payment of interest at a criminal rate, both of which constitute offences under s. 347 of the *Criminal Code of Canada*;

(4) Approving an alternative loan offered by certain members of the Ad Hoc Group pursuant to a term sheet dated September 25, 2012; and

(5) Increasing the Administration Charge by $400,000 to $3 million.

50 Needless to say, Credit Suisse takes the position that the approval of its DIP financing proposal should be maintained by the court. I am advised that GBG and Credit Suisse are continuing to work to finalize the necessary documentation, and that it is anticipated that signing will take place tomorrow and funding will commence immediately.

The Competing DIP Loan Proposals

51 I will address the question of urgency again because this is an issue that was a central theme on this application.

52 The cash flow filed last week anticipated advances under the DIP facility by September 21 of US$9.2 million (mostly for employee claims relating to Burnstone). As previously stated, those amounts were advanced on an emergency basis by Credit Suisse under the existing Burnstone facility and were to be immediately repaid by advances under the DIP facility. In addition, the Monitor advised on September 26 that GBG advanced further cash of US$1.8 million to Hollister from existing cash resources and that other amounts, what have been called "time sensitive disbursements", totaling $1 million have been paid at Burnstone and one of the other South African subsidiaries.

53 The cash flow also anticipates further advances this week by the DIP lender of US$13.1 million. Further advances were anticipated during the weeks ending October 12 (US$1.5 million), October 26 (US$2 million) and November 9 (US$4.5 million - which includes US$1 million to Burnstone) by which the total DIP facility was to be increased to US$31.1 million by mid-December 2012.

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54 The Monitor reports that GBG has various significant and time-sensitive obligations totalling US$14.3 million which it plans to fund this week. These include:

> a) amounts to be paid by Hollister in respect of past-due suppliers, past net proceeds taxes, and overdue royalties, totalling US$8.7 million;
>
> b) payroll and benefits for the GBG Group of US$1.7 million. This initially included approximately US$500,000 in respect of senior management at Burnstone, but I am now advised that this amount was paid from other funds. Part of the remaining US$1.2 million relates to payments due at Hollister tomorrow for payroll. I am also advised that if these obligations are not funded, it could cause retention issues with respect to key employees;
>
> c) professional fees of US$2.2 million; and
>
> d) interest on the term loan in respect of the Credit Suisse Burnstone facility of US$1.7 million.

55 As between South Africa and Nevada, it was anticipated that further advances would be made this week as follows: US $3.1 million (less the US$500,000 now paid) to South Africa; and US$10 million to Nevada. After this advance to Hollister, it is expected that Hollister can fund its operations from its own resources.

56 Counsel for the Ad Hoc Group contends that, while the above payments are ones that should be funded within this restructuring, they are not "urgent" to the extent that the Credit Suisse DIP facility should be reconfirmed on this application with a view to providing funding for these obligations this week. This is a critical aspect of the Ad Hoc Group's argument in that there would appear to be some prospect of a delay in funding under the Ad Hoc Group DIP loan proposal (which will be discussed in more detail below).

57 Counsel for the Ad Hoc Group contends that the Burnstone situation has "stabilized". With respect, this contention is not supported by the evidence from GBG or the views of the Monitor. To some extent, this urgent need for funding has been alleviated by the payment of funds for key management personnel at the Burnstone mine, however, Mr. van den Steen remains concerned that a failure to fund these amounts will result in a loss of managers who are vital in respect of the ongoing care and maintenance of the mine and the progress of the restructuring efforts in South Africa. In addition, the emergency advance of US$10 million by Credit Suisse is due today although it is not particularly evident what arises from any default in payment given that I presume a stay of proceedings is in place in South Africa. A stay of proceedings in Canada is, of course, now in place by reason of the Initial Order.

58 The Monitor also advises that further funding for Burnstone for electrical bills and suppliers will be required next week in the amount of US$1.3 million.

59 In addition, the evidence indicates that the Hollister situation also remains volatile. It is apparent that the amounts owing to the Hollister suppliers have been outstanding for some time. Senior management of GBG have advised the Monitor that payment of these amounts is necessary because "it is becoming increasingly difficult to manage the Hollister supplier base in the absence of definitive interim financing arrangements and clarity as to when these obligations will be paid". No doubt many U.S. creditors are aware of the Canadian and South African filings and are concerned about the prospects of being paid. In fact, I am advised that U.S. suppliers to the Hollister Property are already taking steps to tighten credit arrangements - threatening to stop supply or demanding COD terms - which are further straining the finances of the Hollister operations. Mr. van Vuuren states in his affidavit sworn September 27 that payment of these amounts is "critical" and in his view, if these payments are not made within the next few days, "action will be taken by creditors that could lead to a shut-down of the Hollister mine".

60 GBG expresses this concern given that the U.S. entities have not sought creditor protection and there is, therefore, no stay in the event that precipitous action is taken against the U.S. assets by any of the U.S. creditors. This is answered to some extent by the Ad Hoc Group who suggests that the U.S. subsidiaries should file for protection in the U.S. This solution, however,

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presents its own complications which I will address below. There is also the further complication that even an insolvency filing may not solve the need to pay "critical" suppliers to maintain operations.

61 Failure to stabilize both mining operations will no doubt give rise to disastrous consequences. Labour unrest remains an issue in South Africa, and there is concern about the loss of mining rights in South Africa if matters are not settled in an orderly fashion. Similar concerns arise with respect to Hollister. GBG estimates that the cost of an orderly shut-down of the Hollister mine would be US$15 million, funds which are not available. Needless to say, a failure to maintain either mine would raise regulatory issues relating to environmental concerns.

62 The Monitor has confirmed that in its view, these necessary funds are urgently required.

63 I therefore accept GBG's submissions that there is substantial urgency in addressing the DIP proposals this week towards obtaining financing that will stabilize matters both in South Africa and Nevada.

64 Before I deal with the specifics of the competing proposals, recent events concerning these proposals are of some relevance.

65 In the face of the original Credit Suisse DIP loan proposal, the Ad Hoc Group prepared its own competing proposal which it now seeks to have approved. Despite some negotiations between the parties, they have been unable to solve the impasse between them. Hence this application.

66 During the course of submissions made during this hearing, both Credit Suisse and the Ad Hoc Group have adopted what can be called a "carrot" and "stick" approach. The "carrot" approach arose when both proposals were amended "on the fly" to provide for somewhat better terms than did the original proposals in an attempt to improve the odds of having their proposals accepted. In addition, the "stick" approach took the form of Credit Suisse threatening to move on its security and the Ad Hoc Group threatening to commence litigation against the U.S. subsidiaries to obtain injunctive relief preventing the completion of some aspects of the Credit Suisse DIP proposal. The dynamic nature of this hearing has been challenging in terms of the stakeholders, the Monitor and the Court assessing the competing proposals and is indicative of the nature of these types of proceedings, which has been often described as "real-time litigation".

67 The competing proposals have some similar features - the Credit Suisse proposal is in the amount of US$35 million while the Ad Hoc Group proposal calls for US$40 million to be advanced. Both require guarantees from all the subsidiaries. Both provide for the repayment of the US$10 million emergency advance provided last week by Credit Suisse. Both have six month terms, with possible extensions at the discretion of the lender.

68 I will now address some of the particular terms of the competing offers which highlight the differences as between the two proposals. They are discussed below in ascending order of importance.

(i) Pricing

69 I have already referred to the pricing of the Credit Suisse DIP facilities earlier in these reasons. The pricing under the Ad Hoc Group's DIP proposal is slightly less expensive than that of Credit Suisse's proposal (leaving aside their exclusion of any Advisory Fee). The Ad Hoc Group's pricing includes: interest at LIBOR + 8.5%, an upfront 1% fee payable at close and a 1.25% commitment fee payable at close. The Monitor has indicated that excluding the Advisory Fee, the pricing as between these proposals is not materially different up to December 14, 2012. To the extent that the financing remains in place to June 30, 2013 (the deadline for the Ad Hoc Group), the pricing is approximately US$620,000 less under the Ad Hoc Group proposal (although I would note that the Credit Suisse proposal does not anticipate that the proceedings will extend past March 2013).

70 Accordingly, I acknowledge that the Ad Hoc Group financing becomes less expensive the further that the DIP financing remains in place into 2013.

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(ii) Ability to Fund

71 GBG has requested information from the Ad Hoc Group concerning the identity of the members who would be providing the financing and has sought information that the funds are committed and available. It is my understanding that no such assurance has been given. This point was not, however, pressed in argument, and I place no weight on it. Counsel for the Ad Hoc Group submitted that they are ready to fund and have now offered an emergency advance of US$5 million pending the commencement of certain U.S. proceedings.

72 Initially, the Ad Hoc Group indicated that it was the condition of their DIP proposal that necessary government approvals be obtained particularly as they relate to the security proposed with respect to the South African assets. Apparently, it is quite an involved process and the concern was that this approval process could result in a substantial delay. In any event, during argument, counsel for the Ad Hoc Group indicated that they are prepared to waive such approvals in respect of the security they propose to take as against the Burnstone Property. The Ad Hoc Group is therefore prepared to close immediately after certain Chapter 15 proceedings have been finalized, which is discussed below.

(iii) Milestones

73 Another less distinct difference between the two proposals relates to the milestones, or as more accurately described, the required timing of restructuring efforts by the GBG Group.

74 Under the Ad Hoc Group's proposal, there is a deadline of June 30, 2013 for both a plan of arrangement for refinancing, restructuring or repayment of the debt relating to Hollister and a sale of the Burnstone assets.

75 Under the Credit Suisse proposal, the original deadlines required refinancing of Hollister and a definitive sale agreement relating to Burnstone by December 15, 2012 and closings of any sales by March 2013. During argument, the deadlines were recently extended with respect to Burnstone such that now there is a requirement that only a letter of intent or expression of interest be obtained with respect to Burnstone by December 15, 2012 with a binding offer by January 15, 2013 and closing by March 31, 2013. The Credit Suisse deadlines with respect to Hollister remain the same.

(iv) The Advisory Fee

76 I have already referred to the Advisory Fee that remains a part of the Credit Suisse proposal. As another part of their "carrot" approach, Credit Suisse has now agreed to reduce the Advisory Fee from 15% to 10% of the calculated amount arising from a successful sale of the Burnstone Property. In addition, the Advisory Fee is to be capped at US$15 million.

77 In contrast, there is no such fee required in the Ad Hoc Group DIP facility.

78 As submitted by counsel for Credit Suisse, it is not uncommon for the pricing under DIP financing proposals to be tied to a measure of success achieved in a restructuring: see for example, *Crystallex International Corp., Re*, para. 28. While in a different form than regular interest and fees (such as, for example, commitment fees), the entirety of the proposal, including any such "success" fees, must be considered in terms of whether the price of the financing is the best that can be obtained in the circumstances.

79 Nevertheless, this Advisory Fee, whether viewed as an element of the pricing of this financing or not, does represent potential prejudice to the debenture holders in that payment of this fee will rank in priority to any claim of unsecured creditors of Southgold. The debenture holders hold a guarantee of Southgold and are therefore unsecured creditors of Southgold who will bear this cost, along with any other unsecured creditors of that entity.

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(v) The GBG Inc. Guarantee

80 I have already referred to the requirement in the Credit Suisse DIP loan facility that the GBG Inc. Guarantee be provided with respect of the obligations of GBG in relation to the existing Credit Suisse term loan secured against the Burnstone Property (approximately US$150 million).

81 The Ad Hoc Group's proposal does not include any such guarantee or security.

82 Again, the GBG Inc. Guarantee would be called upon only if Credit Suisse suffers a shortfall in respect of its recovery under its existing Burnstone facility and in that event, no Advisory Fee would be paid. And once more, if the Advisory Fee is payable, no claim on the GBG Inc. Guarantee would be made.

83 This negative aspect of the Credit Suisse proposal was addressed by me on the earlier application on September 19, 2012. At that time, I observed that it was potentially prejudicial to the debenture holders in the sense that if the Burnstone Property realized less than the amounts necessary to repay the Credit Suisse term loan, then that obligation would be transferred to GBG Inc. Accordingly, where there is any shortfall to Credit Suisse in relation to Burnstone (which would otherwise have been an unsecured claim against GBG to be shared with the debenture holders), it would now be a direct obligation to be satisfied at the GBG Inc. level before any excess value from the Hollister Property would flow up to the Canadian parent (either by dividend or repayment of intercompany loans). It should be noted that the GBG Inc. Guarantee would be subordinate to repayment of the Credit Suisse Hollister term loan and unsecured creditors of Rodeo and Antler.

84 I say "potentially" because it is not evident at this time that the GBG Inc. Guarantee will ever be called upon. In addition, during submissions, counsel for GBG advised that Credit Suisse was prepared to amend its proposal such that the GBG Inc. Guarantee would only be called on at the earlier of a sale of the Burnstone Property (no later than March 31, 2013) or maturity of the DIP loan (six months after the initial advance). In addition, if the Hollister Property is sold before the Burnstone Property, Credit Suisse has agreed to hold the proceeds in escrow pending a determination as to whether the GBG Inc. Guarantee will be called upon. I should also add that there is no evidence regarding the potential value of Hollister and therefore, whether there is any realistic possibility that funds will flow up to GBG Inc. from Antler and Rodeo as a result of a sale.

85 Mr. van Vuuren indicates that the Board of Directors carefully considered the effect of granting the GBG Inc. Guarantee as it related to the best interests of GBG, the U.S. subsidiaries and the stakeholders of the GBG Group as a whole. In the face of Credit Suisse's position that it was unwilling to advance the DIP loan without the GBG Inc. Guarantee, he states that the directors "had no choice but to consider the GBG Inc. Guarantee". He stated:

> 93. After extensive consideration the Board of Great Basin Gold and each of its NV Subsidiaries concluded that the giving of the Burnstone X-Guarantee of the Existing Burnstone Facility was in the best interests of Great Basin Gold and of US Holdco and the Petitioner's stakeholders taken as a whole on a consolidated basis. In exercising its business judgment, the Board concluded that the DIP Loan will enhance the likelihood of survival of each of the corporations in the GBG Group and enhance the likelihood of acceptable asset realization values for the consolidated group given the much longer period available to market, and in the case of Hollister operate, the two principal assets. Accordingly, the Board passed a resolution approving the DIP Term Sheet with the GBGI Guarantee and initiating a CCAA filing to restructure its business.

86 Pursuant to s. 11.2(1) of the *CCAA*, any DIP financing charge approved by the court must not provide for security on the "company's property" with respect to amounts owing that exist before the order is made. Given that GBG Inc. is not a "company" or "debtor company" within these proceedings, this provision is not violated by the granting by GBG Inc. of the GBG Inc. Guarantee. The Ad Hoc Group did not contend otherwise, but suggested that the granting of the GBG Inc. Guarantee indirectly achieved what could not be achieved directly. In that regard, the Ad Hoc Group argues that GBG, along with Credit Suisse, have simply made a tactical decision to not include GBG Inc. in these proceedings or commence proceedings in the U.S., both of which would have resulted in a prohibition against the giving of the GBG Inc. Guarantee.

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87 I do acknowledge that the giving of the GBG Inc. Guarantee does represent a potential transfer of value to the prejudice of the debenture holders (and any other unsecured creditors of GBG). As such, this is a factor to be considered pursuant to s. 11.2(4) of the *CCAA* and in particular, subparagraph (f) relating to "whether any creditor would be materially prejudiced as a result of the security or charge".

88 Again, it is of some significance that certain government approvals for the security held by Credit Suisse with respect to the existing Burnstone facilities are not yet in hand although there was no serious suggestion on this application that Credit Suisse had invalid security with respect to the South African assets such that they need to shore up their position through the GBG Inc. Guarantee. However, given the wide ranging potential values relating to the Burnstone Property (some of which are only slightly higher than the amounts outstanding to Credit Suisse under its term loan), it remains a possibility that the GBG Inc. Guarantee will be called.

89 To a large extent, the Ad Hoc Group seeks to invoke the mandatory prohibition in s. 11.2(1) of the *CCAA* by its application to add GBG Inc. as a petitioner to this proceeding, a matter that I will now address.

(vi) The Chapter 15 Strategy

90 The proposal of the Ad Hoc Group requires that GBG Inc., Antler and Rodeo be added as petitioners to this proceeding. Following such relief, the Ad Hoc Group's proposal requires:

> (i) an order of this Court approving its DIP facility and specifically priming the security of Credit Suisse as against the Hollister Property (although junior to the Credit Suisse security on the Burnstone Property); and
>
> (ii) an order of the U.S. Bankruptcy Court pursuant to the *U.S. Bankruptcy Code*, Chapter 15, recognizing the Canadian order, particularly as it relates to priming Credit Suisse on the Hollister Property.

91 This strategy presents substantial challenges in terms of providing the urgent DIP financing needed in these circumstances. For various reasons, GBG and the Monitor do not consider that it represents a workable solution and in particular, that the timing of such a strategy is workable.

92 Credit Suisse objects to any such priming of its security against the Hollister Property (although it is, of course, prepared to prime itself under its own DIP proposal).

93 Before addressing the practicalities of such a strategy, I must consider whether there is any basis upon which GBG Inc., Antler and Rodeo can or should be added as petitioners to this proceeding. If not, then the Ad Hoc Group has indicated that it cannot or will not proceed with its proposal and the remainder of the issues relating to its proposal would be moot.

94 Supreme Court Civil Rule 6-2(7) provides for the addition of parties and in particular, petitioners:

> **Adding, removing or substituting parties by order**
>
> (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
>
> . . .
>
> (b) order that a person be added or substituted as a party if
>
> (i) that person ought to have been joined as a party, or
>
> (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and

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> (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
>
> (i) any relief claimed in the proceeding, or
>
> (ii) the subject matter of the proceeding
>
> that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

95 Supreme Court Civil Rule 6-2(10), however, provides that "a person must not be added or substituted as a plaintiff or petitioner without the person's consent".

96 Mr. Reardon, who acts for GBG Inc., Antler and Rodeo, indicates that his clients have no interest in joining these proceedings as a petitioner.

97 The Ad Hoc Group then contends that these U.S. subsidiaries should be added as respondents to this proceeding. I agree that Rule 6-2 would allow that relief. Sections 4 and 5 of the *CCAA* expressly provide that a compromise or arrangement may be proposed by not only the "debtor company", but by any creditor. While rare, *CCAA* proceedings commenced by creditors of an insolvent company are not unheard of: see *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 42 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List]). In this Court, a recent example includes the initial order granted in respect of Bear Mountain Master Partnership on March 25, 2010 in proceedings commenced by HSBC Bank Canada as petitioner (#S102120 - Vancouver Registry). In both cases, the "debtor company" was named as a respondent to the proceeding.

98 Accepting that Rule 6-2 would allow this court to add GBG Inc., Antler and Rodeo as respondents to this proceeding, I must consider whether the *CCAA* would provide the necessary jurisdiction to do so.

99 Section 3(1) of the *CCAA* provides that the *Act* applies in respect of a "debtor company". "Debtor company" is defined in s. 2 and means in part any "company" that is insolvent. "Company" is also a defined term found in s. 2:

> "company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated ....
>
> [Emphasis added]

100 It is not in dispute on this application that GBG Inc., Antler and Rodeo do not do business in Canada. The question then becomes whether they have assets in Canada.

101 The GBG Group operates a cash management system. Under this system, receipts from gold sales are eventually deposited in various bank accounts and these funds ultimately arrive in Canada. In relation to the Hollister gold sales, the process is as follows: sale proceeds are deposited into an account in Rodeo's name in Switzerland; those proceeds are then transferred to GBG's investment account held with CIBC here in Vancouver; GBG, in turn, transfers monies to Rodeo's accounts in the U.S. to fund the Hollister operations. The proceeds from these gold sales are, upon receipt, immediately credited as against the substantial intercompany loans owing by the U.S. subsidiaries. As of August 31, 2012, the U.S. subsidiaries owed GBG in excess of US$187 million.

102 The uncontroverted evidence of Mr. van Vuuren is that GBG Inc., Antler and Rodeo have no assets in Canada, including credit balances in any bank accounts. All bank accounts of Rodeo are located in the U.S.

103 The Ad Hoc Group contends that GBG Inc., Antler and Rodeo still have some interest in "funds" in Canada. However, upon receipt of these funds into GBG's accounts in Canada, black letter law would dictate that any credit balance represents a debt owing by the bank to GBG. Further, there is no evidence to suggest that GBG Inc., Antler and Rodeo have any beneficial

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interest in any Canadian bank accounts in the name of another member of the Group and in my view, the immediate repayment of the intercompany loans owing to GBG by them would suggest otherwise.

104 In the face of this evidence, I conclude that GBG Inc., Antler and Rodeo have no assets in Canada and are therefore, not "debtor companies" as defined in the *CCAA*. Accordingly, there is no jurisdictional basis to add those companies to this *CCAA* proceeding.

105 That conclusion drives the result that the critical pre-condition of the Ad Hoc Group's proposal cannot be satisfied. Nevertheless, I will comment on the viability of the Ad Hoc Group's proposal leaving aside this issue.

106 It is the intention of the Ad Hoc Group, if its DIP loan proposal is approved by this Court, to seek first ranking priority of a charge with respect to the assets of not only GBG but the Hollister Property, which would prime the presently first-ranking security of Credit Suisse on the Hollister Property. The Ad Hoc Group also seeks security over the Burnstone Property in South Africa, but subordinate to the security of Credit Suisse.

107 Assuming that such an order was granted, it is the Ad Hoc Group's intention to seek a recognition order pursuant to Chapter 15 of the *U.S. Bankruptcy Code* to recognize all aspects of that order, including the priming of the DIP charge or security with respect to Credit Suisse as against the Hollister Property.

108 Credit Suisse has indicated that it would vigorously oppose any such attempt to prime its existing security over the Hollister Property. This position is not surprising given that existing lenders are typically very hesitant to allow other parties to take a priority position, particularly in a restructuring.

109 This strategy of the Ad Hoc Group presents some issues in respect of the appropriateness of its DIP proposal as there are very divergent views concerning any possible U.S. insolvency proceedings.

110 GBG has raised issues concerning the appropriateness of seeking such relief in the U.S. and also, issues relating to what type of proceeding would take place. Even assuming that this Court added the U.S. parties and approved the Ad Hoc Group DIP financing, issues such as a determination of what the "centre of main interest" ("COMI") is in respect of these U.S. entities may be significant in terms of what relief, if any, could be obtained from a U.S. court. Based on submissions made, it appears that the COMI of the U.S. subsidiaries could be either the U.S. or South Africa. Issues arise particularly concerning what protections could be obtained in such proceeding to fend off actions by creditors. Counsel for the Ad Hoc Group contends that even if problems arise in obtaining Chapter 15 relief, proceedings may be available under Chapter 11 of the *U.S. Bankruptcy Code* - which is well known to be a much more involved and costly procedure as opposed to that under Chapter 15.

111 To this point in time, GBG has not seen fit to seek protection from the U.S. courts and its counsel advises that a considered decision was made in that regard. The Ad Hoc Group criticizes this decision and alleges that this is a tactic of GBG and Credit Suisse to avoid the provisions of s. 11.2 of the *CCAA*. It appears equally arguable that the Chapter 15 strategy is also a tactic to allow the Ad Hoc Group to gain further leverage in respect of the Hollister Property to the detriment of Credit Suisse.

112 In any event, I am unable to say that there exist no sound reasons for the GBG Group having avoided initiating such proceedings in the U.S. Based on Credit Suisse's DIP financing proposal that I have already approved, there is funding available to maintain the U.S. operations pending a sale or restructuring of those assets. In those circumstances, and as stated by GBG's counsel, it is not presently necessary to incur the trouble, expense and risks associated with such proceedings.

113 It also became apparent during submissions that the battle between Credit Suisse and the Ad Hoc Group would have inevitably been joined south of the border. Counsel for the Ad Hoc Group indicated that they were in the process of filing an action in the U.S. for the appointment of a receiver over the U.S. subsidiaries and the Hollister Property, and that they were specifically seeking an injunction to prevent GBG Inc. from granting the GBG Inc. Guarantee. Service was imminent on the affected parties, including GBG and Credit Suisse. This was no doubt part of the "stick" approach of the Ad Hoc Group in approaching the question as to which DIP proposal should be accepted, in that they now argue that litigation in the U.S. arises under both proposals.

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114 Suffice it to say that the Ad Hoc Group's approach in relation to the U.S. subsidiaries involves litigation and is therefore, fraught with uncertainty and risk. I recognize that approval of the Credit Suisse DIP facility also now involves litigation in the U.S., and time will only tell whether Credit Suisse will be successful in opposing any such actions taken by the Ad Hoc Group in the U.S. and whether it will continue to fund in the face of those actions.

115 It is the risk, uncertainty and timing issues associated particularly with the strategy of the Ad Hoc Group in relation to the Chapter 15 proceedings that has resulted in GBG rejecting such a proposal. The issues arising from this strategy will no doubt take some time to sort out and in the meantime, Rome burns.

116 I have already mentioned that the Ad Hoc Group has proposed a stop gap measure during what it estimates will be a "two week period" while the battle moves to the U.S. Counsel for the Ad Hoc Group suggests that they could provide interim funding of US$5 million. One member of the Ad Hoc Group has provided a letter dated September 27 confirming that it is prepared to fund this amount at the same interest rate as earlier proposed and with a substantially higher commitment fee. Funding would be subject to, *inter alia*, obtaining an order approving the advance and directing second ranking security in its favour on the Hollister Property.

117 GBG, however, submits that this offer of US$5 million is not sufficient to cover the expenses of the Group during that timeframe, even assuming a two week timeframe.

118 The Monitor concurs that the cash flows are reasonable and also concurs in the position that the amounts to be paid under the DIP facility are "urgent". The Monitor also states that the risk and uncertainty surrounding the proposal of the Ad Hoc Group in the face of these urgent financing needs does not trump the more onerous provisions of the Credit Suisse proposal, including the Advisory Fee and the GBG Inc. Guarantee.

Is the Credit Suisse DIP Loan at a Criminal Interest Rate?

119 Even if its own proposal cannot or will not be approved by the court, the Ad Hoc Group challenges the Credit Suisse DIP financing in one important respect. It takes the position that the DIP financing represents an agreement that will result in Credit Suisse obtaining an illegal criminal rate of interest in respect of its DIP loan facility. If that position is upheld, that would be a circumstance that would require the court to set aside the previous order approving the Credit Suisse DIP loan facility, whether or not the proposal of the Ad Hoc Group is approved.

120 The Ad Hoc Group submits that the Credit Suisse DIP loan facility, as approved, and even as amended over the course of submissions, constitutes an offence or is likely to result in the commission of an offence, contrary to s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46 (the "*Code*"). It is an offence under this provision to enter into an agreement for, or to receive, interest at a rate exceeding 60%.

121 Accordingly, the Ad Hoc Group seeks a declaration that the terms of the Credit Suisse DIP loan facility amount to an agreement to receive interest at a criminal rate, and will result in Credit Suisse receiving a payment of interest at a criminal rate, both again constituting offences under the *Code*. The Ad Hoc Group also seeks to have the portions of the Initial Order approving the DIP loan set aside on that basis.

122 During argument, the Ad Hoc Group submitted in the alternative that the court should grant a declaration that the amount paid out pursuant to the Credit Suisse DIP facility, under either the GBG Inc. Guarantee or the Advisory Fee, are subject to an overriding proviso that the total amount payable is capped at US$6,204,478.98. The Ad Hoc Group says that, based on all of the currently available actuarial evidence, this is the maximum amount that could be paid to Credit Suisse pursuant to its DIP facility before the payments constitute criminal interest.

(i) The Actuarial Calculations

123 For the purposes of this discussion, I will again summarize the relevant terms of the Credit Suisse DIP facility, both as originally proposed and as recently amended.

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124 The DIP facility contemplates a maximum advance of US$35 million (the "Principal"), with an initial term of six months that may, at the discretion of Credit Suisse, be extended up to three times by one-month extension periods, subject to payment of a 1% extension fee. Fees and interest include: (a) interest at a rate of LIBOR + 10% per annum; (b) an upfront fee equal to 2% of the Principal; (c) a commitment fee equal to 4% of the Principal, payable monthly in arrears over six months; (d) the Advisory Fee, originally 15% but now 10% calculated based on the sale proceeds of the Burnstone mine in South Africa; and (e) the GBG Inc. Guarantee. Again, an amount may be paid in respect of the Advisory Fee or the GBG Inc. Guarantee, but not both.

125 The Ad Hoc Group submits that payments made pursuant to the above terms would amount to an effective annual interest rate above 60% per annum.

126 The ultimate amount payable to Credit Suisse under the DIP facility, as it relates to the Advisory Fee and the GBG Inc. Guarantee, is largely predicated on the net realizable value on the sale of the Burnstone Property. I have already commented on the fact that there is no certainty as to what value might be obtained for the Burnstone Property and that estimates of value vary greatly from as low as US$190 million to as high as US$1.76 billion.

127 Despite the difficulties in valuing the Burnside Property, the Ad Hoc Group have presented several Actuarial Certificates that show the effective annual interest rates for the Credit Suisse DIP facilities as exceeding 60% per annum.

128 The first Certificate calculates effective annual interest rates based on the following assumptions: (i) a term of six months; (ii) US$35 million Principal; (iii) a commitment fee calculated as 4% of Principal; (iv) an up-front fee calculated as 2% of Principal; (v) an annual interest rate of US 3-month LIBOR + 10%; (vi) legal fees of $250,000; and (vii) a Burnstone sale fee equal to 15% of the net sale proceeds of the Burnstone facility, payable at the termination date of the DIP loan. Two calculations are provided based on separate scenarios where the gross sale proceeds are US$643 million (Scenario 1) and US$250 million (Scenario 2), with $176 million deductions in each case (which includes the Credit Suisse Burnstone loans). Based on these figures, the effective annual interest rate is calculated to be 928.9% (Scenario 1) and 111.5% (Scenario 2), respectively.

129 In response to these figures, and presumably to the Ad Hoc Group's submissions generally, Credit Suisse offered to amend its terms such that firstly, the Advisory Fee would be reduced to 10% of the Burnstone facility sale proceeds and secondly, the total amount payable under the Advisory Fee would be capped at US$15 million.

130 These concessions did not placate the Ad Hoc Group. Rather, in response, the Ad Hoc Group submitted further Actuarial Certificates containing additional effective annual interest rate calculations based on the proposed amendments to the Credit Suisse DIP loan.

131 The first Actuarial Certificate provides a calculation of the effective annual interest rate with the Advisory Fee capped. The assumptions are the same as those listed above, except to clarify that the commitment fee of 4% is calculated on the unused balance of available credit. Based on these assumptions, the effective annual interest rate is calculated at 132.1%.

132 The second and third Actuarial Certificates contain a reverse calculation in the sense of indicating the maximum amount that can be paid to Credit Suisse from the Burnstone sale proceeds in respect of either the Advisory Fee or the GBG Inc. Guarantee before it constitutes criminal interest over 60%. Based on the same assumptions as in the previous Certificate, the maximum amount payable is calculated at $6,204,478.98.

133 Counsel for the Ad Hoc Group relies on these calculations in its argument that the courts should not sanction an agreement the terms of which are likely to offend s. 374 of the *Code* at a future date. Reliance on calculations in Actuarial Certificates is specifically contemplated in respect of proof of the effective annual rate of interest: the *Code*, s. 347(4).

134 Counsel for Credit Suisse argues that neither the Advisory Fee nor any amounts to be paid under the GBG Inc. Guarantee constitute "interest" for the purpose of calculations under s. 347 of the *Code*. In the alternative, Credit Suisse submits that even if the Advisory Fee and the GBG Inc. Guarantee constitute "interest" under the *Code*, there is no way at this time to calculate what the rate would be. It says that the calculations are frustrated by two factors: (i) the near term realization value of the Burnside

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Property; and (ii) the term over which the Credit Suisse DIP facility will be paid. Credit Suisse submits that neither of these can be determined at this time; thus, any effective annual interest rate calculations would be highly speculative and arbitrary, as they would be based on imperfect or unknown information. Finally, Credit Suisse says that given this uncertainty, their DIP facility does not violate s. 347(1)(a) of the *Code*.

(ii) The Law

135 The criminal interest rate offences are found in s. 347 of the *Code*. The relevant provisions are as follows:

> 347. (1) Despite any other Act of Parliament, every one who enters into an agreement or arrangement to receive interest at a criminal rate, or receives a payment or partial payment of interest at a criminal rate, is
>
> (a) guilty of an indictable offence...; or
>
> (b) guilty of an offence punishable on summary conviction...
>
> . . .
>
> (2) In this section,
>
> "credit advanced" means the aggregate of the money and the monetary value of any goods, services or benefits actually advanced or to be advanced under an agreement or arrangement minus the aggregate of any required deposit balance and any fee, fine, penalty, commission and other similar charge or expense directly or indirectly incurred under the original or any collateral agreement or arrangement;
>
> "criminal rate" means an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds sixty per cent on the credit advanced under an agreement or arrangement;
>
> . . .
>
> "interest" means the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, but does not include any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes...
>
> [Emphasis added.]

136 This provision creates two offences: (i) entering into an agreement or arrangement to receive interest at a criminal rate; and (ii) actually receiving payment or partial payment of interest at a criminal rate.

137 In *Degelder Construction Co. v. Dancorp Developments Ltd.*, [1998] 3 S.C.R. 90 (S.C.C.) at para. 34, Major J. summarized the applicable principles in interpreting and applying these provisions:

> (1) Section 347(1)(*a*) should be narrowly construed. Whether an agreement or arrangement for credit violates s. 347(1)(*a*) is determined as of the time the transaction is entered into. If the agreement or arrangement permits the payment of interest at a criminal rate but does not require it, there is no violation of s. 347(1)(*a*), although s. 347(1)(*b*) might be engaged.
>
> (2) Section 347(1)(*b*) should be broadly construed. Whether an interest payment violates s. 347(1)(*b*) is determined as of the time the payment is received. For the purposes of s. 347(1)(*b*), the effective annual rate of interest arising from a payment is calculated over the period during which credit is actually outstanding.

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> (3) There is no violation of s. 347(1)(*b*) where a payment of interest at a criminal rate arises from a voluntary act of the debtor, that is, an act wholly within the control of the debtor and not compelled by the lender or by the occurrence of a determining event set out in the agreement.
>
> [Original emphasis.]

138 The definition of "interest" is extremely comprehensive, and encompasses "many types of fixed payments which would not be considered interest proper at common law or under general accounting principles": *Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112 (S.C.C.) at para. 27. Any fees, fines, penalties, commissions or other similar charges or expenses are captured by this provision insofar as they are, in accordance with the definition of "interest", "paid or payable for the advancing of credit under an agreement or arrangement".

139 In determining whether a charge or expense - whatever its form - constitutes "interest" under the *Code*, courts look at the substance, and not merely the form, of such payments. As Huddart L.J.S.C. (as she was then) observed in *Mira Design Co. v. Seascape Holdings Ltd.* (1981), 34 B.C.L.R. 55 (B.C. S.C.), at 60:

> The thrust of the definitions of "credit advanced" and "interest" is to cover all possible aspects of any transaction to ensure that the cost of using someone else's money never exceeds the criminal rate. Thus, they focus on the actual benefit given to the borrower and the real cost of borrowing. The actual benefit is the real amount in the borrower's hands minus all the penalties, commissions and other costs incurred. The cost of borrowing is also widely defined. Clearly the intention of the legislature was to concentrate on the substance of the transaction, not on its mechanics or form.
>
> [Emphasis added.]

140 In conducting this analysis, courts will consider the nature of the relationship between the parties: *De Wolf v. Bell ExpressVu Inc.*, 2009 ONCA 644 (Ont. C.A.) at para. 39. In this regard, where the relationship is exclusively one of lending money, any additional charges or fees are inherently connected to the lending of money, regardless their label.

141 Furthermore, the act of providing a service in connection with a charge or expense does not preclude those payments from being "interest" in s. 347. For example, the B.C. Court of Appeal upheld a lower court's decision which found "processing fees" with respect to payday loans, or lender's legal fees that are charged back to the borrower, to be "interest": *Kilroy v. A OK Payday Loans Inc.*, 2006 BCSC 1213 (B.C. S.C.) at para. 15, aff'd 2007 BCCA 231 (B.C. C.A.).

142 Lastly, with particular significance to this case, s. 347(1)(a) (the agreement offence) is not violated if it is not provable by the terms of the agreement that the borrower is *required* to pay a criminal interest rate. In *Degelder*, Major J. explained this requirement in the following terms:

> 29 It follows from the foregoing that s. 347(1)(*a*) should be narrowly construed. That offence is complete upon the formation of an agreement or arrangement for credit, and provable by its terms. As Borins J., then of the Ontario Court (General Division), observed in *Aectra Refining & Marketing Inc. v. Lincoln Capital Funding Corp.* (1991), 6 O.R. (3d) 146, at p. 150:
>
> > ... the critical time at which a lender commits an offence contrary to s. 347(1)(*a*) ... is when the lender "enters into an agreement ... to receive interest". It is at that time that the court must determine whether the rate of "interest", which is very broadly defined in s. 347(2), provided for by the agreement constitutes the "criminal rate" which is also defined in s. 347(2).
>
> Subsection (1)(*a*) is violated if a credit agreement expressly imposes an annual rate of interest above 60 percent, or if the agreement requires payment of interest charges over a period which necessarily gives rise to an annual rate exceeding the legal limit. [Citations omitted.]
>
> [Emphasis added.]

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143 Accordingly, s. 347(1)(a) is violated only when there is a clear and unambiguous requirement that criminal interest be paid. It is insufficient that there is a *mere possibility* that the rate of interest could become illegal under the agreement, such as where a significant interest payment is payable on some named but indeterminate event or over some indefinite period: *Degelder* at para. 29; *Bearcat Explorations Ltd., Re*, 2004 ABQB 601 (Alta. Q.B.) at paras. 99-102; *J.D.M. Capital Ltd. v. Smith* (1998), [1999] 6 W.W.R. 687 (B.C. C.A.). In those circumstances, the effective annual rate of interest "remains speculative until the actual amount of interest and the actual period of repayment are known": *Degelder* at para. 29. As such, the interpretation requires a "wait-and-see approach" to determining the lender's liability: *Degelder* at para. 30; *Bearcat* at para. 92.

144 If a loan agreement "permits but does not require the payment of illegal interest", the analysis turns to a consideration of s. 347(1)(b) (the payment offence): *Degelder* at para. 33. This provision requires an actual payment of interest exceeding the permissible rate.

(iii) Discussion

145 There appears to be no doubt that it is the *possibility* of payment of the Advisory Fee or payment under the GBG Inc. Guarantee that may tip the calculation toward a criminal interest rate. That being so, the first question is whether either the Advisory Fee or amounts that may be paid under the GBG Inc. Guarantee are "interest" for the purpose of the calculations under s. 347 of the *Code*.

146 As earlier stated, "interest" under s. 347 is a broadly defined term that encompasses many different types of fees and charges, and has included: royalty payments, legal fees, monitoring fees, standby fees, facility fees, commitment fees, brokerage fees, late fees, initial loan fees, fees for extensions, administrative fees and processing fees: *J.D.M. Capital* at para. 17; *Boyd v. International Utility Structures Inc.*, 2002 BCCA 438 (B.C. C.A.)*at paras. 52-58*; *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7 (S.C.C.) at para. 11; *Kilroy C.A.*; *Affordable Payday Loans v. Beaudette*, [2004] O.J. No. 3235 (Ont. S.C.J.); *Terracan Capital Corp. v. Pine Projects Ltd.*, [1993] 3 W.W.R. 724 (B.C. C.A.); *William E. Thomson Associates Inc. v. Carpenter* (1989), 69 O.R. (2d) 545 (Ont. C.A.); *Ayrton v. PRL Financial (Alberta) Ltd.*, 2005 ABQB 311 (Alta. Q.B.), aff'd 2006 ABCA 88 (Alta. C.A.).

147 Though broadly defined, "interest" refers in the first instance to "charges and expenses". Here, the Ad Hoc Group stresses the "cost of loan" concept, the actual benefits given to the lender, as the rationale for characterizing both the GBG Inc. Guarantee and the Advisory Fee as "interest".

148 The Ad Hoc Group submits that it is clear that the Advisory Fee is "interest" under s. 347 for the following reasons:

> (a) It is a requirement under the Initial DIP Term Sheet that the borrower enter into an agreement to pay the Advisory Fee to the Initial DIP Lender, and as a result it is clearly a "cost or expense ... paid or payable for the advancing of credit".
>
> (b) The fact that the Advisory Fee arises under a separate agreement does not change the fact that, in substance, it is a charge or expense the borrower must incur in order to obtain credit.
>
> (c) The Initial DIP Loan is clearly a loan transaction in substance, and the nature of the relationship between the Initial DIP Lender and GBG is equally clearly one of creditor and debtor. Accordingly, the Advisory Fee, as a charge associated with the Initial DIP Loan, is inherently connected to advancing of credit.
>
> (d) It is not clear whether the Initial DIP Lender intends or proposes to provide any services to GBG in connection with the advisory agreement, but even if it did this would not change the nature of the Advisory Fee, and would therefore not change its characterization as "interest".

149 The Ad Hoc Group further argues that the GBG Inc. Guarantee constitutes "interest". It states that the GBG Inc. Guarantee, though under a separate agreement, was to be granted at the behest of GBG as part of GBG acquiring credit. As counsel for the Ad Hoc Group framed the negotiations for the Credit Suisse DIP facility: without the GBG Inc. Guarantee, there

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would be no DIP loan. In addition, if the Burnstone Property fails to generate sufficient funds to pay the Credit Suisse loan relating to Burnstone, the shortfall will be paid pursuant to the GBG Inc. Guarantee and thus represents a "charge or expense", *albeit* one borne by GBG Inc., that would not otherwise have been paid had that Guarantee not been provided.

150 Further, the Ad Hoc Group says the GBG Inc. Guarantee is an additional "charge and expense" to GBG because if GBG Inc. is required to pay under the GBG Inc. Guarantee, GBG would at common law be required to indemnify it. This points to a "charge and expense" being borne directly by GBG.

151 The argument of the Ad Hoc Group concerning the Advisory Fee representing "interest" appears to have some force. It is, however, more difficult to fit the GBG Inc. Guarantee into the category of a "charge or expense". Furthermore, the case authorities provided to the court on the scope of what is included within "interest" do not consider arrangements comparable to the Credit Suisse DIP facility.

152 The intertwined nature of the GBG Inc. Guarantee and the Advisory Fee is also likely to be relevant to any determination. As described above, the DIP loan provides an "either or" scenario that is structured to ensure that Credit Suisse collects at least the amount owing on the Burnside term loan. Given that the Advisory Fee is triggered only after the Burnside term loan is satisfied, it is arguable the GBG Inc. Guarantee is precisely what the Ad Hoc Group alleges in the first instance: "an attempt by [Credit Suisse] to bolster the Burnstone Lenders' security for its existing Burnstone Loan". In other words, it is arguably not, in substance, interest; rather, it is security granted on an otherwise unsecured loan as consideration for funding under the DIP facility. This may be said to be distinct from a charge or expense *paid* for the advancing of credit.

153 I consider that there are valid arguments to the effect that both the Advisory Fee and the GBG Inc. Guarantee constitute "interest" under s. 347. However, this position of the Ad Hoc Group is hotly contested by Credit Suisse.

154 In my view, however, these are issues for another day. I do not consider that it is necessary at this juncture to engage in a fulsome analysis or to make such a determination, especially given the urgency of the matter. Counsel for Credit Suisse was unable in this case to present a considered argument on these issues given the urgency of the situation.

155 It is also important to note that even if I were to accede to the position of the Ad Hoc Group on these arguments, it would be of no import given the lack of evidence with respect to the calculation of the effective annual interest rate. I agree with Credit Suisse on this point, in that a determination of this issue is premature. It is not certain, not clear on the face of the Credit Suisse DIP loan, whether GBG is *required* to pay an interest rate in excess of 60% per annum at any time in the future. No interest rate can be calculated without either a value of the Burnside Property proceeds or the termination date at which these proceeds will be paid.

156 The Ad Hoc Group simply cannot show beyond what can only be characterized as a 'reasonable possibility' that a criminal interest rate will result from payments made under the Credit Suisse DIP loan. It is also possible in one scenario that neither the Advisory Fee nor any amounts under the GBG Inc. Guarantee will be paid; another is that only nominal amounts will be paid (for example, where the proceeds from the Burnside Property are equal to or close to the amounts payable to Credit Suisse on the Burnside loan). In addition, despite deadlines under the terms of the DIP loan, it remains possible that repayment will occur outside of those deadlines. It would not be unheard if expectations in that regard are not met for any number of reasons. For example, many "pre-pack" restructurings which are intended to be completed in fairly short order turn out to be anything but.

157 Accordingly, as in *Degelder*, the effective annual rate of interest remains speculative until the actual amount of interest and the actual period of repayment are known. The Credit Suisse DIP loan therefore does not offend s. 347(1)(a) of the *Code*. With respect to this finding, counsel for the Ad Hoc Group conceded at the application that the Credit Suisse DIP loan is not "strictly an offence" today.

158 In the alternative, the Ad Hoc Group's contention is not that the terms of the DIP loan necessarily offends s. 347 at this time, but that as a matter of public policy under the *Code* and the *CCAA*, it is incumbent on the Court to refuse to sanction an agreement that may, and based on all available evidence likely will, violate s. 347(1)(b) at some point in the future.

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159 In support of this position, the Ad Hoc Group's counsel cites *Garland v. Consumers' Gas Co.* (2001), 57 O.R. (3d) 127 (Ont. C.A.). At issue in this case was late payment penalties received by a gas company from its customers pursuant to and in compliance with Ontario Energy Board orders. The company was regulated by the Ontario Energy Board, and as such was subject to Board orders made with respect to rates for the sale of gas, including a Board order which allowed the company to charge a 5% penalty to its customers for late payment. The plaintiff's actuarial evidence showed that the vast majority of late-paying customers paid within a time period during which the interest rate represented by the penalty was greater than 60% per year.

160 In discussing the Board's current penalty structure, at para. 34, McMurtry C.J.O. made it clear that, regardless of the success of the plaintiff's claim for restitutionary relief, the Board would need to implement a new penalty that did not "have the capacity to result in a contravention of s. 347(1)(b)".

161 The Ad Hoc Group submits that this case stands for the proposition that a court should not, as a matter of public policy, sanction an agreement that could possibly violate s. 347 at a later date. It submits further that this policy is particularly applicable when a court is being asked to approve an agreement (as opposed to being asked to provide a ruling on an existing agreement's enforceability).

162 I do not find this case helpful. I do not agree that the above comment stands for the broad proposition put forth by the Ad Hoc Group's counsel. Firstly, such a proposition flies directly against Major J.'s express directions in *Degelder*. Secondly, such an interpretation of McMurtry C.J.O.'s comment would ignore the context of that case. The evidence in that case demonstrated not only that the penalty was capable of violating s. 347(1)(b), but that it in fact did so violate that subsection. Thus, McMurtry C.J.O. was merely commenting that the Board should cease making orders which it knows do in fact lead to the contravention of the *Code*.

163 I do not take issue with this comment when placed in the proper context. I simply do not see how they are applicable to the specific facts before me. The evidence in this case only shows a *possibility* that s. 347(1)(b) will be infringed in the future.

164 Furthermore, I do not see a distinction between approving an agreement and ruling on an agreement's enforceability in assessing whether the agreement violates s. 347, and I note that the Ad Hoc Group did not provide any authority to this effect. In either case, the court is required to determine whether amounts payable under the agreement are, in substance, "interest" payments and if so, whether these amounts exceed the permissible interest rate. I see no principled reason why the analysis in both cases should not be the same, or why the Court should stray away from the interpretive framework provided by the Supreme Court of Canada in *Degelder* and *Garland*. Accordingly, if an agreement permits, but does not require the payment of illegal interest, whether in the context of approving or upholding an existing agreement, the analysis turns to a consideration of s. 347(1)(b): *Degelder* at para. 33.

165 As no payment has been made under the Credit Suisse DIP loan, s. 347(1)(b) clearly does not apply. Following *Degelder*, the appropriate approach in this case is to "wait and see" whether any payment is made pursuant to the GBG Inc. Guarantee or the Advisory Fee, and assuming a determination that the amount paid is "interest", whether the interest rate permitted by s. 347 would be exceeded.

166 I note that the Supreme Court of Canada has described s. 347 as a "deeply problematic law" whose two facets "do not comfortably co-exist" and which has given rise to a large volume of civil litigation and interpretive difficulties: *Garland* at para. 52. I am fully aware that these issues may need to be addressed by the Court at a later time.

167 In conclusion on this issue, the requirements of s. 347(1)(a), as set out by the Supreme Court of Canada, are not met in this case. Although it appears there is a *possibility* that the GBG Inc. Guarantee and the Advisory Fee may very well constitute "interest", and may amount to criminal interest, the evidence before me is insufficient to establish at this time that the effective annual interest rate under the Credit Suisse DIP loan exceeds 60% per annum. The actual amounts to be paid for these items, if any, and the date at which any amount is payable are both unknown. Put bluntly, too many contingencies render any calculations of an effective annual interest rate purely hypothetical.

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168 Furthermore, until any payment is actually made, the application of s. 347(1)(b) is theoretical and moot. Contrary to the Ad Hoc Group's counsel's suggestion that the Credit Suisse DIP loan is "tainted by illegality", I find that this case falls squarely into those scenarios described by Major J. in *Degelder* at para. 30, where the appropriate action is to "wait and see" whether the DIP loan offends s. 347(1)(b) of the *Code*. This approach is wholly consistent with the directions given by the Supreme Court of Canada in *Degelder* and *Garland*, as well as with the B.C. Court of Appeal's ruling in *Boyd* at para. 67.

169 This approach is consistent with the public policy aspects behind s. 347 of the *Code*.

170 Further, it is consistent with the public policy behind the *CCAA* which promotes a determination of issues that will advance the proceedings toward a successful restructuring. I see little need to embark on a consideration of issues that may well be moot, particularly where issues are raised on an urgent basis and where resources would be better directed at more pressing issues.

171 Accordingly, I would not accede to the Ad Hoc Group's submissions that the Credit Suisse DIP loan violates s. 347 of the *Code*. However, even though it is not possible at this time to declare the Credit Suisse DIP facility as being contrary to the *Code*, the possibility of the agreement eventually providing for that result and the possibility of Credit Suisse obtaining such funds remains a factor to be considered under s. 11.2 of the *CCAA*.

172 Lastly, I reject the Ad Hoc Group's submission that this Court should declare that the net proceeds from any sale of the Burnstone Property payable to Credit Suisse in respect of either the Advisory Fee or the GBG Inc. Guarantee be capped at US$6.2 million.

173 There appears to be some support in the case-law for "reading down" an agreement or severing specific clauses to reduce the amount of interest payable to a rate at or below the legally permissible rate: see *Transport North American Express* at paras. 31-40; *Fawcett v. Western Canadian Coal Corp.*, 2010 BCCA 70 (B.C. C.A.) at paras. 47-48. Credit Suisse has indicated that the Definite Documents for its DIP loan will specifically provide that in no event will its recovery exceed an interest rate of 60%. Whether this would save the day for Credit Suisse is an open question: *Brehnan v. Outback Products Inc.*, 2003 BCSC 703 (B.C. S.C. [In Chambers]).

174 However, I agree that it is not appropriate to grant such an order at this time. Again, the Ad Hoc Group bases its calculations on uncertain figures. The termination date of the loan may occur in six months - or it may not. The amount realized from the sale of the Burnside Property may be significant; it may also be such that neither the GBG Inc. Guarantee nor the Advisory Fee is triggered. Accordingly, any cap would be grounded in arbitrarily chosen figures and conditions, the result of which may ultimately be to deny payments to Credit Suisse that do not, in the specific circumstances at that time, represent a criminal interest rate.

175 In short, this is neither the time nor the place to engage in a determination of this dispute, particularly given the urgency and seriousness of the financial circumstances GBG currently faces.

Should the Credit Suisse DIP Loan Approval be Maintained?

176 Even in light of my conclusions on the viability of the Ad Hoc Group's proposal as above, I must consider again the merits of the Credit Suisse DIP proposal.

177 The Ad Hoc Group submits that the Credit Suisse proposal evidences an aggressive existing stakeholder who is using its existing leverage to extract value and secure for itself a betterment of its position to the prejudice of existing stakeholders, including the debenture holders. This is described as an "asset grab". Credit Suisse is also described as overreaching in its approach, a criticism which may have some validity given its present retreat from certain aspects of its original proposal (for example, the reduction in and cap of the Advisory Fee and the more relaxed timelines).

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178 In addition, again the Ad Hoc Group says that matters have "stabilized" since last week and that the stakeholders now have the luxury of allowing the Ad Hoc Group's proposal to proceed without having Credit Suisse's "gun to the head" of GBG in terms of securing approval of its proposal. I have rejected the contention that matters have stabilized.

179 I recognize that in some restructuring proceedings, certain stakeholders may use existing leverage, to the extent that they have it, to take advantage of the chaos and uncertainty that are inherent in these situations. Strategies might be employed to secure for themselves advantages that they would not otherwise obtain. These advantages inevitably come at the expense of other stakeholders in the proceedings. These advantages are also almost always court approved so that they cannot be later revisited. In those circumstances, the court must be constantly vigilant against such strategies. While no doubt there are many examples, some circumstances which clearly invite the scrutiny of the court involve proposals for stalking horse bids where the stalking horse bidder extracts substantial break fees, but where there is no need for such a bid to adequately test the market or address other concerns within the restructuring. Other examples of situations where it is possible that such strategies may be employed are those relating to key employee retention plans or critical supplier charges sought pursuant the *CCAA*.

180 In many cases, the debtor company when faced with these issues - or "demands" - simply wants to buy peace and stability. Given the company's insolvency, management may not have sufficient leverage or negotiating power to counter such requests. I do not intend to imply generally any untoward behavior on the part of management of debtor companies, but often companies find themselves overwhelmed with issues arising from the economic crisis and acceding to these requests may be seen as simply furthering the process in difficult circumstances.

181 Even so, the Court remains the gatekeeper in terms of ensuring that the terms of any such agreements are reasonable and appropriate in the circumstances. Input from stakeholders participating in the process will be critical although the entire stakeholder group must be considered. Critical to the court's analysis will be evidence of the debtor company's actions in the face of these proposals. What is the underlying reason for these transactions? What due diligence was done in the face of these proposals? What negotiations took place? What are the true consequences of not obtaining this relief? What alternatives, if any, are available?

182 Urgency is a continuing theme on many of these applications, just as it is on this application. Often materials are served on very short notice and participating stakeholders may not be afforded sufficient time to adequately consider the relief sought. Again, the court must be vigilant to ensure that it is not rushed to a decision based on an illusory sense of urgency which is not supported by the evidence. There are, no doubt, many cases where the matter is truly urgent. Issues can quickly arise from unforeseen circumstances or even perhaps due to a misstep by the management of the debtor company. In addition, once a filing takes place, many issues must be addressed quickly. The court must guard against deciding issues in the face of "manufactured" urgency, whether created by leverage from a stakeholder seeking certain relief or otherwise.

183 In addition, it is often the case that these applications are brought on an urgent basis where the court is asked to decide the issue without a full review of the evidence before it. The court will, of necessity, seek the input of the monitor, who will have the necessary background and hopefully, knowledge and insight on these important issues. However, if the monitor is, as in this case, only recently appointed, the ability of the monitor to provide meaningful input may be limited.

184 It is in the context of this framework and the submissions of the Ad Hoc Group concerning how the Credit Suisse DIP proposal came about that I now address that proposal.

185 I have already referenced the evidence of GBG concerning the background of the GBG Group, and in particular, the events leading to the Board's efforts to secure appropriate DIP financing on a timely basis. The evidence sets out in detail the Board's detailed consideration of the more negative aspects of the Credit Suisse proposal, including the GBG Inc. Guarantee. The evidence from the Ad Hoc Group indicates that they had begun communications with GBG as early as September 11, 2012 towards expressing an interest in providing DIP financing for the GBG Group. It is unclear what actions GBG took in response to those overtures in terms of flushing out the potential terms of any such financing. In any event, I note that Mr. van Vuuren has generally referenced in his affidavit that other financing proposals were considered, but that they came with "significant closing

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risk and delay". That is the same response that GBG and the Monitor now make in respect of the Ad Hoc Group's proposal after a full disclosure of the terms upon which their financing might be advanced.

186 Of additional significance is Mr. van Vuuren's statement that the Board exercised its business judgment in respect of its decision to pursue the Credit Suisse DIP financing proposal. It is, of course, the case that courts will typically take a very deferential approach with respect to such matters given the expertise of the Board of Directors and their intimate knowledge of the business affairs of the debtor company. I would note, however, the comments of the Ontario Court of Appeal in *Crystallex* that while a factor, deference to the Board's decision does not mean that the factors outlined in s. 11.2 are to be disregarded by the court:

> [85] *Stelco* should not be read as authority for the principle that the recommendation of the directors of a debtor under CCAA protection is entitled to deference in evaluating whether financing should be approved under s. 11.2 of the CCAA where the factors outlined in s. 11.2(4) have not been complied with. In *Stelco*, the debtor did not seek court approval of a recommendation of the board. In the case of interim financing, the court must make an independent determination, and arrive at an appropriate order, having regard to the factors in s. 11.2(4). It may consider, but not defer to, and is not fettered by, the recommendation of the board.

187 Finally, the Monitor has provided its first report to the court in respect of all of these issues. Following from its appointment one week ago, the Monitor has had further time to obtain further information and documentation from the stakeholders with a view to assisting the court on these very complex matters. Again, the Monitor advised during argument that in its view, the greater certainty surrounding the Credit Suisse DIP loan facility, together with the ability of Credit Suisse to quickly advance funds into an urgent cash flow situation trumps the uncertainty, risk and potential cost associated with the Ad Hoc Group's proposal.

188 I turn now to the specific factors set out in s. 11.2(4) of the *CCAA*.

189 The first factor under s. 11.2(4)(a) relates to the period during which GBG is expected to be subject to proceedings under the *CCAA*. It is a matter of debate as to whether the Ad Hoc Group's proposal allows more time to GBG to complete its restructuring. I would note again that the Credit Suisse proposal allows for extensions, *albeit* at a cost. One might argue that the more rigorous timeline set out in the Credit Suisse proposal will result in an enhancement of enterprise value for the stakeholders as a whole as it will reduce restructuring costs, including the cost of the DIP financing. It is debatable which is the proper approach in these circumstances and whether these differences will, in fact, have a material effect upon the restructuring.

190 The management of GBG and how they are to conduct the business and financial affairs of GBG during the proceedings (s. 11.2(4)(b) and (c)) have not been raised as issues on this application and are neutral factors in respect of the two competing proposals. I assume that the present management has the confidence of both Credit Suisse and the Ad Hoc Group. In addition, the nature and value of GBG's property is a matter addressed by both proposals and again does not invite any comparison (s. 11.2(4)(e)). Both proposals appear to be consistent with the DIP financing required in the context of the assets of the GBG Group.

191 In my view, the most important factors to be considered on this application are those set out in s. 11.2(4)(d), (f) and (g).

192 Dealing with s. 11.2(4)(g), as I have already stated, the Monitor supports the continued approval of the Credit Suisse facility on the basis that it provides certainty, not only in terms of result, but in terms of speed in meeting what it agrees are the urgent cash flow requirements of the GBG Group.

193 The factor under s. 11.2(4)(f) relates to prejudice. It is apparent that there *may* be prejudice to the debenture holders in the event that there is a call on the GBG Inc. Guarantee if sufficient value is not realized from the sale of the Burnstone Property. Alternatively, the potential payment of the Advisory Fee, *if paid*, will have a negative effect on recoveries that the debenture holders might otherwise have made at the level of the unsecured debt in Southgold. On that score, I make two observations. Firstly, there remains that possibility that no amount will be paid under either the GBG Inc. Guarantee or the Advisory Fee. Secondly, the debenture holders are part of the general unsecured creditors of both GBG and Southgold and they are not particularly targeted (although I acknowledge that they will represent a large portion of both creditor groups).

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194 It would be a rare case indeed where DIP financing did not raise some element of prejudice in relation to other stakeholders. The section speaks of "material" prejudice and as such, the court must weigh that inevitable prejudice against the benefits of obtaining the DIP financing. In this case, that balancing exercise - which of necessity includes a consideration of the risks of *not* obtaining the financing - points clearly in the direction of maintaining the approval of the Credit Suisse DIP financing proposal, as amended during argument.

195 As discussed above, I recognize that there is some element of prejudice relating to the potential argument that the Credit Suisse DIP loan will result in a criminal rate of interest. I have considered this as a factor - whether expressed by the Ad Hoc Group as a "public policy" issue or otherwise - under s. 11.2. For the reasons already expressed, I consider that the issue can be addressed at the end of the day once more facts are known. I do not consider that there is any prejudice to the stakeholders arising from this issue at this time.

196 Last but not least, and even assuming that the Ad Hoc Group's proposal was viable, I must consider whether each of the Credit Suisse and Ad Hoc Group proposals would enhance the prospects of a viable compromise or arrangement in respect of GBG and as between the Credit Suisse and Ad Hoc Group proposals, which would *better* enhance the prospects of that result (s. 11.2(4)(d)).

197 Counsel for the Ad Hoc Group submits that Credit Suisse's position in relation its current proposal for DIP financing (particularly as it relates to the Advisory Fee and the GBG Inc. Guarantee) is a "bluff" and that I should call that bluff. He says that as the pre-existing secured lender in respect of both the Burnstone and Hollister Properties, it is more than likely that Credit Suisse would agree to fund the necessary DIP loan during these restructuring proceedings whether or not they secure these more objectionable requirements. Mr. van Vuuren stated in his affidavit that Credit Suisse was unwilling to advance any new funds without the GBG Inc. Guarantee. In addition, in argument before me on September 19, 2012, counsel for Credit Suisse confirmed that they were not prepared to fund save and except on the conditions proposed at that time. As I have earlier stated, since that time, it has become apparent that this position was not really writ in stone, in that they have bettered their offer, no doubt by reason of the objections advanced by the Ad Hoc Group.

198 Leaving all that aside, the Ad Hoc Group's proposal remains the more uncertain of the two proposals, even if I had acceded to its application and added the U.S. subsidiaries as respondents to this proceeding. As I have said, the proposal requires certain priming charges that will no doubt be vigorously objected to by Credit Suisse. I do not wish to endorse any strategy by such a party to the point where it can create the very uncertainty and risk that works in its favour. It can equally be said here, however, that the Ad Hoc Group has created uncertainty and risk in relation to the Credit Suisse proposal in an attempt to create leverage in its favour. Nevertheless, the risk, timing and cost issues remain factors that cannot be ignored on this application.

199 I see no basis here upon which the court should consider engaging in a game of brinksmanship with Credit Suisse towards calling their "bluff". There are significant assets that must be maintained so as to preserve enterprise value pending a restructuring of the GBG Group. There are substantial stakeholders here, in addition to Credit Suisse and the debenture holders. Those stakeholders would include the approximately 1,275 employees of the GBG Group, the many suppliers and other unsecured creditors of the various companies and the communities in which those subsidiaries operate. Importantly, as there are mining operations involved, that necessarily means that there are substantial environmental issues potentially in play in the event that the mining operations are not maintained in a proper fashion.

200 I accept that if the Credit Suisse DIP proposal is not allowed to go forward, there is considerable risk involved. As I have said, even the recent interim offer of financing by a member of the Ad Hoc Group in the amount of US$5 million does not fully satisfy what I accept are the urgent cash needs of the GBG Group now and in the immediate future.

Conclusion

201 There is no jurisdictional basis upon which I may add GBG Inc., Antler and Rodeo to these *CCAA* proceedings so as to allow the proposal of the Ad Hoc Group's proposal to go forward. In any event, I consider that there is substantial risk and uncertainty associated with the Ad Hoc Group's proposal.

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202 The Credit Suisse proposal, for all its negative aspects, remains the only viable financing option available to the GBG Group at this time. I therefore conclude that it is appropriate to leave the Credit Suisse DIP financing proposal in place, subject to the further concessions that were agreed to at the outset of this hearing. I order that paragraph 36 of the Initial Order be amended to refer to the document that reflects these revised terms.

203 I have some sympathy for the position of the Ad Hoc Group in terms of the prejudice that they will potentially suffer by reason of the Credit Suisse DIP proposal. However, with respect to the potential Advisory Fee, that is a prejudice that will also be suffered by other stakeholders involved in the South African subsidiaries. In addition, with respect to the GBG Inc. Guarantee, it remains a possibility that that guarantee will never be called upon. While there is obviously some speculation involved, the present view of the Board of Directors is that, even in the face of the present insolvency proceedings, they are optimistic that there is sufficient value in the Burnstone Property towards that result.

204 I would not accede to the submissions of the Ad Hoc Group concerning the criminal interest rate issue. That issue need not be addressed at this time and in fact, based on a certain set of circumstances, may never need to be addressed. Pending these issues being sorted out, I order that GBG take all reasonable steps to ensure that any payment of the Advisory Fee or any payment under the GBG Inc. Guarantee be held and not paid to Credit Suisse without further order of this court. That should provide some protection for the stakeholders to preserve any amounts that would otherwise have been paid until the issues are determined.

205 Accordingly, the application of the Ad Hoc Group is dismissed.

Application dismissed.

Appendix "A"

In the Supreme Court of British Columbia

Date: 20120919

Docket: S126583

Registry: Vancouver

In the Matter of the Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36, as amended
and
In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44
and
In the Matter of Great Basin Gold Ltd.

Petitioner

Before: The Honourable Madam Justice Fitzpatrick
Oral Reasons for Judgment
In Chambers

Counsel for Petitioner:	P.J. Reardon J.L. Cockbill
Counsel for Monitor:	J. McLean
Counsel for Credit Suisse AG:	P.L Rubin K. McEachern
Counsel for Unsecured Note Holders:	J.R. Sandrelli
Place of Trial/Hearing:	Vancouver, B.C. September 19, 2012
Place and Date of Judgment:	Vancouver, B.C.

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September 19, 2012

THE COURT: These are proceedings commenced pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [CCAA] by the petitioner, Great Basin Gold Ltd. The petitioner applies for an initial order.

I will briefly describe the background circumstances, although I do not intend to go through them in detail given the complexity of the situation. The petitioner company is the publicly traded Canadian parent of a large number (22) of subsidiary companies. Through these subsidiaries or groups of subsidiaries, the group owns and operates two gold mines and holds other miscellaneous interests. The first gold mine is the Burnstone Mine located in South Africa. The second gold mine is the Hollister Mine located in Nevada, United States of America.

The circumstances leading up to this filing are outlined in Affidavit #1 of Lourens van Vuuren sworn September 19, 2012. Mr. van Vuuren is the interim Chief Executive Officer and a director of the petitioner. His evidence indicates that through either a combination of economic circumstances or lack of revenue being realized through the mining operations, the corporate group has found itself in a severe liquidity crisis. The circumstances have not arisen just recently; it appears that the corporate group retained CIBC World Markets some months ago to attempt to either arrange a sale of the assets or a restructuring of its operations. I am advised that those efforts continue at this time.

More recently, the Burnstone Mine in South Africa has just been closed down and has been placed in care and maintenance mode. In addition, the major South African subsidiary, Southgold Exploration (Pty) Ltd., filed for creditor protection in South Africa on September 14, 2012.

The debt situation is somewhat complex.

Credit Suisse, who is represented on this application, has various loans outstanding. Firstly, there is a loan to the petitioner with respect to the South Africa operations, namely a US$150 million term loan with a US$14 million hedging facility. I am told that those amounts are directly secured against the South African mine.

In addition, there are loans by Credit Suisse with respect to the Hollister Mine. These are direct advances to the U.S. companies, the lead company of which is Great Basin Gold Inc., who I will address in more detail in a moment. There is a US$43 million term loan and a US$10 million hedging facility. That loan is guaranteed by the petitioner company.

The majority of the assets, as I said, include the two gold mines. There have been various estimates with respect to the value of those mining operations, and of particular relevance to this application is that the book value of the South African mine is estimated to be in excess of $600 million.

The application for the initial order is brought pursuant to s. 11.02(1) of the *CCAA*. I may make an order on any terms that may be imposed. Also, under s. 11.02(3)(a) of the *CCAA*, the petitioner company must satisfy the court that circumstances exist that make the order appropriate.

Mr. Reardon has taken me through the evidence. I am satisfied that the petitioner company meets the technical requirements of the *CCAA* in terms of the amounts that must be outstanding in accordance with s. 3(1) of the *CCAA*. Further, the petitioner company has filed the appropriate documentation, including its projected cash flow. It is beyond question here that the petitioner company is insolvent and is able, as a "debtor company", to take advantage of the provisions of the legislation.

I have the pre-filing report of the proposed Monitor, KPMG Inc., dated September 19, 2012. KPMG was just recently retained on September 18, 2012 and has provided comments on certain matters as are being considered by the court today. I would, however, note that KPMG has only limited information at this time given its recent involvement, and thus its ability to provide an independent opinion on certain issues is limited.

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I am satisfied that the stay of proceedings and the other ancillary relief that would typically be granted in an initial order are appropriate at this time.

The more contentious issue on this application relates to the application by the petitioner company to approve Debtor-in-Possession ("DIP") financing. The proposed DIP financing is from Credit Suisse, who is, as previously stated, an existing secured creditor. The proposal is for a $35 million facility. The intention of the petitioner company is that $25 million would be used in respect to the South African or Burnstone mine operations and $10 million would be used with respect to the U.S. operations at the Hollister Mine.

It is apparent from the evidence that these funds are urgently needed by the South African entities for the care and maintenance program that is currently underway in respect of the Burnstone mine. I have been advised by the petitioner that it proposes to use $7 million of the DIP proceeds to pay severance to the approximately 1,000 miners who were recently laid off. The suggestion is that recent events in South Africa with respect to other mining operations point to the volatility of the situation generally. It is submitted by Mr. Reardon that the severance payments are needed, essentially, to buy labour peace and ensure that matters are satisfactorily settled with the employee miners in South Africa.

With respect to the $10 million intended for the Hollister mining operations, similarly, it is submitted that those monies are needed for the ongoing operations in Nevada. The evidence indicates that the gold being produced by that mine would not otherwise be sufficient to generate revenue to meet its ongoing obligations.

The Credit Suisse DIP facility raises various issues. There are two rather unusual aspects of the proposed DIP security which must be addressed.

The first is that it is proposed that the Credit Suisse agent be entitled to a fee of 15% of net proceeds that might be realized from the South African assets. Assuming a book value of $650 million, Mr. Rubin advises me that that could result in a fee of $60 million. This significant fee is unusual in respect of typical DIP financing terms.

The second and even more contentious and unusual aspect of the proposed DIP financing relates to Credit Suisse's requirement that, in addition to the $35 million DIP proceeds being secured against the assets of the petitioner company, there is a further requirement that Great Basin Gold Inc. (which I earlier identified as being the American parent company) provide a direct guarantee and security for the existing facility owed to Credit Suisse in respect of the South African operations. That would include the US$150 million term loan and the US$14 million hedge facility.

Some opposition was taken to the terms of the DIP facility by counsel acting for a portion of an unsecured note holder group, which is owed approximately $126 million by the petitioner company. Mr. Sandrelli, who has attended here today, acts on behalf of approximately 36% of those note holders, or those holding approximately $45 million of the overall debt. This application was brought without notice to this group, but in any event the group got wind of it and has attended and made some submissions to the court. The clients represented here today submit that the court should not approve the DIP facility as proposed, and specifically should not grant any order that would authorize the further guarantee and security intended to be granted by Great Basin Gold Inc. in respect of the existing Credit Suisse loans owed in relation to the South African operations.

I am advised that the granting of the security by Great Basin Gold Inc. does not result in any breach of the covenants that were negotiated by the note holder group in their documentation. It also bears noting that the granting of the guarantee and security by Great Basin Gold Inc. is not a matter that would be prohibited under s. 11.2(1) of the *CCAA* on this application, which now specifically provides that security for DIP financing as against the debtor company's assets may not secure an obligation that exists before the order is made. Great Basin Gold Inc. is not a "debtor company" as contemplated by that section.

Mr. Sandrelli quite rightly points out that this further guarantee and security to be provided by Great Basin Gold Inc. may have the effect of diluting the note holders' recovery at the level of the petitioner company, That arises because if there is a call on the guarantee and security against Great Basin Gold Inc., that would essentially trap that debt amount as against the value of the U.S. assets before the value of those assets could flow upstream to the parent company, namely the petitioner company,

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through its shares of Great Basin Gold Inc. Accordingly, but for this new guarantee and security, the note holders would have ordinarily shared in that recovery along with Credit Suisse, who currently holds only a guarantee from the petitioner company for the existing debt.

The circumstances of the DIP and these unusual features of the DIP have been addressed by Mr. van Vuuren in his affidavit. In particular, Mr. van Vuuren says that the directors have carefully considered the effect of granting Great Basin Gold Inc.'s guarantee and security. Of particular importance is his evidence, which was confirmed by Mr. Rubin's submissions, that Credit Suisse is not willing to advance this new DIP facility without this guarantee and security being in place.

It is not particularly clear at this time whether this new guarantee and security by Great Basin Gold Inc. will ever be called upon, given that there does appear to be significant value in the South African mine at this time. I do, however, recognize that there is no certainty that the value of the South African mine will be sufficient to repay the existing amount owing by Credit Suisse at the end of the day.

In any event, for all that these unusual features exist with respect to the DIP facility, the fact remains that without these funds there will be significant and, I would stress, deleterious consequences to the entire corporate group. The evidence is that without this additional financing there will be significant consequences with respect to the South African mine in respect to the care and maintenance program. The evidence is also uncontroverted that without this additional financing it will "likely result in an uncontrolled shutdown of the Hollister Mine". Both of those negative consequences would no doubt be detrimental to all of the stakeholders, including the note holder group, a portion of which is represented on this application.

The proposed Monitor has also commented on these unusual features of the DIP facility, although again, the proposed Monitor points out that they have really not had an opportunity, given their recent involvement, to provide the court with any further background or other information that might assist in terms of assessing the appropriateness of the DIP facility at this time.

Mr. van Vuuren has stated in his evidence that the petitioner company has attempted to find appropriate DIP financing, and this happens to be the only option available to the petitioner company at this time. So, for all that this particular DIP financing may have some unusual and negative features, it appears to be the only course available to the petitioner company.

I am required to consider s. 11.2(1) of the *CCAA* and the factors set out in s. 11.2(4). I am satisfied that all of those factors have been addressed to the extent that they support the granting of the DIP facility. As Mr. Reardon has pointed out, without this DIP facility there will be extremely negative consequences to both mining operations, which are the lifeblood of this corporate group. In all, whether it is viewed from the perspective of the Canadian parent, the U.S. corporate group, or the South African corporate group, negative consequences will result if this financing is not obtained.

Accordingly, I am satisfied that the DIP order is appropriate at this time and I approve that.

I would hope that in the future (and that would be in the immediate future) that the parties, including the petitioner company and Credit Suisse, would sit down with the note holder group and satisfy or attempt to satisfy the note holder group in terms of the appropriateness of the DIP financing. Of course, a critical aspect of that discussion would be the value or potential value of the South African mine to the extent of assessing the risk of this guarantee by Great Basin Gold Inc. being called upon in any event. I am not making any order in that respect, but am simply suggesting, as is typical in these files, that the parties enter into some meaningful discussions concerning the situation. I appreciate that Mr. Sandrelli is, as are other people in this courtroom, presently working with a lack of information. Hopefully, in the fullness of time after this hearing, that can be remedied towards possibly satisfying the note holders going forward.

The order sought is therefore granted with some amendments.

The first change is a slight reworking of para. 38 to satisfy Mr. Sandrelli's concern in respect of what exactly is being secured against the petitioner's assets. Accordingly, the following will be added to that paragraph: "For greater certainty, the DIP Lender's Charge shall not secure any obligation under the Burnstone Advisory Agreement as defined in the Term Sheet". This would relate to the 15% fee.

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The second change will be that any party may apply to amend or vary this order on not less than two business days' notice. I acknowledge Mr. Sandrelli's statement that there may potentially be an application to set aside the order relating to the DIP facility given the fact that this application is essentially being heard on an *ex parte* basis.

Lastly, the word "defence" has been added to para. 23 such that the indemnity for the directors and officers will be clarified such that it relates to "legal defence costs" as opposed to "legal costs".

The date of the comeback hearing will be 9:00 a.m. on October 10, 2012.

"Fitzpatrick J."

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2022 ONSC 6581, 2022 CarswellOnt 17388

2022 ONSC 6581
Ontario Superior Court of Justice [Commercial List]

Springer Aerospace Holdings Limited

2022 CarswellOnt 17388, 2022 ONSC 6581

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SPRINGER AEROSPACE HOLDINGS LIMITED AND 1138969 ONTARIO INC.

Penny J.

Heard: November 23, 2022
Judgment: November 24, 2022
Docket: CV-22-00690657-00CL

Counsel: Sharon Kour, Caitlin Fell, Joel Turgeon, for Applicants
Miranda Spence, Matilda Lici, for Proposed Monitor, MNP
Haddon Murray, Katherine Yurkovich, for Caisse Desjardins Ontario Credit Union Inc.
Vern DaRe, for Proposed DIP Lender

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.d Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.a Approval by court
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.7 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Jurisdiction — Court
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Monitor
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"
Table of Authorities
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 2 "trustee or licensed trustee" — referred to

s. 244 — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — considered

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s. 10(2) — referred to

s. 11 — referred to

s. 11.001 [en. 2019, c. 29, s. 136] — referred to

s. 11.02(1) [en. 2005, c. 47, s. 128] — referred to

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

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.7(2) [en. 1997, c. 12, s. 124] — referred to

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

s. 11.51(4) [en. 2005, c. 47, s. 128] — referred to

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

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 137(2) — referred to

***Penny J.*:**

Overview and Issues

1 This is an application for relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36. It is made by 1138969 Ontario Inc. (o/a Springer Aerospace) (which I will refer to as "Springer") and its sole shareholder, Springer Aerospace Holdings Limited (referred to as "Holdco"). Following the hearing, I granted the initial order with reasons to follow. These are the reasons.

2 Springer operates one of the largest aircraft maintenance, repair and overhaul businesses in Canada, dating back to 1972. Springer is one of the only "one-stop-shops" for aircraft maintenance in Canada. It is located in Echo Bay, near Sault Ste. Marie, Ontario. Springer employs about 100 people. It is the second largest employer in the region. The loss of employment and income for 100 households in a town of 1,600 residents would have serious implications in the local area. Springer is the only aerospace business in Northern Ontario, such that it is unlikely that the company's employees would find similar employment in the area. Springer provides maintenance services to most of the airlines servicing the Northern Ontario region, including the fly-in and Indigenous communities located there. Air transport is critical for the delivery of food, fuel and medical supplies and for the provision of air ambulance services to these remote areas.

3 Springer experienced major disruptions to its business as a result of the COVID-19 shutdown and resulting impact on the travel and aviation industry. The pandemic exacerbated existing operational inefficiencies following a rapid expansion by the company and growth initiatives designed to increase top line revenue.

4 The Applicants' primary secured creditor, Caisse Desjardins Ontario Credit Union Inc., has delivered demands and notices under s. 244 of the BIA for amounts advanced by Desjardins under a line of credit and two term loans. In total, $5,747,228.31 was outstanding to Desjardins as of July 2022. Springer is unable to pay the amounts outstanding to Desjardins. In addition, Springer has accrued payables in the ordinary course of its business, including unsecured trade payables in excess of $1.6 million and property taxes of $186,000.

5 The Applicants require interim financing to meet their ordinary course obligations. As of November 22, 2022, their cash position has deteriorated leaving a cash balance of only $1,400. Absent an immediate cash infusion, Springer will not be able to make payroll this week. Desjardins declined the opportunity to be the provider of the needed interim financing. Although

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Desjardins did not oppose the initial order, it did not agree to it either. Desjardins has made it concerns known, coalescing essentially around two major issues: i) the extent of the loss of its priority due to its first charge being "primed" by proposed charges under the CCAA; and (ii) the delay in realizing on its loan (and attendant increased risk of deterioration of its security position) if the attempt at restructuring is not formulated and executed promptly and successfully.

6 With this context in mind, the issues on this application are:

a. Does the court have jurisdiction to grant the relief requested under the CCAA and should a stay of proceedings be granted?

b. Should the court approve the DIP term sheet and grant the charges sought?

c. Should the court permit payment of pre-filing amounts on the terms requested?

d. Should MNP be appointed as Monitor? and

d. Should the court seal the confidential affidavit?

Jurisdiction

7 The evidence satisfies me that the Applicants are unable to meet their obligations as they become due. They have accrued payables in the ordinary course of business that they cannot meet and are unable to pay amounts owed to secured parties.

8 I am also satisfied that it is appropriate for both Applicants to be included as applicants in these proceedings as "affiliated companies" under the CCAA. The Applicants' business is fully integrated. Holdco owns the premises and the facilities where the business is operated. The Applicants have jointly and severally cross-guaranteed and cross-collateralized their obligations to Desjardins and two other secured creditors, the Northern Ontario Heritage Fund and the Development Corporations.

9 The Applicants are corporations collectively owing over $5 million in outstanding liabilities. They have delivered the documents and financial statements required under s. 10(2) of the CCAA.

Stay

10 Section 11.02(1) of the CCAA provides that the court may order a stay of proceedings on an initial CCAA application for a period of not more than 10 days. Section 11.001 of the CCAA provides that relief granted on an initial CCAA application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that initial 10-day period.

11 This is not proposed to be a "liquidating CCAA"; it is an attempt to operationally and financially restructure. It is clear that no effective restructuring could be achieved if creditors were permitted to enforce against either of the Applicants. The complete cessation of the Springer business or even a major disruption would likely be irreparable. Springer has built its business up since 1972. It has trained and retained a skilled workforce through the COVID-19 pandemic. It has developed a reputation and expertise in a specialized industry and its customers are large corporations and governments who rely on Springer's services. The Monitor concurs that the Applicants represent a viable business. While the CCAA filing may cause some disruption to the business, a shut down or liquidation would likely effectively terminate operations with little or no chance of recovery.

12 At first blush, the evidence suggests that the value of the land, in addition to the equipment and other assets of the Applicants, likely exceeds liabilities owing to Desjardins. As noted above, Desjardins does not, with reservations, oppose the initial order at this time.

13 The Applicants have worked with MNP, the proposed Monitor, to assess and determine appropriate operational restructuring steps to execute during the stay period. In addition to an operational restructuring, the Applicants intend to implement a SISP. The business needs time, however, to properly expose the assets to market on a going concern basis.

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14 In addition, public policy weighs in favour of a going-concern restructuring. Springer is a significant local employer. It is also operating in a critical sector that is vital to the fly-in and Indigenous communities in Northern Ontario.

The Charges

The DIP

15 Section 11.2(4) of the CCAA establishes a non-exhaustive list of criteria that the court must consider in deciding whether to grant a DIP lender's charge: the period during which the Applicants are expected to be subject to CCAA proceedings, how the Applicants' business and financial affairs are to be managed during the proceedings, whether the Applicants' management has the confidence of its major creditors, whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the Applicants, the nature and value of the Applicants' property, whether any creditor would be materially prejudiced as a result of the security or charge, and whether the monitor supports the charge. DIP financing may be approved even if it potentially prejudices some creditors, as long as the prejudice is outweighed by the benefit to all stakeholders.

16 While management no longer enjoys the confidence of Desjardins, I am satisfied, at this stage of the application for an initial order, that the factors, considered as a whole, favour the grant of the relief sought. In particular, where the funding is sought on an interim basis, the Court must consider if the terms of the loan are limited to what is reasonably necessary for the continued operations of the company.

17 The initial proposed DIP loan and charge is $600,000. The Applicants need liquidity to continue their operations during the restructuring period. According to the cash flows, the Applicants need to draw on the DIP loan to meet their payroll obligations this week. The proposed amount is roughly tailored to the initial 10 days. A first charge is a condition of advancing the DIP loan. The terms of the DIP loan term sheet are typical for such facilities approved in similar matters before the Commercial List. The DIP lender's charge will not secure any obligations existing before the initial order is made, satisfying the terms set out in s. 11.2(1) of the CCAA. The Monitor supports the approval of the DIP loan and the DIP lenders charge in the circumstances.

Administration Charge

18 The Court has jurisdiction to grant an administration charge under s. 11.52 of the CCAA. I am to consider: the size and complexity of the business being restructured, the proposed role of the beneficiaries of the charge, whether there is an unwarranted duplication of roles, whether the quantum of the proposed charge appears to be fair and reasonable, the position of the secured creditors likely to be affected by the charge, and the position of the Monitor.

19 The success of the Applicants' restructuring is dependent on the involvement of the Monitor and legal counsel. Those roles are not duplicative. While estimating the quantum of an administration charge is "an inexact exercise", the quantum of the administration charge sought is commensurate with the complexity of the Applicants' business and anticipated restructuring. The Applicants have incurred fees leading to this Application and are forecast to incur further fees in connection with the restructuring, including to prepare for the comeback hearing, communicating with employees and stakeholders following the initial filing, and complying with statutory notices, mailings and communications. It is appropriate for the Court to grant the initial administration charge sought of $80,000.

The Directors' Charge

20 The Applicants currently have no director and officer liability insurance. Obtaining director and officer insurance at this stage is unlikely to be within the realm of reasonable possibility.

21 To ensure the stability of the business during the restructuring period, the Applicants need the ongoing assistance of their directors and officers, who have considerable institutional knowledge and specialized expertise. The proposed directors' charge is for the maximum amount of $165,000, which is equivalent to approximately two weeks of the Applicants' payroll, including source deductions. That is the only reasonably anticipated potential exposure of directors and officers for the initial 10-day

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period of these CCAA proceedings. The proposed directors' charge provides assurance to employees that directors' liability for unpaid wages and vacation pay will be satisfied.

22 The directors' charge does not prime Desjardins' security and Desjardins suffers no prejudice. The proposed directors' charge secures only obligations and liabilities incurred after the commencement of the proceedings and does not apply to liability incurred as a result of gross negligence or wilful misconduct, which satisfies the requirements of s. 11.51(1) and 11.51(4) of the CCAA.

23 Finally, the Monitor supports the Applicants' request for the directors' charge.

24 The directors' charge is approved in the amount of $165,000.

Pre-filing Amounts Owed to Key Suppliers

25 Courts have often granted orders under s. 11 of the CCAA allowing applicants to pay pre-filing amounts to critical suppliers with the consent of the monitor. In doing so, courts have considered: whether the goods and services concerned are integral to the business, the applicants' need for the uninterrupted supply of the goods or services, the monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities are appropriate, and the effect on the applicants' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

26 Given Springer's location in Northern Ontario and the specialized nature of the aerospace business, Springer has limited vendors who are able to supply the specific products and services that Springer requires. Any interruption of supply would have a material adverse effect on the business. Springer is particularly vulnerable to interruptions as it does not stockpile significant inventory of parts and supplies in the ordinary course.

27 It is appropriate that the Applicants be entitled but not required to pay, with the consent of the Monitor, amounts owing for goods or services supplied to the Applicants prior to the date of the initial order, if these payments are necessary to avoid disruption to the operations of the Applicants' business during these proceedings.

Appointment of MNP as Monitor

28 The Applicants propose to have MNP appointed as the Monitor. MNP is a "trustee" within the meaning of subsection 2(1) of the BIA, is established and qualified, and has consented to act as Monitor. The involvement of MNP as the court-appointed Monitor will lend stability and assurance to Springer's stakeholders. MNP is not subject to any of the restrictions set out in s. 11.7(2) of the CCAA.

The Sealing Order

29 The confidential affidavit filed in this application contains appraisals of the Applicants' property appended as exhibits. This is sensitive information, the confidentiality of which must be preserved until a plan of compromise or other restructuring is completed. This is to preserve the ability of the Applicants and the Monitor to maximize value during the restructuring process.

30 This court has jurisdiction to make the sealing orders sought under s. 137(2) of the *Courts of Justice Act*. There is a public interest in maximizing recovery in an insolvency that goes beyond each individual case. The relief sought meets the test in *Sherman Estate* and is appropriate in the circumstances.

Comeback Hearing

31 The comeback hearing shall take place on December 2, 2022 at 11:00 AM

End of Document

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

Northstar Aerospace Inc., Re

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

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C 36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Northstar Aerospace, Inc., Northstar Aerospace (Canada) Inc., 2007775 Ontario Inc. and 3024308 Nova Scotia Company Applicants

Morawetz J.

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

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

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.7 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Applicant companies obtained protection from their creditors under Companies' Creditors Arrangement Act (CCAA) — Court-appointed monitor of applicants brought motion for approval of adjudication process — Monitor also sought final determination as to whether two claims were valid claims for which former directors and officers of applicants ("D&Os") were indemnified pursuant to indemnity contained in initial order — If they were so indemnified, D&Os may have been entitled to benefit of certain funds held in reserve by monitor (D&O charge reserve) to satisfy such claims — Two claims in issue were described in proofs of claim filed by provincial Crown as represented by Ministry of Environment (MOE) and by other party on behalf of certain of D&Os — Motion granted; adjudication process approved; D&Os were not entitled to benefit of D&O charge reserve; D&O charge reserve was to be paid to pre-filing agent — To determine that proofs of claim were claims for which D&Os were entitled to be indemnified under Director's Indemnity would wrongly and inequitably affect priority of claims as between Ministry and bank — It would lead to inconsistent results if MOE could, in CCAA proceedings, improve its unsecured position against bank by issuing Director's Order after commencement of CCAA proceedings, based on environmental condition which occurred long before CCAA proceedings — This would result in Ministry achieving indirectly in these CCAA proceedings that which it could not achieve directly — In CCAA proceedings, Ministry claim was unsecured claim and did not entitle Ministry to obtain remedy sought.
Table of Authorities
Cases considered by *Morawetz J.*:
Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — referred to
Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115, 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) — referred to

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

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

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

Statutes considered:

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

Generally — referred to

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

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

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

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

Generally — referred to

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

***Morawetz J.*:**

Motion Overview

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

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

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

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

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

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

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Claims"), for costs incurred and to be incurred by the MOE in carrying out certain remediation activities originally imposed on the Applicants in an Ontario MOE Director's Order issued under the *Environmental Protection Act*, R.S.O. 1990, c. E. 19 (the "EPA") on March 15, 2012 (the "March 15 Order"). The basis for the D&Os' purported liability is a future Ontario MOE Director's Order (the "Future Director's Order"), which the MOE intends to issue against the D&Os. According to the Monitor's counsel, the Future Director's Order will require the D&Os to conduct the same remediation activities previously required of the Applicants.

7 The WeirFoulds proof of claim (the "WeirFoulds Proof of Claim") responds to the threat of the Future Director's Order. It asserts a Post-Filing D&O Claim (the "WeirFoulds Post-Filing D&O Claim") by the individual WeirFoulds D&Os for contribution and indemnity against each other, and against the former directors and officers of the predecessors of Northstar Inc., in respect of any liability that they may incur under the Future Director's Order.

8 Neither the MOE nor the D&Os object to the Monitor's proposed adjudication procedure.

Background to the CCAA Proceedings

9 On May 14, 2012, the Applicants obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C. 36 ("CCAA"); Ernst & Young Inc. was subsequently appointed as the Monitor (the "CCAA Proceedings").

10 A number of background facts have been set out in *Northstar Aerospace Inc., Re*, 2012 ONSC 4423 (Ont. S.C.J. [Commercial List]) (*Northstar*) and *Northstar Aerospace Inc., Re*, 2012 ONSC 6362 (Ont. S.C.J. [Commercial List]). A number of the issues with respect to MOE's claims against the Applicants have been covered in a previous decision. See *Northstar*, *supra.*

Directors' Indemnification and Directors' Charge

11 The Initial Order provided that the Applicants would grant the Directors' Indemnity, indemnifying the D&Os against obligations and liabilities that they may incur as directors and officers of the Applicants after the commencement of the CCAA Proceedings.

12 Paragraph 23 of the Initial Order provides:

> 23. This court orders that the CCAA Entities shall indemnify their directors and officers against obligations and liabilities that they may incur as directors and officers of the CCAA entities after the commencement of the within proceedings, except to the extent that, with respect to any director or officer the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

13 Paragraph 24 of the Initial Order further provides that the D&Os and the chief restructuring officer would have the benefit of a charge, in the amount of US$1,750,000, on the Applicants' current and future assets, undertakings and properties, to secure the Directors' Indemnity (the "Directors' Charge").

14 The Directors' Charge, as established in the Initial Order, was fixed ahead of all security interests in favour of any person, other than the "Administration Charge", "Critical Suppliers' Charge" and the "DIP Lenders' Charge".

15 The statutory basis for the Directors' Charge is set out in section 11.51 of the CCAA, which reads as follows:

> 11.51(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge - in an amount that the court considers appropriate - in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> 11.51(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

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16 Any order under this provision affects, or potentially affects, the priority status of creditors. It is through this lens that the court considers motions. The order is discretionary in nature, is extraordinary in nature and should be, in my view, applied restrictively as it alters the general priority regime affecting secured creditors. In this case, the order was made and it has priority over Fifth Third Bank.

D&O Claims

17 On August 2, 2012, the Claims Procedure Order was issued to solicit the submissions of Proofs of Claim by the claims bar date of October 23, 2012 (the "Claims Bar Date") in respect of all "D&O Claim[s]".

18 As indicated by the Monitor's counsel, the definition of a "D&O Claim" is very broad. It includes both claims that arose prior to June 14, 2012 (pre-filing D&O claims) and claims that arose from and after June 14, 2012 (post-filing D&O claims). It also potentially includes both post-filing D&O claims which are secured by the Directors' Charge and post-filing D&O claims which are not secured by the Directors' Charge.

19 Paragraph 25 of the Claims Procedure Order specifically recognizes this distinction:

> 25. This court orders that no Post-Filing D&O Claim shall be paid by the Monitor from the D&O Charge Reserve without the consent of the Pre-Filing Agent and the CRO Counsel and D&O Counsel or further Order of the court and the determination that a claim is a Post-Filing D&O Claim does not create a presumption that such D&O Claim is entitled to be paid by the Monitor from the D&O Charge Reserve.

20 The MOE D&O Claims concurrently asserts the MOE Pre-Filing D&O Claim and the MOE Post-Filing D&O Claim for the same amounts, namely:

> (a) $66,240.36 for costs incurred by the MOE to carry out the remediation activities described in the March 15 Order up to the date when the MOE Proof of Claim was filed;
>
> (b) $15 million for future costs to be incurred by the MOE to carry out the remediation activities described in the March 15 Order; and
>
> (c) a presently unknown amount required to conduct additional environmental remediation work necessary to decontaminate the Site and the Bishop Street Community.

21 As there are no funds available for distribution to unsecured pre-filing creditors in the CCAA Proceedings, the Monitor appropriately has not considered the validity of the MOE Pre- Filing D&O Claim. This motion, from the Monitor's standpoint, therefore only addresses the MOE Post-Filing D&O Claim.

22 The WeirFoulds Proof of Claim provides that:

> This proof of claim is filed in order to preserve the right to commence:
>
> (1) any and all claims over that any of the [WeirFoulds D&Os] may have against each other; and
>
> (2) any and all claims that any of the [WeirFoulds D&Os] may have against any former director or officer of Northstar Aerospace, Inc., or predecessor companies, for contribution or indemnity, based upon any applicable cause of action in law or in equity, in relation to any liability that may be found to exist against any of the [WeirFoulds D&Os] in connection with the proofs of claim filed in the within proceedings by the Ontario Ministry of the Environment, dated October 19, 2012.

23 For the purpose of resolving the entitlement of any claimant to the D&O Charge Reserve, paragraph 22 of the Claims Procedure Order allows the Monitor and certain other parties to bring a motion seeking approval of an adjudication procedure

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

Issues to Consider

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

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

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

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

Analysis and Conclusion

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

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

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

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

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

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31 The Yuen affidavit goes on to identify the specific obligations and liabilities for which the Directors' Charge was requested, including liability for unpaid wages, pension amounts, vacation pay, statutory employee deductions and HST. At paragraph 143 of his affidavit, Mr. Yuen states:

> I am advised by Daniel Murdoch of Stikeman Elliott LLP, counsel to the CCAA Entities, and do verily believe, that in certain circumstances directors can be held liable for certain obligations of a company owing to employees and government entities. As at May 18, 2012, the CCAA Entities were potentially liable for some or all of unpaid wages, pension amounts, vacation pay, statutory employee deductions, and HST (Harmonized Sales Tax) of approximately CDN $1.65 million ...

32 The Monitor's counsel submits that the quantum of the Directors' Charge was tailored to the Applicants' existing liability for such amounts.

33 The scope of a section 11.51 charge is limited in several ways:

> (a) section 11.51 does not authorize the creation of a charge in favour of any party other than a director or officer (or chief restructuring officer) of the companies under CCAA protection;
>
> (b) section 11.51 does not authorize the creation of a charge for purposes other than to indemnify the directors and officers against obligations and liabilities that they may incur as a director or officer of the company after the commencement of its CCAA Proceedings; and
>
> (c) section 11.51(4) requires the court to exclude from the section 11.51 charge the obligations and liabilities of directors and officers incurred through their own gross negligence or wilful misconduct.

34 In my view, it would be inappropriate to determine that the Proofs of Claim are claims for which the D&Os are entitled to be indemnified under the Directors' Indemnity, as doing so would wrongly and inequitably affect the priority of claims as between the MOE and the Fifth Third Bank.

35 In the context of the MOE claims against the Applicants in these CCAA proceedings, it has already been determined, in *Northstar*, *supra*, that the MOE claims are unsecured and subordinate to the position of Fifth Third Bank. It would be a strange outcome, and invariably lead to inconsistent results, if the MOE could, in the CCAA Proceedings, improve its unsecured position against Fifth Third Bank by issuing a Director's Order after the commencement of CCAA Proceedings, based on an environmental condition which occurred long before the CCAA Proceedings. This would result in the MOE achieving indirectly in these CCAA Proceedings that which it could not achieve directly.

36 Simply put, the activity that gave rise to the MOE claims occurred prior to the CCAA proceedings. It is not the type of claim to which the Directors' Charge under section 11.51 responds. Rather, in the CCAA proceedings, it is an unsecured claim and does not entitle the MOE to obtain the remedy sought on this motion. The fact that the MOE seeks this remedy through the D&Os does not change the substance of the position.

37 The situation facing the Applicants, the Monitor, Fifth Third Bank, and others affected by the Directors' Charge, has to be considered as part of the CCAA Proceedings. In my view, it would be highly inequitable to create a parallel universe, wherein certain MOE claims as against the Applicants are treated as unsecured claims and MOE D&O Claims and the WeirFoulds Post-Filing D&O Claim are treated as secured claims with respect to the Directors' Charge.

38 It could be that the MOE has a remedy against the D&Os; however, any remedy they may have does not provide recourse against the D&O Charge in these CCAA Proceedings. Nevertheless, it remains open for the MOE to pursue its claims against the D&Os on the motion returnable on April 18, 2013.

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Order

39 In the result, I grant the Monitor's motion, approve the aforementioned adjudication process, and approve the activities of the Monitor as described in the Seventh Report of the Monitor dated November 7, 2012. I also direct the following:

(1) The MOE Post-Filing D&O Claim is not a claim for which the D&Os are indemnified under the Directors' Indemnity;

(2) The WeirFoulds Post-Filing D&O Claim is not a claim for which the D&Os are indemnified under the Directors' Indemnity; and

(3) The US$1,750,000 held by the Monitor in respect of the D&O Charge Reserve be paid to the Pre-Filing Agent.

Motion granted.

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2014 ONSC 494, 2013 CarswellOnt 18630, 12 C.B.R. (6th) 290, 236 A.C.W.S. (3d) 820

KeyCite treatment
Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): The Cannabist Company Holdings Inc. et al | 2026 ONSC 1849, 2026 CarswellOnt 4767 | (Ont. S.C.J. [Commercial List], Mar 24, 2026)

2014 ONSC 494
Ontario Superior Court of Justice [Commercial List]

Jaguar Mining Inc., Re

2013 CarswellOnt 18630, 2014 ONSC 494, 12 C.B.R. (6th) 290, 236 A.C.W.S. (3d) 820

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Jaguar Mining Inc., Applicant

Morawetz R.S.J.

Heard: December 23, 2013
Judgment: December 23, 2013
Written reasons: January 16, 2014
Docket: CV-13-10383-00CL

Counsel: Tony Reyes, Evan Cobb for Applicant, Jaguar Mining Inc.
Robert J. Chadwick, Caroline Descours for Ad Hoc Committee of Noteholders
Joseph Bellissimo for Secured Lender, Global Resource Fund
Jeremy Dacks for Proposed Monitor, FTI Consulting Canada Inc.
Robin B. Schwill for Special Committee of the Board of Directors

Subject: Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.a Grant and length of stay
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Miscellaneous
Effect of stay on subsidiaries — Debtor company was holding company for gold mining business Debtor brought application for protection under Companies' Creditors Arrangement Act for itself and subsidiaries Application granted — Debtor wished to affect recapitalization — Recapitalization was supported by 93 per cent of noteholders, which formed bulk of debt — Debtor was insolvent and facing liquidity crisis — Extending stay to subsidiaries was reasonable as debtor was dependant on them for income — Director's charge granted .
Table of Authorities
Cases considered by *Morawetz J.*:
Calpine Canada Energy Ltd., Re (2006), 19 C.B.R. (5th) 187, 2006 ABQB 153, 2006 CarswellAlta 446 (Alta. Q.B.) — referred to
Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115, 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) — referred to
Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

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SkyLink Aviation Inc., Re (2013), 2013 CarswellOnt 2785, 2013 ONSC 1500, 3 C.B.R. (6th) 150 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

Generally — referred to

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

Generally — referred to

s. 10(2) — considered

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

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

s. 22(2) — considered

APPLICATION by debtor for prection under *Companies' Creditors Arrangement Act*.

***Morawetz J.* (orally):**

1 On December 23, 2013, I heard the CCAA application of Jaguar Mining Inc. ("Jaguar") and made the following three endorsements:

> 1. CCAA protection granted. Initial Order signed. Reasons will follow. It is expected that parties will utilize the e-Service Protocol which can be confirmed on comeback motion. Sealing Order of confidential exhibits granted.
>
> 2. Meeting Order granted in form submitted.
>
> 3. Claims Procedure Order granted in form submitted.

2 These are my reasons.

3 Jaguar sought protection from its creditors under the *Companies' Creditors Arrangement Act* ("CCAA") and requested authorization to commence a process for the approval and implementation of a plan of compromise and arrangement affecting its unsecured creditors.

4 Jaguar also requested certain protections in favour of its wholly-owned subsidiaries that are not applicants (the "Subsidiaries" and, together with the Applicant, the "Jaguar Group").

5 Counsel to Jaguar submits that the principal objective of these proceedings is to effect a recapitalization and financing transaction (the "Recapitalization") on an expedited basis through a plan of compromise and arrangement (the "Plan") to provide a financial foundation for the Jaguar Group going forward and additional liquidity to allow the Jaguar Group to continue to work towards its operational and financial goals. The Recapitalization, if implemented, is expected to result in a reduction of over $268 million of debt and new liquidity upon exit of approximately $50 million.

6 Jaguar's senior unsecured convertible notes (the "Notes") are the primary liabilities affected by the Recapitalization. Any other affected liabilities of Jaguar, which is a holding company with no active business operations, are limited and identifiable.

7 The Recapitalization is supported by an Ad Hoc Committee of Noteholders of the Notes (the "Ad Hoc Committee of Noteholders") and other Consenting Noteholders, who collectively represent approximately 93% of the Notes.

8 The background facts are set out in the affidavit of David M. Petrov sworn December 23, 2013 (the "Petrov Affidavit"), the important points of which are summarized below.

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9 Jaguar is a corporation existing under the *Business Corporations Act*, R.S.O. 1990 c. B.16, with a registered office in Toronto, Ontario. Jaguar has assets in Canada.

10 Jaguar is the public parent corporation of other corporations in the Jaguar Group that carry on active gold mining and exploration in Brazil, employing in excess of 1,000 people. Jaguar itself does not carry on active gold mining operations.

11 Jaguar has three wholly-owned Brazilian operating subsidiaries: MCT Mineração Ltda. ("MCT"), Mineração Serras do Oeste Ltda. ("MSOL") and Mineração Turmalina Ltda. ("MTL") (and, together with MCT and MSOL, the "Subsidiaries"), all incorporated in Brazil.

12 The Subsidiaries' assets include properties in the development stage and in the production stage.

13 Jaguar has been the main corporate vehicle through which financing has been raised for the operations of the Jaguar Group. The Subsidiaries have guaranteed repayment of certain funds borrowed by Jaguar.

14 Jaguar has raised debt financing by (a) issuing notes, and (b) borrowing from Renvest Mercantile Bank Corp. Inc., through its global resource fund ("Renvest").

15 In aggregate, Jaguar has issued a principal amount of $268.5 million of Notes through two transactions, known as the "2014 Notes" and the "2016 Notes".

16 Interest is paid semi-annually on the 2014 Notes and the 2016 Notes. Jaguar has not paid the last interest payment due on November 1, 2013. Under the 2014 Notes, the grace period has lapsed and an event of default has occurred.

17 Jaguar is also the borrower under a fully drawn $30 million secured facility (the "Renvest Facility") with Renvest. The obligations under the Renvest Facility are secured by a general security agreement from Jaguar as well as guarantees and collateral security granted by each of the Subsidiaries.

18 Jaguar has identified another potential liability. Mr. Daniel Titcomb, former chief executive officer of Jaguar, and certain other associated parties, have instituted a legal proceeding against Jaguar and certain of its current and former directors that is currently proceeding in the United States Federal Court. Counsel to Jaguar submits that this lawsuit alleges certain employment-related claims and other claims in respect of equity interests in Jaguar that are held by Mr. Titcomb and others. Counsel to Jaguar advises that Jaguar and its board of directors believe this lawsuit to be without merit.

19 Counsel also advises that, aside from the lawsuit and professional service fees incurred by Jaguar, the unsecured liabilities of Jaguar are not material.

20 The Jaguar Group's mines are not low-cost gold producers and the recent decline in the price of gold has negatively impacted the Jaguar Group.

21 Based on current world prices and Jaguar Group's current level of expenditures, the Jaguar Group is expected to cease to have sufficient cash resources to continue operations early in the first quarter of 2014.

22 Counsel also submits that, as a result of Jaguar's event of default under the 2014 Notes, certain remedies have become available, including the possible acceleration of the principal amount and accrued and unpaid interest on the 2014 Notes. As of November 13, 2013, that principal and accrued interest totalled approximately $169.3 million.

23 Jaguar's unaudited consolidated financial statements for the nine months ending September 30, 2013 show that Jaguar had an accumulated deficit of over $317 million and a net loss of over $82 million for the nine months ending September 30, 2013. Jaguar's current liabilities (at book value) exceed Jaguar's current assets (at book value) by approximately $40 million.

24 I accept that Jaguar faces a liquidity crisis and is insolvent.

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25 Jaguar has been involved in a strategic review over the past two years. Counsel submits that the efforts of Jaguar and its advisors have shown that a comprehensive restructuring plan involving a debt-to-equity exchange and an investment of new money is the best available alternative to address Jaguar's financial issues.

26 Counsel to Jaguar advises that the board of directors of Jaguar has determined that the Recapitalization is the best available option to Jaguar and, further, that the plan cannot be implemented outside of a CCAA proceeding. Counsel emphasizes that without the protection of the CCAA, Jaguar is exposed to the immediate risk that enforcement steps may be taken under a variety of debt instruments. Further, Jaguar is not in a position to satisfy obligations that may result from such enforcement steps.

27 Jaguar requests a stay of proceedings in favour of non-applicant Subsidiaries contending that, because of Jaguar's dependence upon its Subsidiaries for their value generating capacity, the commencement of any proceedings or the exercise of rights or remedies against these Subsidiaries would be detrimental to Jaguar's restructuring efforts and would undermine a process that would otherwise benefit Jaguar Group's stakeholders as a whole.

28 Jaguar also seeks a charge on its current and future assets (the "Property") in the maximum amount of $5 million (a $500,000 first-ranking charge (the "Primary Administration Charge") and a $4.5 million fourth-ranking charge (the "Subordinated Administration Charge") (together, the "Administration Charge")). The purpose of the charge is to secure the fees and disbursements incurred in connection with services rendered both before and after the commencement of the CCAA proceedings by various professionals, as well as Canaccord Genuity and Houlihan Lokey, as financial advisors to the Ad Hoc Committee (collectively, the "Financial Advisors").

29 Counsel advises that the Financial Advisors' monthly work fees (but not their success fees) will be secured by the Primary Administration Charge, while the Financial Advisors' success fees will be secured solely by the Subordinated Administration Charge.

30 Counsel further advises that the Proposed Initial Order contemplates the establishment of a charge on Jaguar's Property in the amount of $150,000 (the "Director's Charge") to protect the directors and officers. Counsel further advises that the benefit of the Director's Charge will only be available to the extent that a liability is not covered by existing directors and officers insurance. The directors and officers have indicated that, due to the potential for personal liability, they may not continue their service in this restructuring unless the Initial Order grants the Director's Charge.

31 Counsel to Jaguar further advises that the proposed monitor is of the view that the Director's Charge and the Administration Charge are reasonable in these circumstances.

32 Jaguar is unaware of any secured creditors, other than those who have received notice of the application, who are likely to be affected by the court-ordered charges.

33 In addition to the Initial Order, Jaguar also seeks a Claims Procedure Order and a Meeting Order, submitting that it must complete the Recapitalization on an expedited timeline.

34 Each of the Claims Procedure Order and Meeting Order include a comeback provision.

35 Having reviewed the record and upon hearing submissions, I am satisfied the Applicant is a company to which the CCAA applies. It is insolvent and faces a looming liquidity crisis. The Applicant is subject to claims in excess of $5 million and has assets in Canada. I am also satisfied that the application is properly before me as the Applicant's registered office and certain of its assets are situated in Toronto, Ontario.

36 I am also satisfied that the Applicant has complied with the obligations of s. 10(2) of the CCAA.

37 I am also satisfied that an extension of the stay of proceedings to the Subsidiaries of Jaguar is appropriate in the circumstances. Further, I am also satisfied that it is reasonable and appropriate to grant the Administration Charge and the Director's Charge over the Property of the Applicant. In these circumstances, I am also prepared to approve the Engagement

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Letters and to seal the terms of the Engagement Letters. In deciding on the sealing provision, I have taken into account that the Engagement Letters contain sensitive commercial information, the disclosure of which could be harmful to the parties at issue. However, as I indicated at the hearing, this issue should be revisited at the comeback hearing.

38 I am also satisfied that Jaguar should be authorized to comply with the pre-filing obligations to the extent provided in the Initial Order.

39 In arriving at the foregoing conclusions, I reviewed the argument submitted by counsel to Jaguar that the stay of proceedings against non-applicants is appropriate. The Jaguar Group operates in a fully integrated manner and depends upon its Subsidiaries for their value generating capacity. Absent a stay of proceedings not only in favour of Jaguar but also in favour of the Subsidiaries, various creditors would be in a position to take enforcement steps which could conceivably lead to a failed restructuring, which would not be in the best interests of Jaguar's stakeholders.

40 The court has jurisdiction to extend the stay in favour of Jaguar's Subsidiaries. See *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *Calpine Canada Energy Ltd., Re*, 2006 ABQB 153, 19 C.B.R. (5th) 187 (Alta. Q.B.); *SkyLink Aviation Inc., Re*, 2013 ONSC 1500, 3 C.B.R. (6th) 150 (Ont. S.C.J. [Commercial List]).

41 The authority to grant the court-ordered Administration Charge and Director's Charge is contained in ss. 11.51 and 11.52 of the CCAA.

42 In granting the Administration Charge, I am satisfied that:

(i) notice has been given to the secured creditors likely to be affected by the charge;

(ii) the amount is appropriate; and

(iii) the charges should extend to all of the proposed beneficiaries.

43 In considering both the amount of the Administration Charge and who should be entitled to its benefit, the following factors can also be considered:

(a) the size and complexity of the business being restructured; and

(b) whether there is an unwarranted duplication of roles.

See *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]).

44 In this case, the proposed restructuring involves the proposed beneficiaries of the charge. I accept that many have played a significant role in the negotiation of the Recapitalization to date and will continue to play a role in the implementation of the Recapitalization. I am satisfied that there is no unwarranted duplication of roles among those who benefit from the proposed Administration Charge.

45 With respect to the Director's Charge, the court must be satisfied that:

(i) notice has been given to the secured creditors likely to be affected by the charge;

(ii) the amount is appropriate;

(iii) the applicant could not obtain adequate indemnification insurance for the director or officer at a reasonable cost; and

(iv) the charge does not apply in respect of any obligation incurred by a director or officer as a result of the director's or officer's gross negligence or wilful misconduct.

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46 A review of the evidence satisfies me that it is appropriate to grant the Director's Charge as requested.

47 Jaguar requested that the Initial Order authorize it to perform certain pre-filing obligations in respect of professional service providers and third parties who provide services in respect of Jaguar's public listing agreement. In the circumstances, I find it to be reasonable that Jaguar be authorized to perform these pre-filing obligations.

48 In view of Jaguar's desire to move quickly to implement the Recapitalization, I have also been persuaded that it is both necessary and appropriate to grant the Claims Procedure Order and the Meeting Order at this time. These are procedural steps in the CCAA process and do not require any assessment by the court as to the fairness and reasonableness of the Plan at this stage.

49 Counsel to Jaguar submits that Jaguar's approach to classification of the affected unsecured creditors is appropriate in these circumstances, citing a commonality of interest. Counsel also references s. 22(2) of the CCAA. For the purposes of today's motion, I am prepared to accept this argument. However, this is an issue that can, if raised, be reviewed at the comeback hearing.

50 In the result, an Initial Order is granted together with a Meeting Order and Claims Procedure Order. All orders have been signed in the form presented.

Application granted.

End of Document

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2012 ONSC 506
Ontario Superior Court of Justice [Commercial List]

Timminco Ltd., Re

2012 CarswellOnt 1263, 2012 ONSC 506, [2012] O.J. No. 472, 217 A.C.W.S. (3d) 12, 85 C.B.R. (5th) 169, 95 C.C.P.B. 48

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Timminco Limited and Bécancour Silicon Inc. (Applicants)

Morawetz J.

Heard: January 12, 2012
Judgment: February 2, 2012
Docket: CV-12-9539-00CL

Counsel: A.J. Taylor, M. Konyukhova, K. Esaw, for Applicants
D.W. Ellickson, for Communications, Energy and Paperworkers' Union of Canada
C. Sinclair, for United Steelworkers' Union
K. Peters, for AMG Advance Metallurgical Group NV
M. Bailey, for Superintendent of Financial Services (Ontario)
S. Weisz, for FTI Consulting Canada Inc.
A. Kauffman, for Investissement Quebec

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure; Labour; Employment; Public
Related Abridgment Classifications
Bankruptcy and insolvency
I Bankruptcy and insolvency jurisdiction
I.1 Constitutional jurisdiction of federal government and provinces
Bankruptcy and insolvency
X Priorities of claims
X.2 Preferred claims
Bankruptcy and insolvency
X Priorities of claims
X.6 Restricted and postponed claims
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 Application of Act
Business associations
V Legal proceedings involving business associations
V.3 Practice and procedure in proceedings involving corporations
V.3.k Confidentiality or sealing orders
Labour and employment law
I Labour law
I.6 Collective agreement
I.6.l Employee benefits
I.6.l.iii Pensions
Pensions
I Private pension plans

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I.1 Administration of pension plans
I.1.g Valuation and funding of plans
I.1.g.ii Funding arrangements

Pensions

I Private pension plans
I.2 Payment of pension
I.2.l Bankruptcy or insolvency of employer
I.2.l.ii Registered plans

Pensions

I Private pension plans
I.2 Payment of pension
I.2.m Special payments

Headnote

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

Super priority of administration charge — Insolvent companies sponsored three pension plans — All pension plans had deficiencies, and terminated plan required increased special payments — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA), including administration charge and directors' and officers' charge (D&O charge) — Insolvent companies did not have funds to make contributions to plans other than normal cost contributions — Insolvent companies brought motion for order suspending obligations to make special payments to pension plans, and granting super priority to two charges — Motion granted — It was necessary and appropriate to grant super priority to administrative charge and D&O charge — Absence of court-ordered super priority charge would frustrate objectives of CCAA — Without assistance of advisors, and in void caused by lack of governance structure, companies would be unable to proceed with restructuring and likely result would be bankruptcy — It was unlikely that advisors would participate in proceedings, and it was neither reasonable nor realistic to expect advisors to participate, unless administration charge was granted to secure their fees and disbursements — Role of advisors was critical to efforts to restructure insolvent companies — Employees were not prejudiced by requested relief since alternative was bankruptcy, which would not be better result for stakeholders.

Bankruptcy and insolvency --- Priorities of claims — Restricted and postponed claims — Officers, directors, and stockholders

Super priority of directors' and officers' charge — Insolvent companies sponsored three pension plans — All pension plans had deficiencies, and terminated plan required increased special payments — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA), including administration charge and directors' and officers' charge (D&O charge) — Insolvent companies did not have funds to make contributions to plans other than normal cost contributions — Insolvent companies brought motion for order suspending obligations to make special payments to pension plans, and granting super priority to two charges — Motion granted — It was necessary and appropriate to grant super priority to administrative charge and D&O charge — Absence of court-ordered super priority charge would frustrate objectives of CCAA — Without assistance of advisors, and in void caused by lack of governance structure, companies would be unable to proceed with restructuring and likely result would be bankruptcy — Directors and officers would be unlikely to continue their service without D&O charge — It was neither reasonable nor realistic to expect directors and officers to continue without requested protection — Employees were not prejudiced by requested relief since alternative was bankruptcy, which would not be better result for stakeholders.

Pensions --- Payment of pension — Bankruptcy or insolvency of employer — Registered plans

Suspension of special payments — Insolvent companies sponsored three pension plans — All pension plans had deficiencies, and terminated plan required increased special payments — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA), including administration charge and directors' and officers' charge (D&O charge) — Insolvent companies did not have funds to make contributions to plans other than normal cost contributions — Insolvent companies brought motion for order suspending obligations to make special payments to pension plans, and granting super priority to two charges — Motion granted — It was necessary and appropriate to grant super priority to administrative charge and D&O charge — It was necessary and appropriate to suspend companies' obligations to make pension contributions, in order to allow companies to restructure or sell business as going concern — Companies had insufficient liquidity to make special payments

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to plans at this time — Employees were not prejudiced by requested relief since likely outcome should proceedings fail was bankruptcy — There was no priority for special payments in bankruptcy — Application of provincial pensions legislation would frustrate insolvent companies' ability to restructure and avoid bankruptcy — Requiring companies to make special payments would deprive them of sufficient funds to continue operating, which was what CCAA was intended to avoid.

Pensions --- Administration of pension plans — Valuation and funding of plans — Funding arrangements

Suspension of special payments — Insolvent companies sponsored three pension plans — All pension plans had deficiencies, and terminated plan required increased special payments — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA), including administration charge and directors' and officers' charge (D&O charge) — Insolvent companies did not have funds to make contributions to plans other than normal cost contributions — Insolvent companies brought motion for order suspending obligations to make special payments to pension plans, and granting super priority to two charges — Motion granted — It was necessary and appropriate to grant super priority to administrative charge and D&O charge — It was necessary and appropriate to suspend companies' obligations to make pension contributions, in order to allow companies to restructure or sell business as going concern — Companies had insufficient liquidity to make special payments to plans at this time — Employees were not prejudiced by requested relief since likely outcome should proceedings fail was bankruptcy — There was no priority for special payments in bankruptcy — Application of provincial pensions legislation would frustrate insolvent companies' ability to restructure and avoid bankruptcy — Requiring companies to make special payments would deprive them of sufficient funds to continue operating, which was what CCAA was intended to avoid.

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

Relationship between Act and provincial pensions acts — Insolvent companies sponsored three pension plans — All pension plans had deficiencies, and terminated plan required increased special payments — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA), including administration charge and directors' and officers' charge (D&O charge) — Insolvent companies did not have funds to make contributions to plans other than normal cost contributions — Insolvent companies brought motion for order suspending obligations to make special payments to pension plans, and granting super priority to two charges — Motion granted — It was necessary and appropriate to grant super priority to administrative charge and D&O charge — It was necessary and appropriate to suspend companies' obligations to make pension contributions, in order to allow companies to restructure or sell business as going concern — Application of provincial pension legislation would frustrate insolvent companies' ability to restructure and avoid bankruptcy — Order requiring company to make special payments in accordance with provincial legislation would frustrate rehabilitative purpose of CCAA if such order would have effect of forcing company into bankruptcy — It was necessary to invoke doctrine of paramountcy such that provisions of CCAA overrode those of provincial pension legislation.

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

Insolvent companies sponsored three pension plans — All pension plans had deficiencies, and terminated plan required increased special payments — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA), including administration charge and directors' and officers' charge (D&O charge) — Insolvent companies did not have funds to make contributions to plans other than normal cost contributions — Insolvent companies brought motion for order suspending obligations to make special payments to pension plans, and granting super priority to two charges — Motion granted — It was necessary and appropriate to grant super priority to administrative charge and D&O charge — It was necessary and appropriate to suspend companies' obligations to make pension contributions, in order to allow companies to restructure or sell business as going concern — Application of provincial pension legislation would frustrate insolvent companies' ability to restructure and avoid bankruptcy, contrary to purpose of CCAA — It was necessary to invoke doctrine of paramountcy such that provisions of CCAA overrode those of provincial pension legislation — Doctrine of paramountcy was properly invoked.

Bankruptcy and insolvency --- Priorities of claims — Preferred claims — Wages and salaries of employees — Entitlement to preferred status

Key Employee Retention Plans — Insolvent companies obtained relief under Companies' Creditors Arrangement Act (CCAA) — Insolvent companies' board of directors approved key employee retention plans (KERPs) in order to keep employees who were considered critical to successful proceedings under CCAA because they were experienced employees who played central roles in restructuring initiatives — Insolvent companies brought motion for order approving KERPs, and sealing confidential

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supplement to monitor's report — Motion granted — KERPs were approved — It was necessary that KERPs' participants be incentivized to remain in current positions during restructuring process — Continued participation of these employees would assist company in its objectives — Replacement of these employees if they left would not provide any substantial economic benefits to company — Confidential supplement to monitor's report, which contained copies of unredacted KERPs, was sealed pursuant to R. 151 of Federal Courts Rules.

Business associations --- Legal proceedings involving business associations — Practice and procedure in proceedings involving corporations — Confidentiality or sealing orders

Companies' Creditors Arrangement Act (CCAA) — Supplement to monitor's report — Insolvent companies obtained relief under CCAA — Insolvent companies' board of directors approved key employee retention plans (KERPs) in order to keep certain employees who were considered critical to successful proceedings under CCAA — Supplement to monitor's report contained copies of unredacted KERPs, which had sensitive personal compensation information — Insolvent companies brought motion for order approving KERPs, and sealing confidential supplement to monitor's report — Motion granted — KERPs were approved — Confidential supplement to monitor's report was sealed pursuant to R. 151 of Federal Courts Rules for period of 45 days — Disclosure of personal information in supplement could compromise commercial interests of companies and cause harm to KERPs' participants — Confidentiality order was necessary to prevent serious risk to companies' and KERPs participants' interests.

Labour and employment law --- Labour law — Collective agreement — Employee benefits — Pensions

Insolvent employer.

Table of Authorities

Cases considered by *Morawetz J.*:

AbitibiBowater inc., Re (2009), 74 C.C.P.B. 254, D.T.E. 2009T-434, 57 C.B.R. (5th) 285, 2009 QCCS 2028, 2009 CarswellQue 4329, [2009] R.J.Q. 1415 (C.S. Que.) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

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

Collins & Aikman Automotive Canada Inc., Re (2007), 37 C.B.R. (5th) 282, 2007 CarswellOnt 7014, 63 C.C.P.B. 125 (Ont. S.C.J.) — referred to

Fraser Papers Inc., Re (2009), 2009 CarswellOnt 4469, 55 C.B.R. (5th) 217, 2009 C.E.B. & P.G.R. 8350, 76 C.C.P.B. 254 (Ont. S.C.J. [Commercial List]) — referred to

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

Indalex Ltd., Re (2011), 2011 CarswellOnt 2458, 2011 ONCA 265, 2011 C.E.B. & P.G.R. 8433, 104 O.R. (3d) 641, 75 C.B.R. (5th) 19, 17 P.P.S.A.C. (3d) 194, 331 D.L.R. (4th) 352, 276 O.A.C. 347, 89 C.C.P.B. 39 (Ont. C.A.) — followed

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 1330 (Ont. S.C.J. [Commercial List]) — considered

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

Nortel Networks Corp., Re (2009), 256 O.A.C. 131, 2009 CarswellOnt 7383, 2009 ONCA 833, 59 C.B.R. (5th) 23, 77 C.C.P.B. 161, (sub nom. *Sproule v. Nortel Networks Corp.)* 2010 C.L.L.C. 210-005, (sub nom. *Sproule v. Nortel Networks Corp., Re)* 99 O.R. (3d) 708 (Ont. C.A.) — considered

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

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — followed

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Timminco Ltd., Re (2012), 2012 ONSC 106, 2012 CarswellOnt 1059 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

Generally — referred to

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

s. 11.52(1) [en. 2007, c. 36, s. 66] — considered

s. 11.52(2) [en. 2007, c. 36, s. 66] — considered

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

Generally — referred to

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

en général — referred to

Rules considered:

Federal Courts Rules, SOR/98-106

R. 151 — considered

Words and phrases considered:

special payments

. . . [S]pecial (or amortization) payments are required to be made to liquidate a going concern or solvency deficiency in a pension plan as identified in the most recent funding valuation report for the plan that is filed with the applicable pension regulatory authority. The requirement for the employer to make such payments is provided for under applicable provincial pension minimum standards legislation

The courts have characterized special (or amortization) payments as pre-filing obligations which are stayed upon an initial order being granted under the CCAA [*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36].

MOTION by insolvent companies for order suspending obligations to make special payments to pension plans, granting super priority to two charges, approving key employee retention plans, and sealing confidential supplement to monitor's report.

***Morawetz J.*:**

1 This motion was heard on January 12, 2012. On January 16, 2012, the following endorsement was released:

> Motion granted. Reasons will follow. Order to go subject to proviso that the Sealing Order is subject to modification, if necessary, after reasons provided.

2 These are those reasons.

Background

3 On January 3, 2012, Timminco Limited ("Timminco") and Bécancour Silicon Inc. ("BSI") (collectively, the "Timminco Entities") applied for and obtained relief under the *Companies' Creditors Arrangement Act* (the "CCAA").

4 In my endorsement of January 3, 2012, (*Timminco Ltd., Re*, 2012 ONSC 106 (Ont. S.C.J. [Commercial List])), I stated at [11]: "I am satisfied that the record establishes that the Timminco Entities are insolvent and are 'debtor companies' to which the CCAA applies".

5 On the initial motion, the Applicants also requested an "Administration Charge" and a "Directors. and Officers. Charge" ("D&O Charge"), both of which were granted.

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6 The Timminco Entities requested that the Administration Charge rank ahead of the existing security interest of Investissement Quebec ("IQ") but behind all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, including any deemed trust created under the *Ontario Pension Benefit Act* (the "PBA") or the *Quebec Supplemental Pensions Plans Act* (the "QSPPA") (collectively, the "Encumbrances") in favour of any persons that have not been served with this application.

7 IQ had been served and did not object to the Administration Charge and the D&O Charge.

8 At [35] of my endorsement, I noted that the Timminco Entities had indicated their intention to return to court to seek an order granting super priority ranking for both the Administration Charge and the D&O Charge ahead of the Encumbrances.

9 The Timminco Entities now bring this motion for an order:

(a) suspending the Timminco Entities. obligations to make special payments with respect to the pension plans (as defined in the Notice of Motion);

(b) granting super priority to the Administration Charge and the D&O Charge;

(c) approving key employee retention plans (the "KERPs") offered by the Timminco Entities to certain employees deemed critical to a successful restructuring and a charge on the current and future assets, undertakings and properties of the Timminco Entities to secure the Timminco Entities. obligations under the KERPs (the "KERP Charge"); and

(d) sealing the confidential supplement (the "Confidential Supplement") to the First Report of FTI Consulting Canada Inc. (the "Monitor").

10 If granted, the effect of the proposed Court-ordered charges in relation to each other would be:

- first, the Administration Charge to the maximum amount of $1 million;
- second, the KERP Charge (in the maximum amount of $269,000); and
- third, the D&O Charge (in the maximum amount of $400,000).

11 The requested relief was recommended and supported by the Monitor. IQ also supported the requested relief. It was, however, opposed by the Communications, Energy and Paperworkers. Union of Canada ("CEP"). The position put forth by counsel to CEP was supported by counsel for the United Steelworkers. Union ("USW").

12 The motion materials were served on all personal property security registrants in Ontario and in Quebec: the members of the Pension Plan Committees for the Bécancour Union Pension Plan and the Bécancour Non-Union Pension Plan; the Financial Services Commission of Ontario; the Regie de Rentes du Quebec; the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Works International Union; and La Section Locale 184 de Syndicat Canadien des Communications, De L.Energie et du Papier; and various government entities, including Ontario and Quebec environmental agencies and federal and provincial taxing authorities.

13 Counsel to the Applicants identified the issues on the motion as follows:

(a) Should this court grant increased priority to the Administration Charge and the D&O Charge?

(b) Should this court grant an order suspending the Timminco Entities. obligations to make the pension contributions with respect to the pension plans?

(c) Should this court approve the KERPs and grant the KERPs Charge?

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(d) Should this court seal the Confidential Supplement?

14 It was not disputed that the court has the jurisdiction and discretion to order a super priority charge in the context of a CCAA proceeding. However, counsel to CEP submits that this is an extraordinary measure, and that the onus is on the party seeking such an order to satisfy the court that such an order ought to be awarded in the circumstances.

15 The affidavit of Peter A.M. Kalins, sworn January 5, 2012, provides information relating to the request to suspend the payment of certain pension contributions. Paragraphs 14-28 read as follows:

14. The Timminco Entities sponsor the following three pension plans (collectively, the "**Pension Plans**"):

(a) the Retirement Pension Plan for The Haley Plant Hourly Employees of Timminco Metals, A Division of Timminco Limited (Ontario Registration Number 0589648) (the "**Haley Pension Plan**");

(b) the Régime de rentes pour les employés non syndiqués de Silicium Bécancour Inc. (Québec Registration Number 26042) (the "**Bécancour Non-Union Pension Plan**"); and

(c) the Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (Québec Registration Number 32063) (the "**Bécancour Union Pension Plan**").

Haley Pension Plan

15. The Haley Pension plan, sponsored and administered by Timminco, applies to former hourly employees at Timminco's magnesium facility in Haley, Ontario.

16. The Haley Pension Plan was terminated effective as of August 1, 2008 and accordingly, no normal cost contributions are payable in connection with the Haley Pension Plan. As required by the Ontario *Pension Benefits Act* (the "**PBA**"), a wind-up valuation in respect of the Haley Pension Plan was filed with the Financial Services Commission of Ontario ("**FSCO**") detailing the plan's funded status as of the wind-up date, and each year thereafter. As of August 1, 2008, the Haley Pension Plan was in a deficit position on a wind-up basis of $5,606,700. The PBA requires that the wind-up deficit be paid down in equal annual installments payable annually in advance over a period of no more than five years.

17. As of August 1, 2010, the date of the most recently filed valuation report, the Haley Pension Plan had a wind-up deficit of $3,922,700. Contributions to the Haley Pension Plan are payable annually in advance every August 1. Contributions in respect of the period from August 1, 2008 to July 31, 2011 totalling $4,712,400 were remitted to the plan. Contributions in respect of the period from August 1, 2011 to July 31, 2012 were estimated to be $1,598,500 and have not been remitted to the plan.

18. According to preliminary estimates calculated by the Haley Pension Plan's actuaries, despite Timminco having made contributions of approximately $4,712,400 during the period from August 1, 2008 to July 31, 2011, as of August 1, 2011, the deficit remaining in the Haley Pension Plan is $3,102,900.

Bécancour Non-Union Pension Plan

19. The Bécancour Non-Union Pension Plan, sponsored by BSI, is an on-going pension plan with both defined benefit ("**DB**") and defined contribution provisions. The plan has four active members and 32 retired and deferred vested members (including surviving spouses).

20. The most recently filed actuarial valuation of the Bécancour Non-Union Pension Plan performed for funding purposes was performed as of September 30, 2010. As of September 30, 2010, the solvency deficit in the Bécancour Non-Union Pension Plan was $3,239,600.

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21. In 2011, normal cost contributions payable to this plan totaled approximately $9,525 per month (or 16.8% of payroll). Amortization payments owing to this plan totaled approximately $41,710 per month. All contributions in respect of the plan were paid when due in accordance with the Québec *Supplemental Pension Plans Act* (the "**QSPPA**") and regulations.

Bécancour Union Pension Plan

22. The BSI-sponsored Bécancour Union Pension Plan is an on-going DB pension plan with two active members and 98 retired and deferred vested members (including surviving spouses).

23. The most recently filed actuarial valuation performed for funding purposes was performed as of September 30, 2010. As of September 30, 2010, the solvency deficit in the Bécancour Union Pension Plan was $7,939,500.

24. In 2011, normal cost contributions payable to the plan totaled approximately $7,083 per month (or 14.7% of payroll). Amortization payments owing to this plan totaled approximately $95,300 per month. All contributions in respect of the plan were paid when due in accordance with the QSPPA and regulations.

25. BSI unionized employees have the option to transfer their employment to QSLP, under the form of the existing collective bargaining agreement. In the event of such transfer, their pension membership in the Bécancour Union Pension Plan will be transferred to the Quebec Silicon Union Pension Plan (as defined and described in greater detail in the Initial Order Affidavit). Also, in the event that any BSI non-union employees transfer employment to QSLP, their pension membership in the Bécancour Non-Union Pension Plan would be transferred to the Quebec Silicon Non-Union Pension Plan (as defined and described in greater detail in the Initial Order Affidavit). I am advised by Andrea Boctor of Stikeman Elliott LLP, counsel to the Timminco Entities, and do verily believe that if all of the active members of the Bécancour Union Pension Plan and the Bécancour Non-Union Pension Plan transfer their employment to QSLP, the Régie des rentes du Québec would have the authority to order that the plans be wound up.

Pension Plan Deficiencies and the Timminco Entities' CCAA Proceedings

26. The assets of the Pension Plans have been severely impacted by market volatility and decreasing long-term interest rates in recent years, resulting in increased deficiencies in the Pension Plans. As a result, the special payments payable with respect to the Haley Plan also increased. As at 2010, total annual special payments for the final three years of the wind-up of the Haley Pension Plan were $1,598,500 for 2010, $1,397,000 for 2011 and $1,162,000 for 2012, payable in advance annually every August 1. By contrast, in 2011 total annual special payments to the Haley Pension Plan for the remaining two years of the wind-up increased to $1,728,700 for each of 2011 and 2012.

Suspension of Certain Pension Contributions

27. As is evident from the Cashflow Forecast, the Timminco Entities do not have the funds necessary to make any contributions to the Pension Plans other than (a) contributions in respect of normal cost, (b) contributions to the defined contribution provision of the BSI Non-Union Pension Plan, and (c) employee contributions deducted from pay (together, the "**Normal Cost Contributions**"). Timminco currently owes approximately $1.6 million in respect of special payments to the Haley Pension Plan. In addition, assuming the Bécancour Non-Union Pension Plan and the Bécancour Union Pension Plan are not terminated, as at January 31, 2012, the Timminco Entities will owe approximately $140,000 in respect of amortization payments under those plans. If the Timminco Entities are required to make the pension contributions other than Normal Cost Contributions (the "**Pension Contributions**"), they will not have sufficient funds to continue operating and will be forced to cease operating to the detriment of their stakeholders, including their employees and pensioners.

28. The Timminco Entities intend to make all normal cost contributions when due. However, management of the Timminco Entities does not anticipate an improvement in their cashflows that would permit the making of Pension Contributions with respect to the Pension Plans during these CCAA proceedings.

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The Position of CEP and USW

16 Counsel to CEP submits that the super priority charge sought by the Timminco Entities would have the effect of subordinating the rights of, *inter alia*, the pension plans, including the statutory trusts that are created pursuant to the QSPPA. In considering this matter, I have proceeded on the basis that this submission extends to the PBA as well.

17 In order to grant a super priority charge, counsel to CEP, supported by USW, submits that the Timminco Entities must show that the application of provincial legislation "would frustrate the company's ability to restructure and avoid bankruptcy". (See *Indalex Ltd., Re*, 2011 ONCA 265 (Ont. C.A.) at para. 181.)

18 Counsel to CEP takes the position that the evidence provided by the Timminco Entities falls short of showing the necessity of the super priority charge. Presently, counsel contends that the Applicants have not provided any plan for the purpose of restructuring the Timminco Entities and, absent a restructuring proposal, the affected creditors, including the pension plans, have no reason to believe that their interests will be protected through the issuance of the orders being sought.

19 Counsel to CEP takes the position that the Timminco Entities are requesting extraordinary relief without providing the necessary facts to justify same. Counsel further contends that the Timminco Entities must "wear two hats" and act both in their corporate interest and in the best interest of the pension plan and cannot simply ignore their obligations to the pension plans in favour of the corporation. (See *Indalex Ltd., Re*, *supra*, at para. 129.)

20 Counsel to CEP goes on to submit that, where the "two hats" gives rise to a conflict of interest, if a corporation favours its corporate interest rather than its obligations to its fiduciaries, there will be consequences. In *Indalex Ltd., Re*, *supra*, the court found that the corporation seeking CCAA protection had acted in a manner that revealed a conflict with the duties it owed the beneficiaries of pension plans and ordered the corporation to pay the special payments it owed the plans (See *Indalex Ltd., Re*, *supra*, at paras. 140 and 207.)

21 In this case, counsel to CEP submits that, given the lack of evidentiary support for the super priority charge, the risk of conflicting interests and the importance of the Timminco Entities. fiduciary duties to the pension plans, the super priority charge ought not to be granted.

22 Although counsel to CEP acknowledges that the court has the discretion in the context of the CCAA to make orders that override provincial legislation, such discretion must be exercised through a careful weighing of the facts before the court. Only where the applicant proves it is necessary in the context and consistent with the objects of the CCAA may a judge make an order overriding provincial legislation. (See *Indalex Ltd., Re*, *supra*, at paras. 179 and 189.)

23 In the circumstances of this case, counsel to CEP argues that the position of any super priority charge ordered by the court should rank after the pension plans.

24 CEP also takes the position that the Timminco Entities. obligations to the pension plans should not be suspended. Counsel notes that the Timminco Entities have contractual obligations through the collective agreement and pension plan documents to make contributions to the pension plans and, as well, the Timminco Entities owe statutory duties to the beneficiaries of the pension funds pursuant to the QSPPA. Counsel further points out that s. 49 of the QSPPA provides that any contributions and accrued interest not paid into the pension fund are deemed to be held in trust for the employer.

25 In addition, counsel takes the position that the Court of Appeal for Ontario in *Indalex Ltd., Re*, *supra*, confirmed that, in the context of Ontario legislation, all of the contributions an employee owes a pension fund, including the special payments, are subject to the deemed trust provision of the PBA.

26 In this case, counsel to CEP points out that the special payments the Timminco Entities seek to suspend in the amount of $95,300 per month to the Bécancour Union Pension Plan, and of $47,743 to the Silicium Union Pension Plan, are payments that are to be held in trust for the beneficiaries of the pension plans. Thus, they argue that the Timminco Entities have a fiduciary obligation to the beneficiaries of the pension plans to hold the funds in trust. Further, the Timminco Entities. request to suspend

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the special payments to the Bécancour Union Pension Plan and the Quebec Silicon Union Pension Plan reveals that its interests are in conflict.

27 Counsel also submits that the Timminco Entities have not pointed to a particular reason, other than generalized liquidity problems, as to why they are unable to make special payments to their pension plans.

28 With respect to the KERPs, counsel to CEP acknowledges that the court has the power to approve a KERP, but the court must only do so when it is convinced that it is necessary to make such an order. In this case, counsel contends that the Timminco Entities have not presented any meaningful evidence on the propriety of the proposed KERPs. Counsel notes that the Timminco Entities have not named the KERPs recipients, provided any specific information regarding their involvement with the CCAA proceeding, addressed their replaceability, or set out their individual bonuses. In the circumstances, counsel submits that it would be unfair and inequitable for the court to approve the KERPs requested by the Timminco Entities.

29 Counsel to CEP's final submission is that, in the event the KERPs are approved, they should not be sealed, but rather should be treated in the same manner as other CCAA documents through the Monitor. Alternatively, counsel to CEP submits that a copy of the KERPs should be provided to the Respondent, CEP.

The Position of the Timminco Entities

30 At the time of the initial hearing, the Timminco Entities filed evidence establishing that they were facing severe liquidity issues as a result of, among other things, a low profit margin realized on their silicon metal sales due to a high volume, long-term supply contract at below market prices, a decrease in the demand and market price for solar grade silicon, failure to recoup their capital expenditures incurred in connection with the development of their solar grade operations, and the inability to secure additional funding. The Timminco Entities also face significant pension and environmental remediation legacy costs, and financial costs related to large outstanding debts.

31 I accepted submissions to the effect that without the protection of the CCAA, a shutdown of operations was inevitable, which the Timminco Entities submitted would be extremely detrimental to the Timminco Entities. employees, pensioners, suppliers and customers.

32 As at December 31, 2011, the Timminco Entities. cash balance was approximately $2.4 million. The 30-day consolidated cash flow forecast filed at the time of the CCAA application projected that the Timminco Entities would have total receipts of approximately $5.5 million and total operating disbursements of approximately $7.7 million for net cash outflow of approximately $2.2 million, leaving an ending cash position as at February 3, 2012 of an estimated $157,000.

33 The Timminco Entities approached their existing stakeholders and third party lenders in an effort to secure a suitable debtor-in-possession ("DIP") facility. The Timminco Entities existing stakeholders, Bank of America NA, IQ, and AMG Advance Metallurgical Group NV, have declined to advance any funds to the Timminco Entities at this time. In addition, two thirdparty lenders have apparently refused to enter into negotiations regarding the provision of a DIP Facility. [1]

34 The Monitor, in its Second Report, dated January 11, 2012, extended the cash forecast through to February 17, 2012. The Second Report provides explanations for the key variances in actual receipts and disbursements as compared to the January 2, 2012 forecast.

35 There are some timing differences but the Monitor concludes that there are no significant changes in the underlying assumptions in the January 10, 2012 forecast as compared to the January 2, 2012 forecast.

36 The January 10 forecast projects that the ending cash position goes from positive to negative in mid-February.

37 Counsel to the Applicants submits that, based on the latest cash flow forecast, the Timminco Entities currently estimate that additional funding will be required by mid-February in order to avoid an interruption in operations.

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38 The Timminco Entities submit that this is an appropriate case in which to grant super priority to the Administration Charge. Counsel submits that each of the proposed beneficiaries will play a critical role in the Timminco Entities. restructuring and it is unlikely that the advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements.

39 Statutory Authority to grant such a charge derives from s. 11.52(1) of the CCAA. Subsection 11.52(2) contains the authority to grant super-priority to such a charge:

> 11.52(1) Court may order security or charge to cover certain costs — On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> 11.52(2) Priority — This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

40 Counsel also submits that the Timminco Entities require the continued involvement of their directors and officers in order to pursue a successful restructuring of their business and/or finances and, due to the significant personal exposure associated with the Timminco Entities. liabilities, it is unlikely that the directors and officers will continue their services with the Timminco Entities unless the D&O Charge is granted.

41 Statutory authority for the granting of a D&O charge on a super priority basis derives from s. 11.51 of the CCAA:

> 11.51(1) Security or charge relating to director's indemnification — On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> (2) Priority — The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) Restriction — indemnification insurance — The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> (4) Negligence, misconduct or fault — The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

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Analysis

(i) Administration Charge and D&O Charge

42 It seems apparent that the position of the unions. is in direct conflict with the Applicants. positions.

43 The position being put forth by counsel to the CEP and USW is clearly stated and is quite understandable. However, in my view, the position of the CEP and the USW has to be considered in the context of the practical circumstances facing the Timminco Entities. The Timminco Entities are clearly insolvent and do not have sufficient reserves to address the funding requirements of the pension plans.

44 Counsel to the Applicants submits that without the relief requested, the Timminco Entities will be deprived of the services being provided by the beneficiaries of the charges, to the company's detriment. I accept the submissions of counsel to the Applicants that it is unlikely that the advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements. I also accept the evidence of Mr. Kalins that the role of the advisors is critical to the efforts of the Timminco Entities to restructure. To expect that the advisors will take the business risk of participating in these proceedings without the security of the charge is neither reasonable nor realistic.

45 Likewise, I accept the submissions of counsel to the Applicants to the effect that the directors and officers will not continue their service without the D&O Charge. Again, in circumstances such as those facing the Timminco Entities, it is neither reasonable nor realistic to expect directors and officers to continue without the requested form of protection.

46 It logically follows, in my view, that without the assistance of the advisors, and in the anticipated void caused by the lack of a governance structure, the Timmico Entities will be directionless and unable to effectively proceed with any type or form of restructuring under the CCAA.

47 The Applicants argue that the CCAA overrides any conflicting requirements of the QSPPA and the BPA.

48 Counsel submits that the general paramountcy of the CCAA over provincial legislation was confirmed in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at para. 104. In addition, in *Nortel Networks Corp., Re*, the Court of Appeal held that the doctrine of paramountcy applies either where a provincial and a federal statutory position are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. See *Nortel Networks Corp., Re* (2009), 59 C.B.R. (5th) 23 (Ont. C.A.).

49 It has long been stated that the purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, with the purpose of allowing the business to continue. As the Court of Appeal for Ontario stated in *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.), at para. 36:

> In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme...

50 Further, as I indicated in *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]), this purpose continues to exist regardless of whether a company is actually restructuring or is continuing operations during a sales process in order to maintain maximum value and achieve the highest price for the benefit of all stakeholders. Based on this reasoning, the fact that Timminco has not provided any plan for restructuring at this time does not change the analysis.

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51 The Court of Appeal in *Indalex Ltd., Re* (2011), 75 C.B.R. (5th) 19 (Ont. C.A.) confirmed the CCAA court's ability to override conflicting provisions of provincial statutes where the application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy. The Court stated, *inter alia*, as follows (beginning at paragraph 176):

> The CCAA court has the authority to grant a super-priority charge to DIP lenders in CCAA proceedings. I fully accept that the CCAA judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation, including the PBA. ...
>
> . . .
>
> What of the contention that recognition of the deemed trust will cause DIP lenders to be unwilling to advance funds in CCAA proceedings? It is important to recognize that the conclusion I have reached does not mean that a finding of paramountcy will never be made. That determination must be made on a case by case basis. There may well be situations in which paramountcy is invoked and the record satisfies the CCAA judge that application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy.

52 The Timminco Entities seek approval to suspend Special Payments in order to maintain sufficient liquidity to continue operations for the benefit of all stakeholders, including employees and pensioners. It is clear that based on the January 2 forecast, as modified by the Second Report, the Timminco Entities have insufficient liquidity to make the Special Payments at this time.

53 Counsel to the Timminco Entities submits that where it is necessary to achieve the objective of the CCAA, the court has the jurisdiction to make an order under the CCAA granting, in the present case, super priority over the Encumbrances for the Administration Charge and the D&O Charge, even if such an order conflicts with, or overrides, the QSPPA or the PBA.

54 Further, the Timminco Entities submit that the doctrine of paramountcy is properly invoked in this case and that the court should order that the Administration Charge and the D&O Charge have super priority over the Encumbrances in order to ensure the continued participation of the beneficiaries of these charges in the Timminco Entities. CCAA proceedings.

55 The Timminco Entities also submit that payment of the pension contributions should be suspended. These special (or amortization) payments are required to be made to liquidate a going concern or solvency deficiency in a pension plan as identified in the most recent funding valuation report for the plan that is filed with the applicable pension regulatory authority. The requirement for the employer to make such payments is provided for under applicable provincial pension minimum standards legislation.

56 The courts have characterized special (or amortization) payments as pre-filing obligations which are stayed upon an initial order being granted under the CCAA. (See *AbitibiBowater inc., Re* (2009), 57 C.B.R. (5th) 285 (C.S. Que.); *Collins & Aikman Automotive Canada Inc., Re* (2007), 37 C.B.R. (5th) 282 (Ont. S.C.J.) and *Fraser Papers Inc., Re* (2009), 55 C.B.R. (5th) 217 (Ont. S.C.J. [Commercial List]).

57 I accept the submission of counsel to the Applicants to the effect that courts in Ontario and Quebec have addressed the issue of suspending special (or amortization) payments in the context of a CCAA restructuring and have ordered the suspension of such payments where the failure to stay the obligation would jeopardize the business of the debtor company and the company's ability to restructure.

58 The Timminco Entities also submit that there should be no director or officer liability incurred as a result of a court-ordered suspension of payment of pension contributions. Counsel references *Fraser Papers*, where Pepall J. stated:

> Given that I am ordering that the special payments need not be made during the stay period pending further order of the Court, the Applicants and the officers and directors should not have any liability for failure to pay them in that same period. The latter should be encouraged to remain during the CCAA process so as to govern and assist with the restructuring effort and should be provided with protection without the need to have recourse to the Director's Charge.

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59 Importantly, *Fraser Papers* also notes that there is no priority for special payments in bankruptcy. In my view, it follows that the employees and former employees are not prejudiced by the relief requested since the likely outcome should these proceedings fail is bankruptcy, which would not produce a better result for them. Thus, the "two hats" doctrine from *Indalex Ltd., Re*, *supra*, discussed earlier in these reasons at [20], would not be infringed by the relief requested. Because it would avoid bankruptcy, to the benefit of both the Timminco Entities and beneficiaries of the pension plans, the relief requested would not favour the interests of the corporate entity over its obligations to its fiduciaries.

60 Counsel to the Timminco Entities submits that where it is necessary to achieve the objective of the CCAA, the court has the jurisdiction to make an order under the CCAA suspending the payment of the pension contributions, even if such order conflicts with, or overrides, the QSPPA or the PBA.

61 The evidence has established that the Timminco Entities are in a severe liquidity crisis and, if required to make the pension contributions, will not have sufficient funds to continue operating. The Timminco Entities would then be forced to cease operations to the detriment of their stakeholders, including their employees and pensioners.

62 On the facts before me, I am satisfied that the application of the QSPPA and the PBA would frustrate the Timminco Entities ability to restructure and avoid bankruptcy. Indeed, while the Timminco Entities continue to make Normal Cost Contributions to the pension plans, requiring them to pay what they owe in respect of special and amortization payments for those plans would deprive them of sufficient funds to continue operating, forcing them to cease operations to the detriment of their stakeholders, including their employees and pensioners.

63 In my view, this is exactly the kind of result the CCAA is intended to avoid. Where the facts demonstrate that ordering a company to make special payments in accordance with provincial legislation would have the effect of forcing the company into bankruptcy, it seems to me that to make such an order would frustrate the rehabilitative purpose of the CCAA. In such circumstances, therefore, the doctrine of paramountcy is properly invoked, and an order suspending the requirement to make special payments is appropriate (see *ATB Financial* and *Nortel Networks Corp., Re*).

64 In my view, the circumstances are such that the position put forth by the Timminco Entities must prevail. I am satisfied that bankruptcy is not the answer and that, in order to ensure that the purpose and objective of the CCAA can be fulfilled, it is necessary to invoke the doctrine of paramountcy such that the provisions of the CCAA override those of QSPPA and the PBA.

65 There is a clear inter-relationship between the granting of the Administration Charge, the granting of the D&O Charge and extension of protection for the directors and officers for the company's failure to pay the pension contributions.

66 In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue CCAA proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the CCAA proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.

67 If bankruptcy results, the outcome for employees and pensioners is certain. This alternative will not provide a better result for the employees and pensioners. The lack of a desirable alternative to the relief requested only serves to strengthen my view that the objectives of the CCAA would be frustrated if the relief requested was not granted.

68 For these reasons, I have determined that it is both necessary and appropriate to grant super priority to both the Administrative Charge and D&O Charge.

69 I have also concluded that it is both necessary and appropriate to suspend the Timminco Entities. obligations to make pension contributions with respect to the Pension Plans. In my view, this determination is necessary to allow the Timminco Entities to restructure or sell the business as a going concern for the benefit of all stakeholders.

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70 I am also satisfied that, in order to encourage the officers and directors to remain during the CCAA proceedings, an order should be granted relieving them from any liability for the Timminco Entities. failure to make pension contributions during the CCAA proceedings. At this point in the restructuring, the participation of its officers and directors is of vital importance to the Timminco Entities.

(ii) The KERPs

71 Turning now to the issue of the employee retention plans (KERPs), the Timminco Entities seek an order approving the KERPs offered to certain employees who are considered critical to successful proceedings under the CCAA.

72 In this case, the KERPs have been approved by the board of directors of Timminco. The record indicates that in the opinion of the Chief Executive Officer and the Special Committee of the Board, all of the KERPs participants are critical to the Timminco Entities. CCAA proceedings as they are experienced employees who have played central roles in the restructuring initiatives taken to date and will play critical roles in the steps taken in the future. The total amount of the KERPs in question is $269,000. KERPs have been approved in numerous CCAA proceedings where the retention of certain employees has been deemed critical to a successful restructuring. See *Nortel Networks Corp., Re*, [2009] O.J. No. 1044 (Ont. S.C.J. [Commercial List]), *Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]), and *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]).

73 In *Grant Forest Products*, Newbould J. noted that the business judgment of the board of directors of the debtor company and the monitor should rarely be ignored when it comes to approving a KERP charge.

74 The Monitor also supports the approval of the KERPs and, following review of several court-approved retention plans in CCAA proceedings, is satisfied that the KERPs are consistent with the current practice for retention plans in the context of a CCAA proceeding and that the quantum of the proposed payments under the KERPs are reasonable in the circumstances.

75 I accept the submissions of counsel to the Timminco Entities. I am satisfied that it is necessary, in these circumstances, that the KERPs participants be incentivized to remain in their current positions during the CCAA process. In my view, the continued participation of these experienced and necessary employees will assist the company in its objectives during its restructuring process. If these employees were not to remain with the company, it would be necessary to replace them. It is reasonable to conclude that the replacement of such employees would not provide any substantial economic benefits to the company. The KERPs are approved.

76 The Timminco Entities have also requested that the court seal the Confidential Supplement which contains copies of the unredacted KERPs, taking the position that the KERPs contain sensitive personal compensation information and that the disclosure of such information would compromise the commercial interests of the Timminco Entities and harm the KERPs participants. Further, the KERPs participants have a reasonable expectation that their names and salary information will be kept confidential. Counsel relies on *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.) at para. 53 where Iacobucci J. adopted the following test to determine when a sealing order should be made:

> A confidentiality order under Rule 151 should only be granted when:
>
> (a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh the deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

77 CEP argues that the CCAA process should be open and transparent to the greatest extent possible and that the KERPs should not be sealed but rather should be treated in the same manner as other CCAA documents through the Monitor. In the alternative, counsel to the CEP submits that a copy of the KERPs should be provided to the Respondent, CEP.

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78 In my view, at this point in time in the restructuring process, the disclosure of this personal information could compromise the commercial interests of the Timminco Entities and cause harm to the KERP participants. It is both necessary and important for the parties to focus on the restructuring efforts at hand rather than to get, in my view, potentially side-tracked on this issue. In my view, the Confidential Supplement should be and is ordered sealed with the proviso that this issue can be revisited in 45 days.

Disposition

79 In the result, the motion is granted. An order shall issue:

(a) suspending the Timminco Entities. obligation to make special payments with respect to the pension plans (as defined in the Notice of Motion);

(b) granting super priority to the Administrative Charge and the D&O Charge;

(c) approving the KERPs and the grant of the KERP Charge;

(d) authorizing the sealing of the Confidential Supplement to the First Report of the Monitor.

Motion granted.

Footnotes

1 In a subsequent motion relating to approval of a DIP Facility, the Timminco Entities acknowledged they had reached an agreement with a third-party lender with respect to providing DIP financing, subject to court approval. Further argument on this motion will be heard on February 6, 2012.

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2019 ONSC 6966
Ontario Superior Court of Justice [Commercial List]

Clover Leaf Holdings Company, Re

2019 CarswellOnt 20001, 2019 ONSC 6966, 312 A.C.W.S. (3d) 691, 75 C.B.R. (6th) 124

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 CLOVER LEAF HOLDINGS COMPANY, CONNORS BROS. CLOVER LEAF SEAFOODS COMPANY, K.C.R. FISHERIES LTD., 6162410 CANADA LIMITED, CONNORS BROS. HOLDINGS COMPANY AND CONNORS BROS. SEAFOODS COMPANY

Hainey J.

Heard: November 25, 2019
Judgment: December 4, 2019
Docket: CV-19-631523-00CL

Counsel: Kevin Zych, Sean Zweig, Mike Shakra, for Applicants
Marc Wasserman, Martino Calvaruso, for Monitor
Natasha MacParland, for FCF Co. Ltd.
Peter Rubin, for Wells Forgo
Jeremy Opolsky, for Lion Capital
Robert Chadwick, Christopher Armstrong, for Terms Lenders

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.2 Initial application

XIX.2.d Miscellaneous

Headnote

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

Applicants were Canadian affiliates of BBF, which was international seafood supplier based in United States — Applicants operated CL group of companies in Ontario, New Brunswick and Nova Scotia and had 650 employees — While CL business in Canada was cash flow positive and profitable, balance sheet of BBF, including applicants, had suffered extreme financial pressures primarily due to extensive litigation against BBF in United States — BBF filed voluntary petition for relief under chapter 11 of title 11 of United States Code and U.S. Bankruptcy Court granted certain First Day Orders in those proceedings — Applicants sought similar relief to stabilize and protect business in order to complete comprehensive and coordinated restructuring of CL in Canada and BBF in United States — Applicants obtained initial order pursuant to Companies' Creditors Arrangement Act for appointment of Monitor and staying all proceedings against applicants and Monitor until December 2, 2019 — Applicants brought application for amended and restated order to supplement limited relief obtained pursuant to initial order — Application granted — Stay of proceedings was extended to December 31, 2019 — Applicants had acted in good faith and with due diligence and required extra time to restore solvency — Proposed debtor-in-possession (DIP) financing was approved — Proposed DIP financing would preserve value and going concern operations of applicants' business, which was in best interests of applicants and stakeholders — Monitor supported proposed DIP financing and confirmed that applicants had sufficient liquidity to operate business in ordinary course — It was appropriate to amend initial order to allow for payment of pre-filing obligations — KERP and KEIP charge were approved — Terms and scope of KEIP were limited to what was

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reasonably necessary — Intercompany charge, administrative charge and directors' charge were all granted to protect interests of creditors, secure professional fees and disbursements of Monitor and provide indemnification to directors.

Table of Authorities

Statutes considered:

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

Generally — referred to

s. 11 — considered

s. 11.001 [en. 2019, c. 29, s. 136] — considered

s. 11.2(5) [en. 2005, c. 47, s. 128] — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 137(2) — considered

APPLICATION for amended and restated order to supplement limited relief obtained pursuant to initial order.

***Hainey J.*:**

Overview

1 On November 22, 2019, the applicants ("Clover Leaf"), obtained an initial order pursuant to the *Companies Creditors Arrangement Act* R.S.C. 1985, c. C-36 as amended ("*CCAA*") which appointed Alvarez & Marsal Canada Inc. as Monitor and stayed all proceedings against the applicants, their officers, directors and the Monitor until December 2, 2019.

2 On November 25, 2019 the applicants sought an amended and restated order to supplement the limited relief obtained pursuant to the initial order. I granted the order and indicated that I would provide a more detailed endorsement. This is my endorsement.

Facts

3 The applicants are the Canadian affiliates of Bumble Bee Foods, an international seafood supplier based in the United States ("Bumble Bee").

4 The applicants operate the Clover Leaf business in Ontario, New Brunswick and Nova Scotia. They have approximately 650 employees in Canada. The Clover Leaf business has long been associated with well-known brands of canned seafood products in Canada.

5 While the Clover Leaf business in Canada is cash flow positive and profitable, the balance sheet of the Bumble Bee group, including the applicants, has suffered extreme financial pressures primarily due to extensive litigation against Bumble Bee in the United States.

6 As a result, the Bumble Bee group has filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code ("Chapter 11 proceedings") and the U.S. Bankruptcy Court has granted certain First Day Orders in those proceedings.

7 The applicants are seeking similar relief in these proceedings to stabilize and protect their business in order to complete a comprehensive and coordinated restructuring of Clover Leaf in Canada and Bumble Bee in the United States. This will include an asset sale of each of their respective businesses ("Sale Transaction"). This outcome is the result of extensive consideration of various options and consultations with Bumble Bee's secured lenders in an attempt to restructure the business.

Applicants' Position

8 The applicants submit that this *CCAA* proceeding is in the best interests of their stakeholders and will result in their business being conveyed on a going concern basis with minimal disruption. The breathing room afforded by the *CCAA* and Chapter 11

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proceedings, and the other relief sought, will allow the applicants to continue operations in the ordinary course, maintaining the stability of their business and operations, and preserving the value of their business while the Sale Transaction is implemented.

9 Although the applicants are party to a stalking horse asset purchase agreement, they are not seeking any relief in connection with it or the Sale Transaction at this stage. The applicants will return to court for that relief at a later date. They are, instead, only seeking the limited relief required at this time.

Issues

10 I must determine the following issues:

a) Is the relief sought on this application consistent with the amendments to the *CCAA* which came into effect on November 1, 2019?

b) Should I extend the stay of proceedings to December 31, 2019?

c) Should I approve the proposed DIP financing and grant the DIP charge?

d) Should I grant the administration charge and the directors' charge?

e) Should I approve the KEIP and the KEIP charge, and grant a sealing order?

f) Should I authorize the applicants to pay their ordinary course pre-filing debts? and

g) Should I grant the intercompany charge?

Analysis

The New CCAA Amendments

11 In determining this application I must consider the amendments made to the *CCAA* that came into force on November 1, 2019.

12 Section 11.001 of the *CCAA* provides as follows:

> An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

13 The purpose of this new section of the *CCAA* is to make the insolvency process fairer, more transparent and more accessible by limiting the decisions made at the outset of the proceedings to measures that are reasonably necessary to avoid the immediate liquidation of an insolvent company and to allow for broader participation in the restructuring process.

14 The applicants submit that the relief sought on this application is limited to what is reasonably necessary in the circumstances for the continued operation of their business. Further relief, including approval of the Sale Transactions and related bidding procedures, will not be sought until a later date on reasonable notice to a broader group of stakeholders.

15 I am satisfied that the relief sought on this motion is reasonably necessary for the continued operation of the applicants for the period covered by the order sought to allow them to take the next steps toward a smooth transition of their business to a new owner for the following reasons:

(a) Prior to initiating insolvency proceedings here and in the United States the applicants conducted a thorough assessment of their options and consulted with all their major creditors before arriving at the proposed Sale Transaction;

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(b) The applicants' stakeholder such as employees, customers and suppliers who have not yet been consulted about these *CCAA* proceedings will not be prejudiced by the order sought. In fact, in my view, they will suffer prejudice if the order is not granted;

(c) The applicants have the support of their secured creditors who are expected to suffer a shortfall if the Sale Transaction closes;

(d) The applicants are not the cause of these insolvency proceedings; and

(e) The applicants are only seeking relief that is reasonably necessary to take the next steps toward a smooth transition to a new owner.

16 For these reasons, I have concluded that the relief sought is consistent with the new amendments to the *CCAA*.

17 I will now consider whether it is appropriate to grant certain of the specific terms of the amended and restated initial order.

Stay of Proceedings

18 The applicants seek to extend the stay of proceedings to December 31, 2019.

19 I am satisfied that the stay of proceedings should be extended as requested for the following reasons:

(a) The applicants have acted and are acting in good faith with due diligence;

(b) The stay of proceedings requested is appropriate to provide the applicants with breathing room while they seek to restore their solvency and emerge from these *CCAA* proceedings on a going-concern basis;

(c) Without continued protection under the *CCAA* and the support of their lenders the stability and value of the applicants' business will quickly deteriorate and will be unable to continue to operate as a going-concern;

(d) If existing or new proceedings are permitted to continue against the applicants, they will be destructive to the overall value of their business and jeopardize the proposed Sale Transaction; and

(e) The Monitor supports the requested extension of the stay of proceedings.

DIP Financing

20 The applicants submit that the proposed DIP financing should be approved for the following reasons:

(a) The proposed DIP financing is reasonably necessary for the continued operation of Clover Leaf in the ordinary course of business during the period covered by the order sought within the meaning of s. 11.2(5) of the *CCAA*. It is also consistent with the existing jurisprudence that DIP financing should be granted "to keep the lights on" and should be limited to terms that are reasonably necessary for the continued operation of the company; and

(b) The proposed DIP financing is reasonably necessary to allow the applicants to maintain liquidity and preserve the enterprise value of their business while the Sale Transaction is being pursued. The proposed DIP financing will be used to honour commitments to employees, customers and trade creditors.

21 I am satisfied for these reasons that the requirements of s. 11.2(5) of the *CCAA* are satisfied.

22 In this case, the applicants are not borrowers under the proposed DIP financing but they are proposed to be guarantors. The applicable jurisprudence has established the following factors which should be considered to determine the appropriateness of authorizing a Canadian debtor to guarantee a foreign affiliate's DIP financing:

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(a) The need for additional financing by the Canadian debtor to support a going concern restructuring;

(b) The benefit of the breathing space afforded by *CCAA* protection;

(c) The lack of any financing alternatives to those proposed by the DIP lender;

(d) The practicality of establishing a stand-alone solution for the Canadian debtor;

(e) The contingent nature of the liability of the proposed guarantee and the likelihood that it will be called upon;

(f) Any potential prejudice to the creditors of the Canadian entity if the request is approved; and

(g) The benefits that may accrue to the stakeholders if the request is approved and the prejudice to those stakeholders if the request is denied.

23 I have concluded that I should approve the proposed DIP financing and the proposed DIP charge for the following reasons:

(a) Because of its current financial circumstances, the Bumble Bee Group cannot obtain alternative financing outside of the Chapter 11 and *CCAA* proceedings;

(b) The applicants' liquidity is dependent on the secured lenders providing the proposed DIP financing;

(c) The proposed DIP financing is necessary to maintain the ongoing business and operations of the Bumble Bee Group, including the applicants;

(d) While the proposed DIP financing is being provided by the applicants' existing secured lenders rather than new third-party lenders, eleven third-party lenders were solicited with no viable proposal being received. In my view, this demonstrates that the proposed DIP financing represents the best available DIP financing option in the circumstances;

(e) The proposed DIP financing will preserve the value and going concern operations of the applicant's business, which is in the best interests of the applicants and their stakeholders;

(f) Because the DIP lenders are the existing secured lenders, they are familiar with the applicants' business and operations which will reduce administrative costs that would otherwise arise with a new-third party DIP lender;

(g) Protections have been included in the amended and restated initial order to minimize any prejudice to the applicants and their stakeholders;

(h) The amount of the proposed DIP Financing is appropriate having regard to the applicants' cash-flow statement; and

(i) The Monitor supports the proposed DIP financing and its report confirms that the applicants will have sufficient liquidity to operate their business in the ordinary course.

Payment of Pre-Filing Obligations

24 To preserve normal course business operations, the applicants seek authorization to continue to pay their suppliers of goods and services, honour rebate, discount and refund programs with their customers and pay employees in the ordinary course consistent with existing compensation arrangements.

25 The court has broad jurisdiction to permit the payment of pre-filing obligations in a *CCAA* proceeding. In granting authority to pay certain pre-filing obligations, courts have considered the following factors:

(a) Whether the goods and services are integral to the applicants' business;

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(b) The applicants' need for the uninterrupted supply of the goods or services;

(c) The fact that no payments will be made without the consent of the Monitor;

(d) The Monitors' support and willingness to work with the applicants to ensure that payments in respect of pre-filing liabilities are appropriate;

(e) Whether the applicants have sufficient inventory of the goods on hand to meet their needs; and

(f) The effect on the debtors' ongoing operations and ability to restructure if they are unable to make pre-filing payments.

26 I am satisfied that it is critical to the operation of their business that the applicants preserve key relationships. Any disruption in the services proposed to be paid could jeopardize the value of their business and the viability of the Sale Transaction. The authority in the proposed amended and restated initial order to pay pre-filing obligations is appropriately tailored and responsive to the needs of the applicants and is specifically provided for in the applicants' cash flows and in the DIP budget. In particular, the payments are limited to those necessary to preserve critical relationships with employees, suppliers, and customers, to ensure the stability and continued operation of the applicants' business and will only be made with the consent of the Monitor. The relief sought is consistent with orders in other *CCAA* cases.

27 Further, in keeping with the requirements in s. 11.001 of the *CCAA* the contemplated payments are all reasonably necessary to the continued operation of the applicants' business so that there will be no disruption in services provided to the applicants and no deterioration in their relationships with their suppliers, customers and employees.

KEIP and KEIP Charge

28 I have also concluded that the KEIP and KEIP charge should be approved because of the following:

(a) The KEIP was developed in consultation with AlixPartners, Bennett Jones LLP and with the involvement of the Monitor. The Monitor is supportive of the KEIP. The secured creditors also support the KEIP charge;

(b) The KEIP is reasonably necessary to retain key employees who are necessary to guide the applicants through the *CCAA* proceedings and the Sale Transaction;

(c) The KEIP is incentive-based and will only be earned if certain conditions are met; and

(d) The amount of the KEIP, and corresponding KEIP charge, is reasonable in the circumstance.

29 In approving the KEIP and KEIP charge pursuant to s. 11 of the *CCAA* I have determined that the terms and scope of the KEIP have been limited to what is reasonably necessary at this time in accordance with s. 11.001 of the *CCAA*.

30 As the KEIP contains personal confidential information about the applicants' employees, including their salaries, I am granting a sealing order pursuant to s. 137(2) of the *Courts of Justice Act*, RSO 1990, c. C. 43. This will prevent the risk of disclosure of this personal and confidential information.

Intercompany Charge

31 I am also granting the requested Intercompany Charge to preserve the status quo between all entities within the Bumble Bee group to protect the interest of creditors against individual entities within the group. The Monitor supports the charge which ranks behind all the other court-ordered charges.

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Administrative Charge

32 I am also granting an administration charge in the amount of $1.25 million to secure the professional fees and disbursements of the Monitor, its counsel and the applicants' counsel for the following reasons:

(a) The beneficiaries of the administration charge have, and will continue to, contribute to these *CCAA* proceedings and assist the applicants with their business;

(b) Each beneficiary of the administration charge is performing distinct functions and there is no duplication of roles;

(c) The quantum of the proposed charge is reasonable having regard to administration charges granted in other similar *CCAA* proceedings;

(d) The secured creditors support the administrative charge; and

(e) The Monitor supports the administrative charge.

Directors' Charge

33 Finally, I am granting a directors' charge in the amount of $2.3 million to secure the indemnity of the applicants' directors and officers for liabilities they may incur during these *CCAA* proceedings for the following reasons:

(a) The directors and officers may be subject to potential liabilities in connection with the *CCAA* proceedings and have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;

(b) The applicants' liability insurance policies provide insufficient coverage for their officers and directors;

(c) The directors' charge applies only to the extent that the directors and officers do not have coverage under another directors and officers' insurance policy;

(d) The directors' charge would only cover obligations and liabilities that the directors and officers may incur after the commencement of the *CCAA* proceedings and does not cover willful misconduct or gross negligence;

(e) The applicants will require the active and committed involvement of its directors and officers, and their continued participation is necessary to complete the Sale Transaction;

(f) The amount of the directors' charge has been calculated based on the estimated potential exposure of the directors and officers and is appropriate given the size, nature and employment levels of the applicants; and

(g) The calculation of the directors' charge has been reviewed with the Monitor and the Monitor supports it.

Conclusion

34 For these reasons the amended and restated initial order is granted.

35 I thank counsel for their helpful submissions.

Application granted.

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2016 ONSC 495
Ontario Superior Court of Justice [Commercial List]

PT Holdco, Inc., Re

2016 CarswellOnt 1447, 2016 ONSC 495, 263 A.C.W.S. (3d) 23

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of PT Holdco, Inc., Primus Telecommunications Canada, Inc., Ptus, Inc., Primus Telecommunications, Inc., and Lingo, Inc.

Penny J.

Heard: January 19, 2016
Judgment: January 21, 2016
Docket: CV-16-11257-00CL

Counsel: Maria Konyukhova, Vlad Calina, for Applicants
Linc Rogers, Aryo Shalviri, for Monitor
Brendan O'Neill, for Birch Telecommunications Inc.
Natasha MacParland, for Bank of Montreal
Greg Azeff, Stephanie DeCaria, for Manulife
D. Magisano, for Origin Merchant Partners

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.a Grant and length of stay
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.d Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Miscellaneous
Companies were insolvent and unable to meet their obligations as they came due — Companies had debts in excess of $5 million — Companies brought initial application for protection under Companies' Creditors Arrangement Act (CCAA) — Application granted — Companies met definition of "debtor company" under CCAA — As result of financial difficulties and liquidity issues, companies required CCAA protection in order to maintain operations while allowing time necessary to complete sales process and thereby maximize recovery for shareholders — Without CCAA protection, shutdown of operations was inevitable which would disrupt companies' efforts to maximize recovery — Stay of proceedings was appropriate to allow for liquidation — $1 million administrative charge and $3.1 million directors' and officers' charge granted.
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Monitor
Table of Authorities
Cases considered by *Penny J.*:
Canwest Publishing Inc. / Publications Canwest Inc., Re (2010), 2010 ONSC 222, 2010 CarswellOnt 212, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) — followed

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

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

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

Statutes considered:

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

s. 2 "insolvent person" — considered

s. 2 "trustee or licensed trustee" — considered

Bankruptcy Code, 11 U.S.C.

ss. 1501-1532 — considered

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

Generally — referred to

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

Generally — referred to

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

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

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

s. 56 — considered

APPLICATION by companies for protection under Companies' Creditors Arrangement Act.

***Penny J.*:**

1 This is an application for court protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), including authorization to apply for recognition in the United States pursuant to Chapter 15 of the United States Bankruptcy Code, 11 U.S. Code § 1501-1532 (the "Code").

2 I granted the initial order on January 19, 2016 with reasons to follow. These are those reasons.

3 The applicants (collectively Primus) offer telecommunications services in Canada and the United States. Primus' principal business is the re-selling of residential and commercial telecommunications services within the United States and Canada.

4 Primus has been experiencing rapidly declining revenues, its customer base is being lost to lower profit margin services and, yet, its capital costs remain high. As a result, Primus does not have the liquidity to meet its payment obligations as they become due. Primus is unable to satisfy the financial covenants set out in its secured credit agreements and has defaulted under these credit agreements. If these agreements are enforced, Primus would be unable to satisfy its obligations. Primus has operated under forbearance agreements in respect of these defaults since February 4, 2015. Primus has been unable to successfully restructure its business outside of formal insolvency proceedings.

5 The Primus North American operations are thoroughly integrated. Internally, Primus shares networks, platforms, infrastructure and personnel (including senior management).

6 Holdco is the principal holding company of Primus with PTUS and Primus Canada the wholly owned subsidiaries of Holdco. Primus Canada is the Canadian operating company. PTUS is the holding company for PTI and Lingo, which are Primus' U.S. operating companies.

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7 Holdco and Primus Canada are private companies incorporated under the Ontario *Business Corporations Act*, with registered head offices in Toronto, Ontario. PTUS, PTI, and Lingo are private companies incorporated under the laws of Delaware, with registered head offices in Wilmington, Delaware.

8 Primus Canada does not own sufficient telecommunications network infrastructure to provide telecommunications services without the assistance of a major carrier. Primus Canada's business and operations are heavily dependent on the major carriers. The largest vendors are Bell, Allstream, Rogers and Telus, which collectively account for approximately 50% of supplier obligations. Primus Canada purchases services from major carriers at wholesale rates determined by the CRTC or through negotiated arrangements to re-sell to its own residential and commercial consumers. The majority of Primus Canada's gross revenue is earned by providing these resale services.

9 Primus Canada is also dependent on its credit card processing service provider. Approximately 30% of Primus Canada's customers pay for their services by credit card. Primus Canada could not process credit card transactions without the continued supply of credit card services.

10 Primus Canada generates 88% of the Primus gross revenues of which 78% is generated in Ontario with 10% in Quebec, 6% in British Columbia, 4% in Alberta, and 2% in other provinces.

11 Primus Canada has approximately 204,000 residential accounts and 23,000 commercial accounts. In 2014, approximately 56% of Primus Canada's revenue was generated from residential customers and approximately 44% was generated from commercial customers.

12 Typical residential agreements are for two years or less. Typical commercial agreements range between two to three years.

13 The U.S. Primus entities' revenues account for approximately 12% of the Primus gross revenue. U.S. Primus primarily offers digital home phone services and long-distance phone services.

14 U.S. Primus has about 27,000 residential customers, of which approximately 1,100 are located in Puerto Rico. The balance of the U.S. Primus customers are located in the United States.

15 Primus Canada employs 502 people and U.S. Primus employs 28 people. Certain of the Primus employees provide services to both the U.S. and Canadian operations. The Primus workforce is non-unionized. Primus does not have a pension plan for its employees.

16 Primus'gross revenue decreased from $229 in 2012 to $199 million in 2013, to $180 million in 2014. Gross revenue is forecasted to drop to $166 million in 2015. Since 2012, the Primus consolidated revenue has declined an average of 9% per year. During the same period, the Canadian residential business, representing approximately 56% of gross revenue for 2015, has declined an average of 9% year-over-year. At the same time, revenue has declined 18% in Canada and 25% in the United States. Despite these declining revenues, Primus has not been able to reduce capital expenditures due to the capital-intensive nature of its business. Consequently, Primus reported a net loss of $830,000 in 2014 and has forecast a net loss of $13,078,000 for 2015.

17 As a result of their financial difficulties and resulting defaults with their lenders, the Primus entities are insolvent and unable to meet their obligations as they come due.

18 Primus elected to pursue a pre-filing sales process out of concern that the extensive period of CCAA protection necessary to implement a post-filing sales process would have a detrimental impact on the Primus business and its customers.

19 Following a SISP, Primus selected a successful bidder. Subject to obtaining the initial order being sought, Primus intends to return on a motion seeking approval of the asset purchase agreement and associated sale transaction and ancillary relief.

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Should the Court grant CCAA Protection to Primus?

20 Primus Canada and Holdco, as companies incorporated under Ontario legislation meet the CCAA definition of "company" and are therefore eligible for CCAA protection.

21 PTI, PTUS and Lingo are also "companies" within the definition of the CCAA because they are incorporated companies (under the laws of Delaware) having assets in Canada, being funds held on deposit in Canadian bank accounts, *Cinram International Inc., Re*, 2012 ONSC 3767 (Ont. S.C.J. [Commercial List])).

22 Although the CCAA does not define the term "insolvent," the definition of "insolvent person" under section 2(1) of the BIA is well-established as the governing definition in applications under the CCAA.

23 Primus' precarious financial situation, including the defaults under credit agreements, has rendered Primus insolvent within the definition contemplated in both the BIA and the expanded definition set out in *Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]). None of the Primus entities have sufficient liquidity to satisfy their obligations as they come due. The continued forbearance of Primus' lenders is conditional on the granting of the Initial Order. Without this forbearance, the Primus entities' loans will be immediately due. Primus will not have the funds to satisfy these debts.

24 Finally, the Primus entities, either individually or as a whole, have debts in excess of $5 million. I find that the Primus entities are "debtor companies" to which the CCAA applies.

25 Under s. 11.02(3) of the CCAA, on an initial application in respect of a "debtor company", the Court may make an order on any terms that it considers appropriate where the applicant satisfies the Court that circumstances exist to make the order, including, among other things, staying all proceedings that might be taken in respect of the company under the BIA.

26 A stay of proceedings is appropriate in liquidating CCAA proceedings such as this one, *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List])), para. 6.

27 As a result of the financial difficulties and liquidity issues outlined above, Primus requires CCAA protection to maintain operations while allowing it the time necessary to complete the sales process and thereby to maximize recovery for its stakeholders. Without CCAA protection, a shut-down of operations is inevitable. This would be disruptive to Primus' efforts to maximize recovery.

Should the Court grant the Administration Charge?

28 Primus seeks a charge on its assets in the maximum amount of $1 million to secure the fees and disbursements incurred in connection with services rendered to Primus both before and after the commencement of the CCAA proceedings by counsel to Primus, the Monitor and the Monitor's counsel (the "Administration Charge").

29 Primus worked with the proposed monitor to estimate the proposed quantum of the Administration Charge to ensure that it was reasonable and appropriate in the circumstances.

30 The Administration Charge is proposed to rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise held by persons with notice of this application.

31 Section 11.52 of the CCAA provides statutory jurisdiction to grant such a charge.

32 In *Canwest Publishing Inc./Publications Canwest Inc., Re* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]), in addition to the considerations enumerated in section 11.52, Justice Pepall considered the following factors:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

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(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.

33 In the present matter, the following factors support the granting of the Administration Charge as requested:

(a) Primus operates a business which is technical in nature, operates across North America, and is subject to regulatory obligations;

(b) the beneficiaries of the Administration Charge will provide essential legal and financial advice throughout the CCAA proceedings;

(c) there is no anticipated unwarranted duplication of roles;

(d) the lenders were advised of the anticipated return date of this application, have or will have received copies of the application materials, and have not indicated opposition to the granting of the Administration Charge; and

(e) the proposed Monitor, in its pre-filing report, supports the Administration Charge and its proposed quantum and believes it to be fair and reasonable in view of the complexity of Primus' CCAA proceedings and the services to be provided by the beneficiaries of the Administration Charge;.

34 Each of the proposed beneficiaries of this charge will play a critical role in the Primus restructuring and it is unlikely that these advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements. Accordingly, the Administrative Charge is granted.

Should the Court grant the Directors' Charge?

35 Primus also seeks a charge over its assets in favour of the Primus former and current directors in the amount of $3.1 million (the "D&O Charge") in order to protect the directors and officers from the risk of significant personal exposure. The D&O Charge is proposed to rank immediately behind the Administration Charge but in priority to all other encumbrances held by persons given notice of this application.

36 Primus maintains directors' and officers' liability insurance for its directors and officers. The current D&O insurance policies provide a total of $15 million in coverage. Under the D&O insurance, there are deductibles for certain claims and a large number of exclusions which create a degree of uncertainty. In addition, contractual indemnities which have been given to the directors and officers cannot be satisfied as Primus does not have sufficient funds to satisfy those indemnities should their directors and officers be found responsible for the full amount of the potential directors' liabilities. Adequate indemnification insurance is not otherwise available for the directors and officers at reasonable cost.

37 The CCAA has codified the granting of directors' and officers' charges on a priority basis in section 11.51. The Court must be satisfied that the amount of the charge is appropriate in light of obligations and liabilities that may be incurred after the commencement of proceedings, *Canwest Publishing Inc./Publications Canwest Inc., Re*, *supra*.

38 Primus requires the continued involvement of its directors and officers in order to finalize the sales process already in progress. The directors and officers of Primus have indicated that, due to the significant personal exposure associated with Primus' liabilities, they will resign from their positions with Primus unless the Initial Order grants the D&O Charge.

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39 The D&O Charge will allow Primus to continue to benefit from the expertise and knowledge of its directors and officers. The quantum of the requested D&O Charge is reasonable given the complexity of Primus' business and the potential exposure of the directors and officers to personal liability.

40 Further, the proposed monitor has advised that it is supportive of the D&O Charge, including the amount.

41 The D&O Charge is therefore granted.

The Proposed Monitor

42 FTI Consulting Canada Inc. has consented to act as the court-appointed monitor. FTI is a trustee within the meaning of s. 2 of the BIA and is not subject to any of the restrictions on who may be appointed as a monitor. The monitor has filed a pre-filing report indicating that it is supportive of the relief being sought. The appointment of FTI is granted.

Should the Court Authorize FTI Consulting Canada Inc. to Act as Foreign Representative?

43 Section 56 of the CCAA grants the court the unfettered authority to appoint "any person or body" to act as a representative for the purpose of having these CCAA proceedings recognized in any jurisdiction outside of Canada, including but not limited to the United States.

44 In order to enforce the stay of proceedings established under the Initial Order in the United States and to facilitate the contemplated restructuring strategy, it is necessary to seek recognition of the Initial Order by the United States Bankruptcy Court. Accordingly, Primus seeks authorization for FTI, as foreign representative of Primus, to seek recognition of these proceedings in the United States under Chapter 15 of the Code.

45 Courts have consistently encouraged comity and cooperation between courts in cross-border insolvencies to enable enterprises to restructure on a cross-border basis. To authorize FTI to act as foreign representative and seek recognition of these proceedings in the United States is consistent with and gives full effect to these principles.

46 The commencement of proceedings in the United States is necessary and appropriate under the circumstances because, among other things, Primus operates a cross-border business that is operationally and functionally integrated in several significant respects. Among other things, Primus has assets and employees in the United States and many affected creditors are located in the United States. As a result, it is possible that one or more parties in the United States will seek to commence proceedings against one or more of the U.S. Primus entities.

47 The appointment and authorization of FTI as foreign representative is granted.

48 For all these reasons, I have granted the initial order in the form sought.

Application granted.

End of Document

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2024 ONSC 2026
Ontario Superior Court of Justice [Commercial List]

Pride Group Holdings Inc. et al.

2024 CarswellOnt 5431, 2024 ONSC 2026, 2024 A.C.W.S. 1917

IN THE MATTER OF THE COMPANIES' CKEDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-3, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF PRIDE GROUP HOLDINGS INC. and those entities listed in Schedule "A" hereto

Pride Group Holdings Inc., et al. (Applicants)

Peter J. Osborne J.

Heard: April 5, 2024
Judgment: April 9, 2024
Docket: CV-24-00717340-00CL

Counsel: Leanne Williams, Rachel Nicholson, Puya Fesharaki, for Applicants
Raj Sahni, for Directors and Officers
Olivia Mann-Foster, for Paccar Entities
Jeffrey Levine, for Roynat Inc. and Bank of Nova Scotia
Stuart Brotman, for Lending Syndicate
Shaun Parsons, for TD Equipment Finance Canada
John Salmas, for Bank of Montreal
Marc Wasserman, Harvey Chaiton, Blair McRadu, for Mitsubishi HC Capital
Brendan Bissell, for Versafinance US Corp.
Edmond Lamek, for Triumph Business Capital
Rania Hammad, Lee Nicholson, for Movetrust and Boat Capital LP
Elaine Gray, Kim Gage, for Daimler Truck Financial Services Canada Corporation and Daimler Truck Financial Services USA LLC
John MacDonald, Tracy Sandler, for RBC as Financial Service Agent
Caroline Descours, for Regions Bank, Regions Equipment Finance Corporation and Regions Commercial Equipment Finance LLC
Jamey Gage, Trevor Courtis, for Bennington Financial Corp.
Heather Meredith, for National Bank of Canada
Pamela Huff, Chris Bur, Daniel Loberto, Kevin Wu, for Monitor, Ernst & Young Inc.

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.d Miscellaneous

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2024 ONSC 2026, 2024 CarswellOnt 5431, 2024 A.C.W.S. 1917

Headnote

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

Amendments regarding extension of stay period, approval of debtor-in-possession facility, priority of charges, treatment of set off amounts, approval of governance protocol, and other plans.

Table of Authorities

Cases considered by *Peter J. Osborne J.*:

AbitibiBowater inc., Re (2009), 2009 CarswellQue 9964, 58 C.B.R. (5th) 62, 2009 QCCS 6453 (C.S. Que.) — referred to

Canwest Publishing Inc. / Publications Canwest Inc., Re (2010), 2010 ONSC 222, 2010 CarswellOnt 212, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) — referred to

Clover Leaf Holdings Company, Re (2019), 2019 ONSC 6966, 2019 CarswellOnt 20001, 75 C.B.R. (6th) 124 (Ont. S.C.J. [Commercial List]) — referred to

League Assets Corp., Re (2013), 2013 BCSC 2043, 2013 CarswellBC 3408, 7 C.B.R. (6th) 74 (B.C. S.C.) — referred to

Montréal (Ville) c. Restructuration Deloitte Inc. (2021), 2021 SCC 53, 2021 CSC 53, 2021 CarswellQue 18528, 2021 CarswellQue 18529, 94 C.B.R. (6th) 1, 463 D.L.R. (4th) 657 (S.C.C.) — referred to

Pacific Shores Resort & Spa Ltd., Re (2011), 2011 BCSC 1775, 2011 CarswellBC 3500, 75 C.B.R. (5th) 248 (B.C. S.C. [In Chambers]) — referred to

Performance Sports Group Ltd., Re (2016), 2016 ONSC 6800, 2016 CarswellOnt 17492, 41 C.B.R. (6th) 245 (Ont. S.C.J. [Commercial List]) — referred to

Target Canada Co., Re (2015), 2015 ONSC 303, 2015 CarswellOnt 620, 22 C.B.R. (6th) 323 (Ont. S.C.J.) — referred to

Walter Energy Canada Holdings, Inc., Re (2016), 2016 BCSC 107, 2016 CarswellBC 158, 23 C.C.P.B. (2nd) 201, 33 C.B.R. (6th) 60 (B.C. S.C.) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C.

Chapter 15 — referred to

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

Generally — referred to

s. 11 — referred to

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

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

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

s. 11.02(2) [en. 2005, c. 47, s. 128] — referred to

s. 11.02(3) [en. 2005, c. 47, s. 128] — referred to

s. 11.2(4) [en. 2005, c. 47, s. 128] — referred to

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

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

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

Repair and Storage Liens Act, R.S.O. 1990, c. R.25

Generally — referred to

MOTION by debtor for amendments to initial order in insolvency proceedings.

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***Peter J. Osborne J.*:**

ENDORSEMENT

1 This is the comeback hearing directed by Chief Justice Morawetz in the Endorsement and Initial Order of March 27, 2024.

2 The Applicants seek an amended and restated initial order (the "ARIO") that, among other things:

a. extends the Stay Period to and including June 30, 2024;

b. approves a debtor-in-possession ("DIP") facility;

c. elevates the priority of the Charges as described below;

d. confirms that no person shall be entitled to set off amounts that are or may become due to any Pride Entity prior to the date of the Initial Order of March 27, 2024 with any amounts that are or may become due from any of the Pride Entities on or after the date of the Initial Order; and

e. approves each of the Governance Protocol, the Real Estate Monetization Plan, and the Intercompany and Unsecured Claims Preservation Protocol.

3 At the conclusion of the comeback hearing, I advised the parties that, notwithstanding the objections of certain parties discussed below who submitted that a shorter stay extension was appropriate, the requested stay extension to and including June 30, 2024 was granted, effective immediately, and that the DIP facility was approved, subject to one outstanding issue discussed below.

4 Given the number of parties involved, and the pace at which this matter was proceeding, there were discussions ongoing between the Applicants on the one hand and certain of the Respondents on the other hand (with the assistance of the Court-appointed Monitor) as to other relief sought and/or with respect to the exact wording that the parties were requesting be captured in the ARIO.

5 Accordingly, I directed the parties to continue those discussions, albeit for a very short period of time, with a view to narrowing or resolving the issues. I directed the Monitor to provide to me, by end of day yesterday, a revised form of draft order that included the additional language that had been agreed by the parties. I further directed that, to the extent that any issues remained outstanding, the Monitor was to identify those issues for me without further submissions from any party and I would determine those issues on the basis of submissions made at the hearing and the materials filed.

6 Late yesterday, counsel to the Monitor provided to me a revised version of the ARIO reflecting my rulings made at the conclusion of the hearing last Friday (such as the approval of the requested stay extension) as well as additional language reflecting the input of the stakeholders provided over the weekend to which the Applicants agreed, and which the Monitor approved and recommended as being reasonable and appropriate in the circumstances.

7 Finally, counsel to the Monitor provided to me proposed additional language to be included in the ARIO to which the Applicants and, importantly, the DIP Lender, did not agree, as follows:

a. counsel for Bennington and MOVE Trust proposed, with the support of a number of other securitization funders, an exception to the paramountcy provision in paragraph 53 of the draft ARIO to be captured with the addition of the following language after the words "notwithstanding any other provision of this Order": except paragraphs 5, 12, 13, 13A and 14 in relation to Securitization Party Assets; and

b. counsel to Triumph Business Capital requested that the DIP Charge be expressly subject to a carveout to be captured in paragraph 61 of the draft ARIO in respect of the assets of the Applicant, Arnold Transportation Services, in the amount of USD $3 million in favour of Triumph. Counsel to the Applicants (with the consent of the DIP Lenders and

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the recommendation of the Monitor) are agreeable to a carveout, but maintain the position advanced at the conclusion of the hearing last Friday following a brief adjournment in order for counsel to the DIP Lender to obtain instructions in this regard (at my request), that such carveout have a maximum of CDN $3 million.

8 I will address in this Endorsement all of the relief sought by the Applicants.

9 Defined terms in this Endorsement have the meaning given to them in the Endorsement of Chief Justice Morawetz dated March 27, 2024 or the motion materials, unless otherwise stated.

10 The Applicants rely on the Affidavit of Randall Benson sworn April 2, 2024 together with Exhibits thereto, the Affidavit of Sulakhan Johal sworn March 26, 2024 together with Exhibits thereto, the Pre-Filing Report of the Monitor dated March 27, 2024, and the First Report of the Monitor dated April 4, 2024.

11 The background to, and context of, this Application are fully set out in the Endorsement of the Chief Justice. However, additional events have transpired since that first hearing. As noted above, events continue to transpire, given the rapid pace of this proceeding.

12 Pursuant to the Initial Order, the Applicants obtained creditor protection which included, among other things:

a. a stay of proceedings to and including April 6, 2024 in favour of the Applicants and the limited partnerships set out in Schedule "A" to the Initial Order (collectively, the "Pride Entities"), together with certain related companies and personal guarantors as described in the Initial Order;

b. the appointment of Ernst & Young Inc. as the Court-appointed Monitor;

c. the appointment of R.C. Benson Consulting Inc. as Chief Restructuring Officer and authorization for the CRO to act as foreign representative of the Pride Entities, including in respect of the proceedings commenced by the Applicants under Chapter 15 of the United States Bankruptcy Code;

d. an order that the Pride Entities comply with the Governance Protocol which permitted them to continue selling trucks in the ordinary course of business, subject to the terms of that Governance Protocol;

e. an order that service of the Notice of Application on any claimant who has filed a lien under the *Repair and Storage Lien Act* under the Personal Property Registry in any Canadian jurisdiction against any of the Pride Entities, together with the cover letter with directions to access the website of the Monitor, constituted sufficient service of this Application, and all future motions; and

f. approval of the Administration Charge and the Directors' Charge.

13 On April 1, 2024, the CRO, in its capacity as foreign representative, filed a voluntary Chapter 15 petition for certain of the Pride Entities in the United States Bankruptcy Court for the District of Delaware seeking recognition of the Initial Order.

14 For the reasons below, I am satisfied that the relief sought by the Applicants on this comeback hearing should be granted as set out in this Endorsement.

15 The proposed stay extension to and including June 30, 2024 is necessary and appropriate in the circumstances to provide time for the continued operation of the business of the Pride Entities while the Applicants determine the appropriate next steps to be taken to further the necessary restructuring.

16 No party opposed a stay extension. However, a number of Respondents submitted that a shorter stay extension, such as 30 days, should be granted. In my view, the requested stay extension is appropriate in the circumstances. I observe that June 30 is approximately six weeks away, with the result that the additional period of time in dispute is relatively modest: two — three weeks.

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17 Moreover, while there has clearly been a period during which there was a lack of transparency and visibility resulting in a corresponding lack of trust or confidence of various stakeholders in the Applicants (which is what underlies the request for a short extension), that period predated the commencement of this proceeding. This Court is now engaged in a supervisory role, and the Monitor will have a very active role as a Court officer, alongside the CRO.

18 Among the overarching objectives of this proceeding, and those that are specifically sought to be advanced through the Governance Protocol discussed below, are to increase visibility, transparency and fairness. In my view, no party will be materially prejudiced by the extra two — three weeks requested, and the requested time will be necessary for the Applicants, with the assistance of the Monitor and CRO, to determine the sequence and timing of next steps in an efficient manner.

19 As I observed to all present at the hearing of this motion, and while I intend to ensure the procedural and substantive fairness to all parties, it is imperative to minimize the number of Court attendances requiring the vast number of counsel, as were present at this hearing, in order that costs can be minimized and recoveries can be maximized. Moreover, given the recognition proceedings ongoing in the United States, any order approving a stay extension made by this Court would necessitate a recognition motion in the US proceeding, with associated time and expense required.

20 I am satisfied that the Applicants and the Pride Entities have acted in good faith and with due diligence and continue to do so. I am also satisfied that, provided that the DIP Facility is approved, the Applicants will have sufficient liquidity to fund operations during the proposed extension period, all as reflected in the projected cash flows appended to the First Report. The Monitor supports the proposed stay extension.

21 Accordingly, the stay extension is approved pursuant to subsections 11.02(2) and (3) of the *CCAA*.

22 The DIP Facility is also approved. It is clear that the Pride Entities require interim financing to provide stability, continue going-concern operations and restructure their business. The DIP Facility has been negotiated by the Applicants, in consultation with the Monitor and the CRO, in the maximum principal amount of $30 million, with the Royal Bank of Canada, on behalf of itself and as Agent to the Syndicate Lenders (the "DIP Agent"), all pursuant to the DIP Term Sheet dated April 1, 2024.

23 The DIP Term Sheet includes the following material terms, among others:

a. financing will be provided pursuant to a $30 million, non-revolving multiple advance facility, which includes a $6.5 million initial advance;

b. the term is until June 30, 2024 as may be extended to September 30, 2024;

c. interest is payable at the Canadian prime rate from time to time in effect, plus 250 bps;

d. certain amounts are required to be applied to repay the DIP Facility, including all payments received by any of the Pride Entities outside the ordinary course of business, whether disclosed or not in the DIP Budget and which exceed $1 million individually or in the aggregate; and, subject to the Governance Protocol and the ARIO, all proceeds from the sale of Secured Assets which proceeds are not contemplated in the DIP Budget and are not subject to a security interest in favour of a third-party financier ranking in priority to the security interest of the Administrative Agent as of the Filing Date.

The DIP Term Sheet also requires that certain amounts be applied as against the Pre-Filing Secured Obligations of the Syndicate Lenders, including amounts paid in respect of Pre-Filing intercompany advances by the Pride Entities and all amounts paid to the Administrative Agent in respect of Pre-Filing Secured Obligations in accordance with the Real Property Monetization Plan and Governance Protocol, in each case, subject to an opinion from counsel to the Monitor confirming entitlement to such amounts; and

e. there is a commitment fee of $200,000.

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24 The DIP Facility is to be secured by a Court-ordered charge (the "DIP Lenders' Charge"), and it requires that an Intercompany Advances Charge also be granted to secure all payments made after the date of the ARIO by one Pride Entity to another in favour of the entity advancing such amount.

25 I am satisfied that the DIP Facility is necessary to maintain for the time being the business of the Applicants as a going concern, and that the terms are appropriate and competitive in the circumstances. I am also satisfied that the proposed DIP Lenders' Charge should be approved. It is, not surprisingly, a condition of the DIP Facility.

26 This Court has jurisdiction pursuant to section 11.2 of the *CCAA* to approve interim financing and grant a corresponding charge in an amount that the Court considered appropriate.

27 DIP financing will be ordered where the benefits of financing to all stakeholders outweigh potential prejudice to some creditors. Even where it can be established that a creditor may be prejudiced, this factor is only one factor to be considered in equal measure with the other factors set out in section 11.2(4): *Re AbitibiBowater Inc.*, 2009 QCCS 6453 at paras. 16 and 37; *League Assets Corp. (Re),*2013 BCSC 2043 at para. 51; and *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775 at para. 49(f).

28 For all of the above reasons, I am satisfied that the factors set out in section 11.2(4), and the section 11.2(1) factors enumerated by the court in *CanWest Publishing Inc.* 2010 ONSC 222, have been satisfied here. Clearly, the DIP Facility will enhance the prospects of a viable compromise or arrangement being made. Notice has been given to secured creditors and service has been effected on all known affected parties. The Monitor supports both the DIP Facility and the corresponding DIP Lenders' Charge.

29 Finally, the DIP Lenders' Charge will not prime any valid and enforceable security interest of third-party financiers in specific vehicle and lease collateral or any valid and enforceable mortgage in favour of a third-party mortgagee, which rank in priority to the Syndicate Lenders' Security.

30 No viable restructuring is possible without the DIP Facility, and the business of the Pride Entities is already in serious jeopardy. Additional and immediate funding is critical. The quantum of that funding has been calculated in good faith by the Applicants with the active involvement of the Monitor. Given the number of lenders with security interests in assets of the Pride Group, the state of its operations and its books and records (which impair any due diligence by any third party lender), as well as the significant involvement of the Syndicate Lenders in the discussions leading up to the CCAA filing and their willingness to provide interim financing, it is far from clear that there would be any other viable alternatives, let alone any alternatives on commercially competitive terms.

31 I am satisfied that with the assistance of both the Monitor and the Chief Restructuring Officer ("CRO") to continue to monitor operations, approval of the DIP Facility and the corresponding DIP Lenders' Charge is appropriate.

32 I decline to add the additional language creating an exception to the paramountcy provision proposed by Bennington and MOVE Trust (supported by other securitization funders) referred to above. First, the DIP Agent has confirmed that these proposed changes are not acceptable and, as observed above, there is at least today, no alternative to the proposed DIP Facility which I am satisfied is critical and needs to be approved now. Moreover, the ARIO contains the usual comeback clause permitting any party to seek to vary or amend the terms of the ARIO on seven days' notice if and as necessary.

33 With respect to the proposed carve-out sought by Triumph, as noted above, the Applicants and the DIP Lenders have agreed to such a carveout, in principle. I am satisfied that this is appropriate given that, at least on the evidence to date (including but not limited to the very late-breaking affidavit of Mr. Daniel Mourning of Triumph sworn April 5, 2024 and delivered just prior to the comeback hearing), it is not clear that Arnold is a borrower or included in any of the consolidated financial statements of the Pride Entities, and nor is it clear that Arnold requires any intercompany advances or advances under the DIP to continue operations. I am satisfied that the carveout is appropriate.

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34 However, I am also satisfied that the compromise (a significant one) agreed to on very short notice by the DIP Lenders and the Applicants that the carveout have a maximum of CDN $3 million is appropriate. I observe that even the Mourning Affidavit describes the customer receivables purchased by Triumph as having a value of "approximately" USD $3.3 million. The exact amount is not certain in the record, and I am satisfied that the potential prejudice to Triumph, if indeed there is any, that could result from my declining to increase the carveout by the incremental amount representing the difference between CDN $3 million and USD $3 million, is more than outweighed by the potential prejudice of the DIP Facility not being approved today.

35 I am also satisfied that all four priority charges and their relative priority are appropriate and should be approved and/or continued. At the initial hearing presided over by the Chief Justice, the priority of the Administration Charge and the Directors' Charge was deferred since that hearing proceeded effectively on an *ex parte* basis and notice of the charges had not been provided to stakeholders as is required by the *CCAA*.

36 The Initial Order of the Chief Justice granted an Administration Charge in the maximum amount of $2 million and a Directors' Charge in the maximum amount of $4.1 million. The quantum of each was determined in consultation with the Monitor, but related only to the initial 10-day stay period.

37 I am satisfied that the proposed increase in the maximum amount of the Administration Charge to $3 million and the proposed increase in the maximum amount of the Directors' Charge to $7.4 million are both appropriate. The increased quantum for each charge was again determined by the Monitor with a view to the proposed extension of the stay of proceedings to June 30, 2024. The Monitor submits that, in its opinion, the increases are reasonable and supports approval thereof. No party today challenges the quantum of the proposed increase of those charges.

38 In my view, the proposed quantum of each is appropriate. The proposed increase in the quantum of the Administration Charge was foreshadowed in the affidavit of Mr. Johal sworn in support of the Initial Order, so stakeholders have been on notice of this for some time. The increased quantum reflects the estimated financial exposure during the proposed stay extension period as well as the estimated payment cycles of the Pride Entities, and in my view is appropriate, having considered the relevant factors: see *CanWest*, at para. 54. Pursuant to section 11.52 of the *CCAA*, it is approved.

39 I am also satisfied that the Intercompany Advances Charge is appropriate. Pursuant to the proposed Preservation Protocol discussed below, the Pride Entities would be entitled to continue to utilize their centralized cash management system currently in place, and that includes the ability to make intercompany transfers. This in turn includes the authority for one Pride Entity to advance amounts to a recipient Pride Entity, and for such recipient to borrow from the lending Pride Entity the amounts advanced in order to fund its ongoing operations (referred to in the materials as the "Intercompany Advances").

40 Moreover, the DIP Facility permits the advance of funds from one DIP Borrower to another, and the requested relief would help to ensure that stakeholders, including but not limited to the DIP Lenders, are not prejudiced by the movement of such funds.

41 It follows that a corresponding charge in favour of the lending Pride Entity is appropriate. This is consistent with the overarching objective of maintaining the status quo and avoiding, particularly at this early stage, inadvertently altering relative priorities or rights of creditors of different Pride Entities within the group.

42 Where the operations and expenses of debtor companies are funded in the ordinary course through intercompany advances, *CCAA* courts have found it to be appropriate to approve the continuation of those arrangements and to grant a corresponding charge: *Re Performance Sports Group Ltd.*, 2016 ONSC 6800 at paras. 33-35 [Performance Sports Group]; and *Walter Energy Canada Holdings, Inc., (Re)*, 2016 BCSC 107 at paras. 62-67 [Walter Energy].

43 I am further satisfied that the proposed increase in the Directors' Charge is appropriate as was also previewed in the Initial Affidavit. Established by the Applicants in consultation with the Monitor, it reflects approximately two weeks of payroll, one month of Canadian sales tax obligations, and one month of US state sales and use taxes, income taxes and payroll taxes that attract director and officer liability in the jurisdictions in which those entities operate during the proposed stay extension period, all in addition to the current accrued vacation pay and current unremitted source deductions.

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44 For all of these reasons, I am satisfied that the Directors' Charge should be approved pursuant to section 11.51 of the *CCAA*.

45 The general jurisdiction of the court found in section 11 of the *CCAA* includes the ability to make orders that it thinks appropriate. The express power to grant a critical supplier's charge found in section 11.4 does not remove the inherent jurisdiction of the court to grant other critical supplier protections, including provision for the payment of prefiling amounts to suppliers whose services are critical to the post-filing operations of the debtor: *CanWest*, at para. 50.

46 A supplier is "critical", or can be, where the particular goods or services are sufficiently integrated into the operations of the debtor company that it would be materially disruptive to the operations and restructuring of the debtor for the particular supplier to cease providing such services and/or it would be difficult or impossible to secure an alternate supplier: *Re Target Canada Co.*, 2015 ONSC 303 at paras. 62-65; and *Re Clover Leaf Holdings Company*, 2019 ONSC 6966 at paras. 24-27.

47 In my view, the particular circumstances of this case justify the proposed authorization for the Pride Entities to pay certain prefiling amounts, including (with the consent of both the Monitor and the CRO), any amounts owing for goods, services or tolls if the payment is necessary to preserve value, together with insurance premiums that were accrued but unpaid as of the date of filing.

48 The ARIO sought today contemplates the following priorities among charges:

a. first, the Administration Charge;

b. second, the Intercompany Advances Charge;

c. third, the DIP Lenders' Charge; and

d. fourth, the Directors' Charge.

49 The ARIO would further provide that the Directors' Charge shall, subject to the priorities listed above, rank in priority to all other Encumbrances except for any validly perfected and enforceable security interest of third-party financiers in specific vehicle and lease collateral; and any valid and enforceable mortgage in favour of a third-party mortgagee, in each case, including for greater certainty, such interests in favour of the Administrative Agent and Syndicate Lenders under the Security.

50 For the reasons set out above, I am satisfied that the proposed priority of the charges is appropriate. It, too, is supported by the Monitor and no party at the hearing seriously contested the proposed relative priorities.

51 In addition, the proposed ARIO provides that no person shall be entitled to set off amounts that are or may become due to any Pride Entity prior to the date of the Initial Order with any amounts that are or may become due from any of the Pride Entities on or after the date of the Initial Order, or are or may become due from any of the Pride Entities in respect of obligations arising prior to the date of the ARIO with any amounts that are or may become due to any of the Pride Entities in respect of obligations arising on or after the date of the Initial Order without the prior written consent of the applicable Pride Entity, the CRO and the Monitor, or further Order of this Court.

52 I observe that such accords with the law as it now stands in any event: see ss. 11 and 11.02 of the *CCAA* and *Montréal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53 at para. 62. Moreover, any stakeholder ought not to be prejudiced by this language in that they can seek an order lifting the stay of proceedings if and as necessary. I am satisfied, however, that the proposed language should be included in the ARIO given that certain creditors of Pride Entities have suggested, or taken steps in furtherance of, setting off pre-filing obligations against post-filing obligations. It is important that there be clarity in this regard.

53 I am also satisfied that the Protocols Order is appropriate and should be approved. The Protocols Order provides for Court approval of the Governance Protocol, the Real Estate Monetization Plan, and the Intercompany and unsecured Claims Preservation Protocol. None of these proposed protocols is opposed. The Protocols are fully supported by the Monitor as well

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as the Syndicate Lenders and the Directors & Officers. In my view, each of them is appropriate. The protocols, and particularly the Governance Protocol, achieve that objective.

54 The Governance Protocol provides for reasonable controls and oversight over cash proceeds and provides sufficient scrutiny that distributions and remittances are made in accordance with the rights of all stakeholders considered. The overarching objective, as observed above, is to create an environment of visibility, transparency and fairness, and to maintain the status quo particularly in this early phase of this restructuring, where there remain many unknowns.

55 It is important to observe that the Governance Protocol is not intended to be a final and determinative document describing how revenues of the Pride Group will be dealt with. Rather, it is intended to provide short-term stability, predictability and equality of treatment for lenders.

56 To this end, I further observe that a number of stakeholders have made submissions to the effect that their consent or lack of opposition to the approval of the Governance Protocol is not to be taken as any agreement as to the appropriateness of its terms, for all time. Approval today of the Governance Protocol is without prejudice to the rights of any stakeholder to make submissions as to proposed amendments or variations at a later date.

57 The Real Estate Monetization Plan (also referred to in the materials as the Real Estate Protocol) provides for the requirement that the Pride Entities list for sale all of the real property by no later than May 1, 2024 or such later date as the DIP Agent may agree under the direction of the CRO. At my direction, approval of the Monitor is also required.

58 It appears that one very significant source of potential recoveries will be the realization of net proceeds from the sale of real property. I am satisfied that the Real Estate Monetization Plan provides for the maximization of such recoveries on an accelerated basis, but does so in an orderly way, and subject to appropriate oversight to ensure that it is in the best interests of the stakeholders to sell a particular parcel of real property as opposed to keeping it for going concern operations. Proceeds will be dealt with in accordance with the terms of the DIP Term Sheet, the Preservation Protocol and any relevant orders of this Court.

59 The Intercompany and Unsecured Claims Preservation Protocol provides that, after repayment of specific property mortgages registered on title to the real properties once sold, any net proceeds of sale are pooled in accordance with the mechanisms described in that Protocol, with the objective of preserving claims in the priority and manner as they would have attached to the real properties, until distributions of such proceeds are made.

60 I am further satisfied that this is appropriate. Certain mortgage lenders of the Pride Entities have provided financing for several real properties which has been cross collateralized as against other real properties. This Protocol ensures that any inequity that could result from the timing of the sale of such properties are minimized. Such inequities could arise from the timing of the sale of a property since certain properties are subject to intercompany claims and others are not.

61 This Protocol was designed to implement a mechanism to permit mortgagees to be repaid from proceeds of monetization of properties in their respective Mortgage Pools (as defined in the Preservation Protocol) as and when they are sold, but the distribution of proceeds to claimants of sold properties mimics, to the greatest extent possible in the circumstances, the realization to which they would have been entitled had the properties in each Mortgage Pool not been cross collateralized.

62 The Pride Entities will seek an order from this Court authorizing any distribution from the net proceeds of sale of any properties to the relevant mortgagee at the same time as they seek an order approving the sale of that property. Remaining net proceeds after such distributions will be held by the Monitor.

63 Following the sale of all property in a Mortgage Pool, the Pride Entities, in consultation with the Monitor, the CRO and the DIP Agent, will seek approval of any distribution to claimants with the same nature and priority as they had immediately prior to the sale, with respect to those properties that have been sold.

64 For all of these reasons, the requested relief is approved. ARIO and Protocols Order to go in the form signed by me today. Both orders have immediate effect without the necessity of issuing and entering.

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65 The Monitor will schedule the next hearing, to address any requested revisions to the Governance Protocol, expected in approximately two weeks' time, through the Commercial List Office.

Motion granted.

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KeyCite treatment
Most Negative Treatment: Distinguished
Most Recent Distinguished: Party A v. The Law Society of British Columbia | 2021 BCCA 130, 2021 CarswellBC 872, 48 B.C.L.R. (6th) 238, 83 Admin. L.R. (6th) 250, [2021] 9 W.W.R. 379, 329 A.C.W.S. (3d) 457, 458 D.L.R. (4th) 77 | (B.C. C.A., Mar 29, 2021)

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 CSC 41, 2002 SCC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

McLachlin C.J.C., Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant
Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental
Related Abridgment Classifications
Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.xiii Miscellaneous
Civil practice and procedure
XII Discovery
XII.4 Examination for discovery
XII.4.h Range of examination
XII.4.h.ix Privilege
XII.4.h.ix.F Miscellaneous
Evidence
XIV Privilege
XIV.8 Public interest immunity

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XIV.8.a Crown privilege

Headnote

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous documents

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Examination for discovery — Range of examination — Privilege — Miscellaneous privileges

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Preuve --- Preuve documentaire — Confidentialité en ce qui concerne les documents — Documents divers

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Communication des documents — Documents confidentiels — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire — Confidentialité — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

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The federal government provided a Crown corporation with a $1.5 billion loan for the construction and sale of two CANDU nuclear reactors to China. An environmental organization sought judicial review of that decision, maintaining that the authorization of financial assistance triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*. The Crown corporation was an intervenor with the rights of a party in the application for judicial review. The Crown corporation filed an affidavit by a senior manager referring to and summarizing confidential documents. Before cross-examining the senior manager, the environmental organization applied for production of the documents. After receiving authorization from the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the Crown corporation sought to introduce the documents under R. 312 of the *Federal Court Rules, 1998* and requested a confidentiality order. The confidentiality order would make the documents available only to the parties and the court but would not restrict public access to the proceedings.

The trial judge refused to grant the order and ordered the Crown corporation to file the documents in their current form, or in an edited version if it chose to do so. The Crown corporation appealed under R. 151 of the *Federal Court Rules, 1998* and the environmental organization cross-appealed under R. 312. The majority of the Federal Court of Appeal dismissed the appeal and the cross-appeal. The confidentiality order would have been granted by the dissenting judge. The Crown corporation appealed.

Held: The appeal was allowed.

Publication bans and confidentiality orders, in the context of judicial proceedings, are similar. The analytical approach to the exercise of discretion under R. 151 should echo the underlying principles set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). A confidentiality order under R. 151 should be granted in only two circumstances, when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

The alternatives to the confidentiality order suggested by the Trial Division and Court of Appeal were problematic. Expunging the documents would be a virtually unworkable and ineffective solution. Providing summaries was not a reasonable alternative measure to having the underlying documents available to the parties. The confidentiality order was necessary in that disclosure of the documents would impose a serious risk on an important commercial interest of the Crown corporation, and there were no reasonable alternative measures to granting the order.

The confidentiality order would have substantial salutary effects on the Crown corporation's right to a fair trial and on freedom of expression. The deleterious effects of the confidentiality order on the open court principle and freedom of expression would be minimal. If the order was not granted and in the course of the judicial review application the Crown corporation was not required to mount a defence under the *Canadian Environmental Assessment Act*, it was possible that the Crown corporation would suffer the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. The salutary effects of the order outweighed the deleterious effects.

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organisme environnemental a demandé la production des documents avant de procéder au contre-interrogatoire du cadre supérieur. Après avoir obtenu l'autorisation des autorités chinoises de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, la société d'État a cherché à les introduire en invoquant la r. 312 des *Règles de la Cour fédérale, 1998*, et elle a aussi demandé une ordonnance de confidentialité. Selon les termes de l'ordonnance de confidentialité, les documents seraient uniquement mis à la disposition des parties et du tribunal, mais l'accès du public aux débats ne serait pas interdit.

Le juge de première instance a refusé l'ordonnance de confidentialité et a ordonné à la société d'État de déposer les documents sous leur forme actuelle ou sous une forme révisée, à son gré. La société d'État a interjeté appel en vertu de la r. 151 des *Règles de la Cour fédérale, 1998*, et l'organisme environnemental a formé un appel incident en vertu de la r. 312. Les juges majoritaires de la Cour d'appel ont rejeté le pourvoi et le pourvoi incident. Le juge dissident aurait accordé l'ordonnance de confidentialité. La société d'État a interjeté appel.

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Arrêt: Le pourvoi a été accueilli.

Il y a de grandes ressemblances entre l'ordonnance de non-publication et l'ordonnance de confidentialité dans le contexte des procédures judiciaires. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la r. 151 devrait refléter les principes sous-jacents énoncés dans l'arrêt *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Une ordonnance de confidentialité rendue en vertu de la r. 151 ne devrait l'être que lorsque: 1) une telle ordonnance est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le cadre d'un litige, en l'absence d'autres solutions raisonnables pour écarter ce risque; et 2) les effets bénéfiques de l'ordonnance de confidentialité, y compris les effets sur les droits des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris les effets sur le droit à la liberté d'expression, lequel droit comprend l'intérêt du public à l'accès aux débats judiciaires.

Les solutions proposées par la Division de première instance et par la Cour d'appel comportaient toutes deux des problèmes. Épurer les documents serait virtuellement impraticable et inefficace. Fournir des résumés des documents ne constituait pas une « autre option raisonnable » à la communication aux parties des documents de base. L'ordonnance de confidentialité était nécessaire parce que la communication des documents menacerait gravement un intérêt commercial important de la société d'État et parce qu'il n'existait aucune autre option raisonnable que celle d'accorder l'ordonnance.

L'ordonnance de confidentialité aurait d'importants effets bénéfiques sur le droit de la société d'État à un procès équitable et à la liberté d'expression. Elle n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression. Advenant que l'ordonnance ne soit pas accordée et que, dans le cadre de la demande de contrôle judiciaire, la société d'État n'ait pas l'obligation de présenter une défense en vertu de la *Loi canadienne sur l'évaluation environnementale*, il se pouvait que la société d'État subisse un préjudice du fait d'avoir communiqué cette information confidentielle en violation de ses obligations, sans avoir pu profiter d'un avantage similaire à celui du droit du public à la liberté d'expression. Les effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables.

Table of Authorities

Cases considered by *Iacobucci J.*:

AB Hassle v. Canada (Minister of National Health & Welfare), 1998 CarswellNat 2520, 83 C.P.R. (3d) 428, 161 F.T.R. 15 (Fed. T.D.) — considered

AB Hassle v. Canada (Minister of National Health & Welfare), 2000 CarswellNat 356, 5 C.P.R. (4th) 149, 253 N.R. 284, [2000] 3 F.C. 360, 2000 CarswellNat 3254 (Fed. C.A.) — considered

Canadian Broadcasting Corp. v. New Brunswick (Attorney General), 2 C.R. (5th) 1, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 182 N.B.R. (2d) 81, 463 A.P.R. 81, 39 C.R.R. (2d) 189, 203 N.R. 169, 1996 CarswellNB 462, 1996 CarswellNB 463, 2 B.H.R.C. 210 (S.C.C.) — followed

Dagenais v. Canadian Broadcasting Corp., 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 1994 CarswellOnt 1168 (S.C.C.) — followed

Edmonton Journal v. Alberta (Attorney General) (1989), [1990] 1 W.W.R. 577, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, 102 N.R. 321, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1, 1989 CarswellAlta 198, 1989 CarswellAlta 623 (S.C.C.) — followed

Eli Lilly & Co. v. Novopharm Ltd., 56 C.P.R. (3d) 437, 82 F.T.R. 147, 1994 CarswellNat 537 (Fed. T.D.) — referred to

Ethyl Canada Inc. v. Canada (Attorney General), 1998 CarswellOnt 380, 17 C.P.C. (4th) 278 (Ont. Gen. Div.) — considered

Irwin Toy Ltd. c. Québec (Procureur général), 94 N.R. 167, (sub nom. *Irwin Toy Ltd. v. Quebec (Attorney General)*) [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 1989 CarswellQue 115F, 1989 CarswellQue 115 (S.C.C.) — followed

M. (A.) v. Ryan, 143 D.L.R. (4th) 1, 207 N.R. 81, 4 C.R. (5th) 220, 29 B.C.L.R. (3d) 133, [1997] 4 W.W.R. 1, 85 B.C.A.C. 81, 138 W.A.C. 81, 34 C.C.L.T. (2d) 1, [1997] 1 S.C.R. 157, 42 C.R.R. (2d) 37, 8 C.P.C. (4th) 1, 1997 CarswellBC 99, 1997 CarswellBC 100 (S.C.C.) — considered

N. (F.), Re, 2000 SCC 35, 2000 CarswellNfld 213, 2000 CarswellNfld 214, 146 C.C.C. (3d) 1, 188 D.L.R. (4th) 1, 35 C.R. (5th) 1, [2000] 1 S.C.R. 880, 191 Nfld. & P.E.I.R. 181, 577 A.P.R. 181 (S.C.C.) — considered

R. v. E. (O.N.), 2001 SCC 77, 2001 CarswellBC 2479, 2001 CarswellBC 2480, 158 C.C.C. (3d) 478, 205 D.L.R. (4th) 542, 47 C.R. (5th) 89, 279 N.R. 187, 97 B.C.L.R. (3d) 1, [2002] 3 W.W.R. 205, 160 B.C.A.C. 161, 261 W.A.C. 161 (S.C.C.) — referred to

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R. v. Keegstra, 1 C.R. (4th) 129, [1990] 3 S.C.R. 697, 77 Alta. L.R. (2d) 193, 117 N.R. 1, [1991] 2 W.W.R. 1, 114 A.R. 81, 61 C.C.C. (3d) 1, 3 C.R.R. (2d) 193, 1990 CarswellAlta 192, 1990 CarswellAlta 661 (S.C.C.) — followed

R. v. Mentuck, 2001 SCC 76, 2001 CarswellMan 535, 2001 CarswellMan 536, 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 47 C.R. (5th) 63, 277 N.R. 160, [2002] 2 W.W.R. 409 (S.C.C.) — followed

R. v. Oakes, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 53 O.R. (2d) 719, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — referred to

s. 2(b) — referred to

s. 11(d) — referred to

Canadian Environmental Assessment Act, S.C. 1992, c. 37

Generally — considered

s. 5(1)(b) — referred to

s. 8 — referred to

s. 54 — referred to

s. 54(2)(b) — referred to

Criminal Code, R.S.C. 1985, c. C-46

s. 486(1) — referred to

Rules considered:

Federal Court Rules, 1998, SOR/98-106

R. 151 — considered

R. 312 — referred to

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1re inst.)), qui avait accueilli en partie la demande.

The judgment of the court was delivered by *Iacobucci J.*:

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

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2 For the following reasons, I would issue the confidentiality order sought and, accordingly, would allow the appeal.

II. Facts

3 The appellant, Atomic Energy of Canada Ltd. ("AECL"), is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a $1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

4 The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

5 The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Dr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under R. 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang, which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

9 As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order; otherwise, it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Dr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

10 The Federal Court of Canada, Trial Division, refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

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III. Relevant Statutory Provisions

11 *Federal Court Rules, 1998*, SOR/98-106

151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.

(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments below

A. Federal Court of Canada, Trial Division, [2000] 2 F.C. 400

12 Pelletier J. first considered whether leave should be granted pursuant to R. 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondents would be prejudiced by delay, but since both parties had brought interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

17 In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found

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that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

19 Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. Federal Court of Appeal, [2000] 4 F.C. 426

(1) Evans J.A. (Sharlow J.A. concurring)

21 At the Federal Court of Appeal, AECL appealed the ruling under R. 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under R. 312.

22 With respect to R. 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b), which the appellant proposed to raise if s. 5(1)(b) of the CEAA was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the CEAA. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under R. 312.

23 On the issue of the confidentiality order, Evans J.A. considered R. 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

24 In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health & Welfare)*, [2000] 3 F.C. 360 (Fed. C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Gen. Div.), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEAA, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

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26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus, the appeal and cross-appeal were both dismissed.

(2) Robertson J.A. (dissenting)

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

31 Robertson J.A. stated that, although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

32 He observed that, in the area of commercial law, when the information sought to be protected concerns "trade secrets," this information will not be disclosed during a trial if to do so would destroy the owner's proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

> (1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is "necessary" to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

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34 Robertson J.A. also considered the public interest in the need to ensure that site-plans for nuclear installations were not, for example, posted on a web-site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

35

A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under R. 151 of the *Federal Court Rules, 1998*?

B. Should the confidentiality order be granted in this case?

VI. Analysis

A. The Analytical Approach to the Granting of a Confidentiality Order

(1) The General Framework: Herein the Dagenais Principles

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) [hereinafter *New Brunswick*], at para. 23, La Forest J. expressed the relationship as follows:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

37 A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

38 Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under R. 151 should echo the underlying principles laid out in *Dagenais*, *supra*, although it must be tailored to the specific rights and interests engaged in this case.

39 *Dagenais*, *supra*, dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

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40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

> A publication ban should only be ordered when:
>
> (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code* to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick*, *supra*, at para. 33; however, he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

> (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
>
> (b) the judge must consider whether the order is limited as much as possible; and
>
> (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, 2001 SCC 76 (S.C.C.), and its companion case *R. v. E. (O.N.)*, 2001 SCC 77 (S.C.C.). In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

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45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve *any* important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

> A publication ban should only be ordered when:
>
> > (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

> The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflect . . . the substance of the *Oakes* test", *we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right*. [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

49 The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

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50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the *Charter*: *New Brunswick*, *supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is *seen* to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice," guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, *supra*, at para. 22.

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

> A confidentiality order under R. 151 should only be granted when:
>
> > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in *Mentuck*, *supra*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well-grounded in the evidence and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest," the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35

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(S.C.C.), at para. 10, the open court rule only yields" where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. Application of the Test to this Appeal

(1) Necessity

58 At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the confidential documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been" accumulated with a reasonable expectation of it being kept confidential" (para. 14) as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEAA and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

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63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

64 There are two possible options with respect to expungement, and, in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal in the sense that at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

65 Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese authorities require prior approval for any request by AECL to disclose information.

66 The second option is that the expunged material be made available to the Court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are *reasonably* alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits" may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

(2) The Proportionality Stage

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which, in turn, is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

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(a) Salutary Effects of the Confidentiality Order

70 As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan*, *supra*, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected *Charter* right, the proper administration of justice calls for a confidentiality order: *Mentuck*, *supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

71 The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the CEAA is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

72 Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

(b) Deleterious Effects of the Confidentiality Order

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick, supra*, at paras. 22-23. Although as a *general* principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the *particular* deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 976, *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), *per* Dickson C.J., at pp. 762-764. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the *Charter*: *Keegstra*, *supra*, at pp. 760-761. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal*,

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supra, *per* Wilson J., at pp. 1357-1358. Clearly, the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

77 However, as mentioned above, to some extent the search for truth may actually be *promoted* by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will not submit the documents, with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination. In addition, the court will not have the benefit of this cross-examination or documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

78 As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would, in turn, assist the court in reaching accurate factual conclusions. Given the nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

79 In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focuses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

81 The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in *Edmonton Journal*, *supra*, at p. 1339:

> It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

82 On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

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83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a confidentiality order. It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below, where he stated, at para. 87:

> While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the CEAA. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish *public* interest from *media* interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public *nature* of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values," we must guard carefully against judging expression according to its popularity."

86 Although the public interest in open access to the judicial review application *as a whole* is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

> Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-1354:

> One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

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88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations or withholding the documents in the hopes that either it will not have to present a defence under the CEAA or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the CEAA, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on *either* the public interest in freedom of expression *or* the appellant's commercial interests or fair trial right. This neutral result is in contrast with the scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

90 In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

91 In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the CEAA, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

92 Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under R. 151 of the *Federal Court Rules, 1998*.

Appeal allowed.

Pourvoi accueilli.

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KeyCite treatment
Most Negative Treatment: Distinguished
Most Recent Distinguished: T.Z. v. P.V.R. | 2022 SKQB 129, 2022 CarswellSask 256 | (Sask. Q.B., May 17, 2022)

2021 SCC 25, 2021 CSC 25
Supreme Court of Canada

Sherman Estate v. Donovan

2021 CarswellOnt 8340, 2021 CarswellOnt 8339, 2021 SCC 25, 2021 CSC 25, [2021] 2 S.C.R. 75, [2021] 2 R.C.S. 75, [2021] S.C.J. No. 25, 331 A.C.W.S. (3d) 489, 458 D.L.R. (4th) 361, 66 C.P.C. (8th) 1, 67 E.T.R. (4th) 163, 72 C.R. (7th) 223, EYB 2021-391973

Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate (Appellants) and Kevin Donovan and Toronto Star Newspapers Ltd. (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee (Interveners)

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

Heard: October 6, 2020
Judgment: June 11, 2021
Docket: 38695

Proceedings: affirming *Donovan v. Sherman Estate* (2019), 56 C.P.C. (8th) 82, 47 E.T.R. (4th) 1, 2019 CarswellOnt 6867, 2019 ONCA 376, C.W. Hourigan J.A., Doherty J.A., Paul Rouleau J.A. (Ont. C.A.); reversing *Toronto Star Newspapers Ltd. v. Sherman Estate* (2018), 41 E.T.R. (4th) 126, 2018 CarswellOnt 13017, 2018 ONSC 4706, 28 C.P.C. (8th) 102, 417 C.R.R. (2d) 321, S.F. Dunphy J. (Ont. S.C.J.)

Counsel: Chantelle Cseh, Timothy Youdan, for Appellants
Iris Fischer, Skye A. Sepp, for Respondents
Peter Scrutton, for Intervener, Attorney General of Ontario
Jacqueline Hughes, for Intervener, Attorney General of British Columbia
Ryder Gilliland, for Intervener, Canadian Civil Liberties Association
Ewa Krajewska, for Intervener, Income Security Advocacy Centre
Robert S. Anderson, Q.C., for Interveners, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.
Adam Goldenberg, for Intervener, British Columbia Civil Liberties Association
Khalid Janmohamed, for Interveners, HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee

Subject: Civil Practice and Procedure; Criminal; Estates and Trusts
Related Abridgment Classifications
Civil practice and procedure
XXIII Practice on appeal
XXIII.13 Powers and duties of appellate court

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XXIII.13.e Evidence on appeal
XXIII.13.e.i New evidence

Judges and courts

XVI Jurisdiction
XVI.11 Jurisdiction of court over own process
XVI.11.c Sealing files

Headnote

Judges and courts --- Jurisdiction — Jurisdiction of court over own process — Sealing files

Wealthy couple were found dead in their home and deaths generated intense public interest and press scrutiny — Estates and estate trustees sought to stem press scrutiny — When applications to obtain certificates of appointment of estate trustees were made, trustees sought sealing order — Application judge granted sealing order — Journalist and newspaper successfully appealed and sealing order was set aside — Trustees appealed — Appeal dismissed — Court of Appeal was right to set aside sealing order — Information in court files was not of highly sensitive character that it could be said to strike at core identity of affected persons — Trustees had failed to show how lifting of sealing orders engaged dignity of affected individuals — It could not be said that risk to privacy was sufficiently serious to overcome strong presumption of openness — Same was true of risk to physical safety.

Civil practice and procedure --- Practice on appeal — Powers and duties of appellate court — Evidence on appeal — New evidence

Juges et tribunaux --- Compétence — Compétence de la cour sur sa propre procédure — Mise sous scellés de dossiers

Couple riche et célèbre a été retrouvé sans vie dans sa résidence, et la mort du couple a suscité un vif intérêt dans le public et provoqué une attention médiatique intense — Successions ainsi que les fiduciaires des successions ont cherché à réfréner l'attention médiatique intense — Quand le temps est venu d'obtenir leurs certificats de nomination à titre de fiduciaires des successions, les fiduciaires ont sollicité une ordonnance de mise sous scellés — Juge de première instance a accordé l'ordonnance de mise sous scellés — Journaliste et journal ont eu gain de cause en appel et l'ordonnance a été annulée — Fiduciaires ont formé un pourvoi — Pourvoi rejeté — Cour d'appel a eu raison d'annuler l'ordonnance de mise sous scellés — Renseignements contenus dans les dossiers judiciaires ne revêtaient pas un caractère si sensible qu'on pourrait dire qu'ils touchaient à l'identité fondamentale des personnes concernées — Fiduciaires n'ont pas démontré en quoi la levée des ordonnances de mise sous scellés mettait en jeu la dignité des personnes touchées — On ne saurait affirmer que le risque pour la vie privée était suffisamment sérieux pour permettre de réfuter la forte présomption de publicité des débats judiciaires — Il en était de même du risque pour la sécurité physique.

Procédure civile --- Procédure en appel — Pouvoirs et obligations de la cour d'appel — Preuve en appel — Nouvelle preuve

A wealthy and prominent husband and wife were found dead in their home. Their deaths generated intense public interest and press scrutiny, and the following year the police service announced that the deaths were being investigated as homicides. The couple's estates and the estate trustees sought to stem the intense press scrutiny. When the time came to obtain certificates of appointment of estate trustees, the trustees sought a sealing order so that the trustees and beneficiaries might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. These sealing orders were granted, with the application judge sealing the orders for an initial period of two years with the possibility of renewal.

The sealing orders were challenged by a journalist, who had written a series of articles on the couple's death, and the newspaper for which he wrote. The Court of Appeal allowed the appeal and the sealing orders were lifted. The Court of Appeal concluded that the privacy interest for which the trustees sought protection lacked the quality of public interest and that there was no evidence that could warrant a finding that disclosure of the content of the estate files posed a real risk to anyone's physical safety. The trustees had failed the first stage of the test for obtaining orders sealing the probate files.

The trustees appealed, seeking to restore the sealing orders. The newspaper brought a motion to adduce new evidence on the appeal.

Held: The appeal was dismissed; the motion was dismissed as moot.

Per Kasirer J. (Wagner C.J.C., Moldaver, Karakatsanis, Brown, Rowe, Martin JJ. concurring): There is a strong presumption in favour of open courts. Notwithstanding this presumption, exceptional circumstances do arise where competing interests justified a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness

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was sought, the applicant must demonstrate as a threshold requirement that openness presents a serious risk to a competing interest of public importance. The applicant must show that the order was necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweighed its negative effects. For the purposes of the relevant test, an aspect of privacy was recognized as an important public interest. Proceedings in open court could lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what was seen as the public interest in protecting human dignity, was shown to be at serious risk, an exception to the open court principle may be justified. It could not be said that the risk to privacy was sufficiently serious to overcome the strong presumption of openness. The same was true of the risk to physical safety. The Court of Appeal was right to set aside the sealing orders.

The broad claims of the trustees failed to focus on the elements of privacy that were deserving of public protection in the open court context. Personal information disseminated in open court could be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy served to protect individuals from this affront, it was an important public interest relevant under the 2002 Supreme Court of Canada judgment that set out the relevant test. This public interest would only be seriously at risk where the information in question struck at what was the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings. The information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons. The trustees had failed to show how the lifting of the sealing orders engaged the dignity of the affected individuals.

In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that: (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects. Only where all three of these prerequisites have been met can a discretionary limit on openness properly be ordered. Contrary to what the trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. The fundamental rationale for openness applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action. The emphasis that the Court of Appeal placed on personal concerns as a means of deciding that the sealing orders failed to meet the necessity requirement was mistaken. It was inappropriate to dismiss the public interest in protecting privacy as merely a personal concern. The important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. The risk to this interest would be serious only where the information that would be disseminated as a result of court openness was sufficiently sensitive such that openness could be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity.

The failure of the application judge to assess the sensitivity of the information constituted a failure to consider a required element of the legal test, and this warranted intervention on appeal. Applying the appropriate framework to the facts of this case, it was concluded that the risk to the important public interest in the affected individuals' privacy was not serious. The information that the trustees sought to protect was not highly sensitive and this alone was sufficient to conclude that there was no serious risk to the important public interest in privacy so defined. The relevant privacy interest bearing on the dignity of the affected persons had not been shown. Merely associating the beneficiaries or trustees with the couple's unexplained deaths was not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity. The trustees did not advance any specific reason why the contents of these files were more sensitive than they may seem at first glance. While some of the material in the court files may well be broadly disseminated, the nature of the information had not been shown to give rise to a serious risk to the important public interest in privacy.

There was no controversy that there was an important public interest in protecting individuals from physical harm. Direct evidence was not necessarily required to establish a serious risk to an important interest. It was not just the probability of the feared harm but also the gravity of the harm itself that was relevant to the assessment of serious risk. There was no dispute that the feared physical harm was grave, but it was agreed that the probability of this harm was speculative. The bare assertion that such a risk exists failed to meet the threshold necessary to establish a serious risk of physical harm. The application judge's

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conclusion to the contrary was an error warranting intervention. Even if the trustees had succeeded in showing a serious risk to the privacy interest they asserted, a publication ban would likely have been sufficient as a reasonable alternative to prevent this risk. The trustees were not entitled to any discretionary order limiting the open court principle. The Court of Appeal rightly concluded that there was no basis for asking for redactions because the trustees had failed at this stage of the test for discretionary limits on court openness.

Les cadavres d'un homme et de sa femme, un couple riche et célèbre, ont été retrouvés dans leur résidence. Leur mort a suscité un vif intérêt dans le public et provoqué une attention médiatique intense et, au cours de l'année qui a suivi, le service de police a annoncé que les morts faisaient l'objet d'une enquête pour homicides. La succession du couple ainsi que les fiduciaires des successions ont cherché à réfréner l'attention médiatique intense. Quand le temps est venu d'obtenir leurs certificats de nomination à titre de fiduciaires des successions, les fiduciaires ont sollicité une ordonnance de mise sous scellés dans le but d'épargner aux fiduciaires des successions et aux bénéficiaires de nouvelles atteintes à leur vie privée, et de les protéger contre ce qui, selon les allégations, aurait constitué un risque pour leur sécurité. Les ordonnances de mise sous scellés ont été accordées et le juge de première instance a fait placer sous scellés les dossiers pour une période initiale de deux ans avec possibilité de renouvellement.

Les ordonnances de mise sous scellés ont été contestées par un journaliste qui avait écrit une série d'articles sur la mort du couple et par le journal pour lequel il écrivait. La Cour d'appel a accueilli l'appel et les ordonnances de mise sous scellés ont été levées. La Cour d'appel a conclu que l'intérêt en matière de vie privée à l'égard duquel les fiduciaires sollicitaient une protection ne comportait pas la qualité d'intérêt public et qu'il n'y avait aucun élément de preuve permettant de conclure que la divulgation du contenu des dossiers de succession posait un risque réel pour la sécurité physique de quiconque. Les fiduciaires n'avaient pas franchi la première étape du test relatif à l'obtention d'ordonnances de mise sous scellés des dossiers d'homologation.

Les fiduciaires ont formé un pourvoi visant à faire rétablir les ordonnances de mise sous scellés. Le journal a déposé une requête visant à introduire une nouvelle preuve dans le cadre du pourvoi.

Arrêt: Le pourvoi a été rejeté; la requête, devenue théorique, a été rejetée.

Kasirer, J. (Wagner, J.C.C., Moldaver, Karakatsanis, Brown, Rowe, Martin, JJ., souscrivant à son opinion) : Il existe une forte présomption en faveur de la publicité des débats judiciaires. Malgré cette présomption, il peut arriver des circonstances exceptionnelles où des intérêts opposés justifient de restreindre le principe de la publicité des débats judiciaires. Lorsqu'un demandeur sollicite une ordonnance judiciaire discrétionnaire limitant le principe constitutionnalisé de la publicité des procédures judiciaires, il doit démontrer, comme condition préliminaire, que la publicité des débats en cause présente un risque sérieux pour un intérêt opposé qui revêt une importance pour le public. Le demandeur doit démontrer que l'ordonnance est nécessaire pour écarter le risque et que, du point de vue de la proportionnalité, les avantages de cette ordonnance restreignant la publicité l'emportent sur ses effets négatifs. On a reconnu qu'un aspect de la vie privée constituait un intérêt public important pour l'application du test pertinent. La tenue de procédures judiciaires publiques était susceptible de mener à la diffusion de renseignements personnels très sensibles, laquelle entraînerait non seulement un désagrément ou de l'embarras pour la personne touchée, mais aussi une atteinte à sa dignité. Dans les cas où il est démontré que cette dimension plus restreinte de la vie privée, qui semble tirer son origine de l'intérêt du public à la protection de la dignité humaine, était sérieusement menacée, une exception au principe de la publicité des débats judiciaires peut être justifiée. On ne saurait affirmer que le risque pour la vie privée était suffisamment sérieux pour permettre de réfuter la forte présomption de publicité des débats judiciaires. Il en était de même du risque pour la sécurité physique. La Cour d'appel a eu raison d'annuler les ordonnances de mise sous scellés.

Les larges revendications des fiduciaires n'étaient pas axées sur les éléments de la vie privée qui méritaient une protection publique dans le contexte de la publicité des débats judiciaires. La diffusion de renseignements personnels dans le cadre de débats judiciaires publics peut être plus qu'une source de désagrément et peut aussi entraîner une atteinte à la dignité d'une personne. Dans la mesure où elle sert à protéger les personnes contre une telle atteinte, la vie privée constitue un intérêt public important qui est pertinent en vertu du critère établi par la Cour suprême du Canada dans une décision rendue en 2002. L'intérêt public ne serait sérieusement menacé que si les renseignements en question portaient atteinte à ce que l'on considère comme l'identité fondamentale de la personne concernée : des renseignements si sensibles que leur diffusion pourrait porter atteinte à la dignité de la personne d'une manière que le public ne tolérerait pas, pas même au nom du principe de la publicité des débats judiciaires. En l'espèce, les renseignements contenus dans les dossiers judiciaires ne revêtaient pas ce caractère si sensible qu'on pourrait dire qu'ils touchaient à l'identité fondamentale des personnes concernées. Les fiduciaires n'ont pas démontré en quoi la levée des ordonnances de mise sous scellés mettait en jeu la dignité des personnes touchées.

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Pour obtenir gain de cause, la personne qui demande au tribunal d'exercer son pouvoir discrétionnaire de façon à limiter la présomption de publicité doit établir que : 1) la publicité des débats judiciaires pose un risque sérieux pour un intérêt public important; 2) l'ordonnance sollicitée est nécessaire pour écarter ce risque sérieux pour l'intérêt mis en évidence, car d'autres mesures raisonnables ne permettront pas d'écarter ce risque; et 3) du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs. Ce n'est que lorsque ces trois conditions préalables sont remplies qu'une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires pourra dûment être rendue. Contrairement à ce que les fiduciaires soutiennent, les questions soulevées dans un dossier d'homologation ne sont pas typiquement de nature privée ou fondamentalement de nature administrative. La raison d'être fondamentale de la publicité des débats s'applique aux procédures d'homologation et donc au transfert de biens sous l'autorité d'un tribunal ainsi qu'à d'autres questions touchées par ce recours judiciaire. La Cour d'appel a eu tort de mettre l'accent sur les préoccupations personnelles pour décider que les ordonnances de mise sous scellés ne satisfaisaient pas à l'exigence de la nécessité. Il est inapproprié de rejeter l'intérêt du public à la protection de la vie privée au motif qu'il s'agit d'une simple préoccupation personnelle. L'intérêt public important en matière de vie privée, tel qu'il est considéré dans le contexte des limites à la publicité des débats, vise à permettre aux personnes de garder un contrôle sur leur identité fondamentale dans la sphère publique dans la mesure nécessaire pour protéger leur dignité. Le public a un intérêt dans la publicité des débats, mais il a aussi un intérêt dans la protection de la dignité : l'administration de la justice exige que, lorsque la dignité est menacée de cette façon, des mesures puissent être prises pour tenir compte de cette préoccupation en matière de vie privée. Le risque pour cet intérêt ne sera sérieux que lorsque les renseignements qui seraient diffusés en raison de la publicité des débats judiciaires sont suffisamment sensibles pour que l'on puisse démontrer que la publicité porte atteinte de façon significative au coeur même des renseignements biographiques de la personne d'une manière qui menace son intégrité.

En n'examinant pas le caractère sensible des renseignements, le juge de première instance a omis de se pencher sur un élément nécessaire du test juridique, ce qui justifiait une intervention en appel. En appliquant le cadre approprié aux faits de la présente affaire, on a conclu que le risque pour l'intérêt public important à l'égard de la vie privée des personnes touchées n'était pas sérieux. Les renseignements que les fiduciaires cherchaient à protéger n'étaient pas très sensibles, ce qui suffisait en soi pour conclure qu'il n'y avait pas de risque sérieux pour l'intérêt public important en matière de vie privée tel que défini. L'intérêt pertinent en matière de vie privée se rapportant à la dignité des personnes touchées n'a pas été démontré. Le simple fait d'associer les bénéficiaires ou les fiduciaires à la mort inexpliquée du couple ne suffisait pas à constituer un risque sérieux pour l'intérêt public important en matière de dignité ayant été constaté, intérêt défini au regard de la dignité. Les fiduciaires n'ont pas fait valoir de raison précise pour laquelle le contenu de ces dossiers serait plus sensible qu'il n'y paraît à première vue. Même si certains des éléments contenus dans les dossiers judiciaires pouvaient fort bien être largement diffusés, il n'a pas été démontré que la nature des renseignements en cause entraînerait un risque sérieux pour l'intérêt public important en matière de vie privée. Nul n'a contesté l'existence d'un intérêt public important dans la protection des personnes contre un préjudice physique. Une preuve directe n'est pas nécessairement exigée pour démontrer qu'un intérêt important est sérieusement menacé. Ce n'est pas seulement la probabilité du préjudice appréhendé qui est pertinente lorsqu'il s'agit d'évaluer si un risque est sérieux, mais également la gravité du préjudice lui-même. Si nul ne contestait que le préjudice physique appréhendé fût grave, il fallait cependant reconnaître que la probabilité que ce préjudice se produise était conjecturale. Le simple fait d'affirmer qu'un tel risque existe ne permettait pas de franchir le seuil requis pour établir l'existence d'un risque sérieux de préjudice physique. La conclusion contraire tirée par le juge de première instance était une erreur justifiant l'intervention de la Cour d'appel. Même si les fiduciaires avaient réussi à démontrer l'existence d'un risque sérieux pour l'intérêt en matière de vie privée qu'ils invoquent, une interdiction de publication aurait probablement été suffisante en tant qu'autre option raisonnable pour écarter ce risque. Les fiduciaires n'ont droit à aucune ordonnance discrétionnaire limitant le principe de la publicité des débats judiciaires. La Cour d'appel a conclu à juste titre qu'il n'y avait aucune raison de demander un caviardage parce que les fiduciaires n'avaient pas franchi cette étape du test des limites discrétionnaires à la publicité des débats judiciaires.

Table of Authorities

Cases considered by *Kasirer J.*:

A. c. B. & Southam Inc. (1990), 1990 CarswellQue 2075 (C.A. Que.) — referred to

A.B. (Litigation Guardian of) v. Bragg Communications Inc. (2012), 2012 SCC 46, 2012 CarswellNS 675, 2012 CarswellNS 676, 25 C.P.C. (7th) 1, 350 D.L.R. (4th) 519, 95 C.C.L.T. (3d) 171, 1021 A.P.R. 1, 322 N.S.R. (2d) 1, *(*sub

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nom. *A.B. v. Bragg Communications Inc.)* [2012] 2 S.C.R. 567, *(*sub nom. *B. (A.) v. Bragg Communications Inc.)* 266 C.R.R. (2d) 185 (S.C.C.) — considered

A.B. v. Canada (Citizenship and Immigration) (2017), 2017 FC 629, 2017 CarswellNat 3046, 2017 CF 629, 2017 CarswellNat 3604 (F.C.) — considered

C. (R.) c. Gourdeau (2004), 2004 CarswellQue 1804 (C.A. Que.) — considered

Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (1996), 2 C.R. (5th) 1, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 182 N.B.R. (2d) 81, 463 A.P.R. 81, 39 C.R.R. (2d) 189, 203 N.R. 169, 1996 CarswellNB 462, 1996 CarswellNB 463, 2 B.H.R.C. 210 (S.C.C.) — considered

Dagenais v. Canadian Broadcasting Corp. (1994), 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 1994 CarswellOnt 1168 (S.C.C.) — followed

Dagg v. Canada (Minister of Finance) (1997), 213 N.R. 161, 148 D.L.R. (4th) 385, 1997 CarswellNat 869, 1997 CarswellNat 870, 46 Admin. L.R. (2d) 155, [1997] 2 S.C.R. 403, 132 F.T.R. 55 (note) (S.C.C.) — considered

Douez v. Facebook, Inc. (2017), 2017 SCC 33, 2017 CSC 33, 2017 CarswellBC 1663, 2017 CarswellBC 1664, 1 C.P.C. (8th) 213, 97 B.C.L.R. (5th) 1, [2017] 7 W.W.R. 637, 3 C.P.C. (8th) 1, 411 D.L.R. (4th) 434, 71 B.L.R. (5th) 1, [2017] 1 S.C.R. 751 (S.C.C.) — considered

Edmonton Journal v. Alberta (Attorney General) (1989), [1990] 1 W.W.R. 577, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, 102 N.R. 321, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1, 1989 CarswellAlta 198, 1989 CarswellAlta 623 (S.C.C.) — considered

Fedeli v. Brown (2020), 2020 ONSC 994, 2020 CarswellOnt 1710, 60 C.P.C. (8th) 417 (Ont. S.C.J.) — referred to

Foster-Jacques v. Jacques (2012), 2012 NSCA 83, 2012 CarswellNS 591, 1014 A.P.R. 166, 320 N.S.R. (2d) 166, 353 D.L.R. (4th) 1, *(*sub nom. *Coltsfoot Publishing Ltd. v. Foster-Jacques)* 266 C.R.R. (2d) 1, 26 R.F.L. (7th) 259 (N.S. C.A.) — referred to

Godbout c. Longueuil (Ville) (1995), [1995] R.J.Q. 2561, 31 M.P.L.R. (2d) 130, 1995 CarswellQue 175 (C.A. Que.) — considered

Godbout c. Longueuil (Ville) (1997), 219 N.R. 1, *(*sub nom. *Godbout v. Longueuil (City))* 152 D.L.R. (4th) 577, 1997 CarswellQue 883, 1997 CarswellQue 884, *(*sub nom. *Godbout v. Longueuil (City))* 47 C.R.R. (2d) 1, 43 M.P.L.R. (2d) 1, *(*sub nom. *Longueuil (City) v. Godbout)* 97 C.L.L.C. 210-031, [1997] 3 S.C.R. 844 (S.C.C.) — referred to

Goulet c. Transamerica du Canada, cie d'assurance-vie (2002), 2002 SCC 21, 2002 CarswellQue 191, 2002 CarswellQue 192, *(*sub nom. *Goulet v. Transamerica Life Insurance Co. of Canada)* 210 D.L.R. (4th) 22, *(*sub nom. *Goulet v. Transamerica Life Insurance Co. of Canada)* [2002] I.L.R. I-4059, *(*sub nom. *Goulet v. Compagnie d'assurance-vie Transamerica du Canada)* 284 N.R. 139, 35 C.C.L.I. (3d) 204, *(*sub nom. *Goulet v. Transamerica Life Insurance Co. of Canada)* [2002] 1 S.C.R. 719, 2002 CSC 21 (S.C.C.) — considered

H. (M.E.) v. Williams (2012), 2012 ONCA 35, 2012 CarswellOnt 1100, 108 O.R. (3d) 321, 287 O.A.C. 133, 346 D.L.R. (4th) 668, 15 R.F.L. (7th) 37 (Ont. C.A.) — considered

Himel v. Greenberg (2010), 2010 ONSC 2325, 2010 CarswellOnt 8261, 93 R.F.L. (6th) 357 (Ont. S.C.J.) — considered

Khuja v. Times Newspapers Ltd (2017), [2019] A.C. 161, 2017 UKSC 49 (U.K. S.C.) — considered

Lac d'Amiante du Québec ltée c. 2858-0702 Québec inc. (2001), 2001 SCC 51, 2001 CarswellQue 1864, 2001 CarswellQue 1865, *(*sub nom. *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.)* 204 D.L.R. (4th) 331, *(*sub nom. *Lac d'Amiante du Québec ltée v. 2858-0702 Québec inc.)* 274 N.R. 201, 14 C.P.C. (5th) 189, [2001] 2 S.C.R. 743, 2001 CSC 51 (S.C.C.) — considered

Lavigne v. Canada (Commissioner of Official Languages) (2002), 2002 SCC 53, 2002 CarswellNat 1357, 2002 CarswellNat 1358, 214 D.L.R. (4th) 1, 289 N.R. 282, 228 F.T.R. 319 (note), [2002] 2 S.C.R. 773, 2002 CSC 53 (S.C.C.) — considered

MacIntyre v. Nova Scotia (Attorney General) (1982), [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 40 N.R. 181, 26 C.R. (3d) 193, 96 A.P.R. 609, 132 D.L.R. (3d) 385, *(*sub nom. *Nova Scotia (Attorney General) v. MacIntyre)* 65 C.C.C. (2d) 129, 1982 CarswellNS 21, 1982 CarswellNS 110 (S.C.C.) — followed

N. (F.), Re (2000), 2000 SCC 35, 2000 CarswellNfld 213, 2000 CarswellNfld 214, 146 C.C.C. (3d) 1, 188 D.L.R. (4th) 1, 35 C.R. (5th) 1, [2000] 1 S.C.R. 880, 191 Nfld. & P.E.I.R. 181, 577 A.P.R. 181 (S.C.C.) — considered

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Otis v. Otis (2004), 2004 CarswellOnt 1643, 7 E.T.R. (3d) 221 (Ont. S.C.J.) — referred to
R. v. Chanmany (2016), 2016 ONCA 576, 2016 CarswellOnt 11225, 338 C.C.C. (3d) 578, 352 O.A.C. 121 (Ont. C.A.) — referred to
R. v. Cole (2012), 2012 SCC 53, 2012 CarswellOnt 12684, 2012 CarswellOnt 12685, D.T.E. 2012T-731, 96 C.R. (6th) 88, 223 L.A.C. (4th) 1, 290 C.C.C. (3d) 247, 353 D.L.R. (4th) 447, 436 N.R. 102, 2012 C.L.L.C. 210-059, 297 O.A.C. 1, [2012] 3 S.C.R. 34, 269 C.R.R. (2d) 228, 128 O.R. (3d) 639 (note) (S.C.C.) — considered
R. v. Dyment (1988), 10 M.V.R. (2d) 1, 66 C.R. (3d) 348, 89 N.R. 249, [1988] 2 S.C.R. 417, 45 C.C.C. (3d) 244, 73 Nfld. & P.E.I.R. 13, 229 A.P.R. 13, 55 D.L.R. (4th) 503, 38 C.R.R. 301, 1988 CarswellPEI 7, 1988 CarswellPEI 73 (S.C.C.) — considered
R. v. Esseghaier (2017), 2017 ONCA 970, 2017 CarswellOnt 19349, 356 C.C.C. (3d) 455 (Ont. C.A.) — distinguished
R. v. Henry (2009), 2009 BCCA 86, 2009 CarswellBC 439, 244 C.C.C. (3d) 175, 270 B.C.A.C. 5, 454 W.A.C. 5, 187 C.R.R. (2d) 366 (B.C. C.A. [In Chambers]) — referred to
R. v. Mabior (2012), 2012 SCC 47, 2012 CarswellMan 509, 2012 CarswellMan 510, [2012] 11 W.W.R. 213, 96 C.R. (6th) 1, 352 D.L.R. (4th) 619, 290 C.C.C. (3d) 32, 284 Man. R. (2d) 114, 555 W.A.C. 114, [2012] 2 S.C.R. 584, 268 C.R.R. (2d) 39, 434 N.R. 341 (S.C.C.) — considered
R. v. Marakah (2017), 2017 SCC 59, 2017 CSC 59, 2017 CarswellOnt 19341, 2017 CarswellOnt 19342, 42 C.R. (7th) 1, [2017] 2 S.C.R. 608, 418 D.L.R. (4th) 313, 357 C.C.C. (3d) 281, 396 C.R.R. (2d) 247 (S.C.C.) — referred to
R. v. Mentuck (2001), 2001 SCC 76, 2001 CarswellMan 535, 2001 CarswellMan 536, 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 47 C.R. (5th) 63, 277 N.R. 160, [2002] 2 W.W.R. 409, 163 Man. R. (2d) 1, 269 W.A.C. 1, [2001] 3 S.C.R. 442 (S.C.C.) — followed
R. v. Oakes (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 1986 CarswellOnt 95, 1986 CarswellOnt 1001, 53 O.R. (2d) 719 (note) (S.C.C.) — referred to
R. v. Paterson (1998), 122 C.C.C. (3d) 254, 1998 CarswellBC 122, 102 B.C.A.C. 200, 166 W.A.C. 200 (B.C. C.A.) — considered
R. v. Pickton (2010), 2010 BCSC 1198, 2010 CarswellBC 2242 (B.C. S.C.) — referred to
R. v. Plant (1993), [1993] 8 W.W.R. 287, 145 A.R. 104, 55 W.A.C. 104, 17 C.R.R. (2d) 297, 12 Alta. L.R. (3d) 305, 84 C.C.C. (3d) 203, [1993] 3 S.C.R. 281, 24 C.R. (4th) 47, 157 N.R. 321, 1993 CarswellAlta 94, 1993 CarswellAlta 566 (S.C.C.) — considered
R. v. Quesnelle (2014), 2014 SCC 46, 2014 CSC 46, 2014 CarswellOnt 9195, 2014 CarswellOnt 9196, 11 C.R. (7th) 221, 460 N.R. 27, 320 O.A.C. 38, 375 D.L.R. (4th) 71, 312 C.C.C. (3d) 187, [2014] 2 S.C.R. 390, 314 C.R.R. (2d) 283, 129 O.R. (3d) 640 (note) (S.C.C.) — referred to
R. v. Spencer (2014), 2014 SCC 43, 2014 CSC 43, 2014 CarswellSask 342, 2014 CarswellSask 343, [2014] 8 W.W.R. 209, 11 C.R. (7th) 52, 458 N.R. 249, 438 Sask. R. 230, 608 W.A.C. 230, 312 C.C.C. (3d) 215, 375 D.L.R. (4th) 255, [2014] 2 S.C.R. 212, 312 C.R.R. (2d) 349 (S.C.C.) — referred to
R. v. Tessling (2004), 2004 SCC 67, 2004 CarswellOnt 4351, 2004 CarswellOnt 4352, 244 D.L.R. (4th) 541, 189 C.C.C. (3d) 129, 23 C.R. (6th) 207, 326 N.R. 228 (Eng.), 326 N.R. 228 (Fr.), [2004] 3 S.C.R. 432, 192 O.A.C. 168, 75 O.R. (3d) 480 (note), 123 C.R.R. (2d) 257 (S.C.C.) — referred to
Reference re s. 12 (1) of the Juvenile Delinquents Act (Canada) (1983), 146 D.L.R. (3d) 408, 41 O.R. (2d) 113, 3 C.C.C. (3d) 515, (sub nom. *R. v. Southam Inc.)* 34 C.R. (3d) 27, 6 C.R.R. 1, (sub nom. *R. v. Southam Inc.)* 33 R.F.L. (2d) 279, 1983 CarswellOnt 273 (Ont. C.A.) — referred to
S. c. Lamontagne (2020), 2020 QCCA 663, 2020 CarswellQue 4349 (C.A. Que.) — considered
Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — followed
Toronto Star Newspaper Ltd. v. R. (2012), 2012 ONCJ 27, 2012 CarswellOnt 1255, (sub nom. *Toronto Star Newspaper Ltd. v. Ontario)* 255 C.R.R. (2d) 207, 289 C.C.C. (3d) 549 (Ont. C.J.) — referred to

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Toronto Star Newspapers Ltd. v. Ontario (2005), 2005 SCC 41, 2005 CarswellOnt 2613, 2005 CarswellOnt 2614, 197 C.C.C. (3d) 1, 253 D.L.R. (4th) 577, 29 C.R. (6th) 251, (sub nom. *R. v. Toronto Star Newspapers Ltd.)* 200 O.A.C. 348, (sub nom. *R. v. Toronto Star Newspapers Ltd.)* 335 N.R. 201, 76 O.R. (3d) 320 (note), 132 C.R.R. (2d) 178, [2005] 2 S.C.R. 188 (S.C.C.) — referred to

UFCW, Local 401 v. Alberta (Information and Privacy Commissioner) (2013), 2013 SCC 62, 2013 CarswellAlta 2210, 2013 CarswellAlta 2211, D.T.E. 2013T-775, 365 D.L.R. (4th) 257, [2014] 2 W.W.R. 1, 60 Admin. L.R. (5th) 173, 88 Alta. L.R. (5th) 1, (sub nom. *Alberta (IPC) v. UFCW, Local 401)* 2014 C.L.L.C. 210-003, (sub nom. *United Food and Commercial Workers, Local 401 v. Privacy Commissioner (Alta.))* 451 N.R. 253, (sub nom. *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401)* [2013] 3 S.C.R. 733, (sub nom. *United Food and Commercial Workers, Local 401 v. Privacy Commissioner (Alta.))* 561 A.R. 359, (sub nom. *United Food and Commercial Workers, Local 401 v. Privacy Commissioner (Alta.))* 594 W.A.C. 359, 239 L.A.C. (4th) 317, (sub nom. *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, local 401)* 297 C.R.R. (2d) 71 (S.C.C.) — considered

Vancouver Sun, Re (2004), 2004 SCC 43, 2004 CarswellBC 1376, 2004 CarswellBC 1377, (sub nom. *R. v. Bagri)* 184 C.C.C. (3d) 515, (sub nom. *R. v. Bagri)* 240 D.L.R. (4th) 147, (sub nom. *Application Under Section 83.28 of the Criminal Code, Re)* 322 N.R. 161, 21 C.R. (6th) 142, (sub nom. *Application Under Section 83.28 of the Criminal Code, Re)* 199 B.C.A.C. 1, [2004] 2 S.C.R. 332, 33 B.C.L.R. (4th) 261, 120 C.R.R. (2d) 203, [2005] 2 W.W.R. 671 (S.C.C.) — considered

Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario (2021), 2021 ONSC 1100, 2021 CarswellOnt 1831 (Ont. Div. Ct.) — referred to

X. v. Y. (2011), 2011 BCSC 943, 2011 CarswellBC 1874, 21 B.C.L.R. (5th) 410, [2011] 11 W.W.R. 514, 338 D.L.R. (4th) 156, 238 C.R.R. (2d) 219 (B.C. S.C.) — distinguished

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 2(b) — referred to

s. 8 — considered

Charte des droits et libertés de la personne, RLRQ, c. C-12

art. 5 — referred to

Code civil du Québec, L.Q. 1991, c. 64

art. 35-41 — referred to

Code de procédure civile, RLRQ, c. C-25.01

art. 12 — considered

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31

Generally — referred to

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5

Generally — referred to

Privacy Act, R.S.C. 1985, c. P-21

Generally — referred to

APPEAL by estate trustees from judgment reported at *Donovan v. Sherman Estate* (2019), 2019 ONCA 376, 2019 CarswellOnt 6867, 47 E.T.R. (4th) 1, 56 C.P.C. (8th) 82 (Ont. C.A.), allowing appeal from judgment imposing sealing orders.

POURVOI formé par les fiduciaires d'une succession à l'encontre d'un jugement publié à *Donovan v. Sherman Estate* (2019), 2019 ONCA 376, 2019 CarswellOnt 6867, 47 E.T.R. (4th) 1, 56 C.P.C. (8th) 82 (Ont. C.A.), ayant accueilli l'appel interjeté à l'encontre d'un jugement imposant une ordonnance de mise sous scellés.

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Kasirer J. **(Wagner C.J.C. and Moldaver, Karakatsanis, Brown, Rowe and Martin JJ. concurring):**

I. Overview

1 This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.

2 Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.

3 Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.

4 This appeal turns on whether concerns advanced by persons seeking an exception to the ordinarily open court file in probate proceedings — the concerns for privacy of the affected individuals and their physical safety — amount to important public interests that are at such serious risk that the files should be sealed. The parties to this appeal agree that physical safety is an important public interest that could justify a sealing order but disagree as to whether that interest would be at serious risk, in the circumstances of this case, should the files be unsealed. They further disagree whether privacy is in itself an important interest that could justify a sealing order. The appellants say that privacy is a public interest of sufficient import that can justify limits on openness, especially in light of the threats individuals face as technology facilitates widespread dissemination of personally sensitive information. They argue that the Court of Appeal was mistaken to say that personal concerns for privacy, without more, lack the public interest component that is properly the subject-matter of a sealing order.

5 This Court has, in different settings, consistently championed privacy as a fundamental consideration in a free society. Pointing to cases decided in other contexts, the appellants contend that privacy should be recognized here as a public interest that, on the facts of this case, substantiates their plea for orders sealing the probate files. The respondents resist, recalling that privacy has generally been seen as a poor justification for an exception to openness. After all, they say, virtually every court proceeding entails some disquiet for the lives of those concerned and these intrusions on privacy must be tolerated because open courts are essential to a healthy democracy.

6 This appeal offers, then, an occasion to decide whether privacy can amount to a public interest in the open court jurisprudence and, if so, whether openness puts privacy at serious risk here so as to justify the kind of orders sought by the appellants.

7 For the reasons that follow, I propose to recognize an aspect of privacy as an important public interest for the purposes of the relevant test from *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. Proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what I see as the public interest in protecting human dignity, is shown to be at serious risk, an exception to the open court principle may be justified.

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8 In this case, and with this interest in mind, it cannot be said that the risk to privacy is sufficiently serious to overcome the strong presumption of openness. The same is true of the risk to physical safety here. The Court of Appeal was right in the circumstances to set aside the sealing orders and I would therefore dismiss the appeal.

II. Background

9 Prominent in business and philanthropic circles, Bernard Sherman and Honey Sherman were found dead in their Toronto home in December of 2017. Their deaths had no apparent explanation and generated intense public interest and press scrutiny. In January of the following year, the Toronto Police Service announced that the deaths were being investigated as homicides. As the present matter came before the courts, the identity and motive of those responsible remained unknown.

10 The couple's estates and estate trustees (collectively the "Trustees") [1] sought to stem the intense press scrutiny prompted by the events. The Trustees hoped to see to the orderly transfer of the couple's property, at arm's length from what they saw as the public's morbid interest in the unexplained deaths and the curiosity around apparently great sums of money involved.

11 When the time came to obtain certificates of appointment of estate trustee from the Superior Court of Justice, the Trustees sought a sealing order so that the estate trustees and beneficiaries ("affected individuals") might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. The Trustees argued that if the information in the court files was revealed to the public, the safety of the affected individuals would be at risk and their privacy compromised as long as the deaths were unexplained and those responsible for the tragedy remained at large. In support of their request, they argued that there was a real and substantial risk that the affected individuals would suffer serious harm from the public exposure of the materials in the circumstances.

12 Initially granted, the sealing orders were challenged by Kevin Donovan, a journalist who had written a series of articles on the couple's deaths, and Toronto Star Newspapers Ltd., for which he wrote (collectively the "Toronto Star"). [2] The Toronto Star said the orders violated its constitutional rights of freedom of expression and freedom of the press, as well as the attending principle that the workings of the courts should be open to the public as a means of guaranteeing the fair and transparent administration of justice.

III. Proceedings Below

A. Ontario Superior Court of Justice, 2018 ONSC 4706, 41 E.T.R. (4th) 126 (Dunphy J.)

13 In addressing whether the circumstances warranted interference with the open court principle, the application judge relied on this Court's judgment in *Sierra Club* . He noted that a confidentiality order should only be granted when: "(1) such an order is necessary ... to prevent a serious risk to an important interest because reasonable alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression and the public interest in open and accessible court proceedings" (para. 13(d)).

14 The application judge considered whether the Trustees' interests would be served by granting the sealing orders. In his view, the Trustees had correctly identified two legitimate interests in support of making an exception to the open court principle: "protecting the privacy and dignity of victims of crime and their loved ones" and "a reasonable apprehension of risk on behalf of those known to have an interest in receiving or administering the assets of the deceased" (paras. 22-25). With respect to the first interest, the application judge found that "[t]he degree of intrusion on that privacy and dignity has already been extreme and ... excruciating" (para. 23). For the second interest, although he noted that "it would have been preferable to include objective evidence of the gravity of that risk from, for example, the police responsible for the investigation", he concluded that "the lack of such evidence is not fatal" (para. 24). Rather, the necessary inferences could be drawn from the circumstances notably the "willingness of the perpetrator(s) of the crimes to resort to extreme violence to pursue whatever motive existed" (*ibid.*). He concluded that the "current uncertainty" was the source of a reasonable apprehension of the risk of harm and, further, that the foreseeable harm was "grave" (*ibid.*).

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15 The application judge ultimately accepted the Trustees' submission that these interests "very strongly outweigh" what he called the proportionately narrow public interest in the "essentially administrative files" at issue (paras. 31 and 33). He therefore concluded that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on the rights and interests of the affected individuals.

16 Finally, the application judge considered what order would protect the affected individuals while infringing upon the open court principle to the minimum extent possible. He decided no meaningful part of either file could be disclosed if one were to make the redactions necessary to protect the interests he had identified. Open-ended sealing orders did not, however, sit well with him. The application judge therefore sealed the files for an initial period of two years, with the possibility of renewal.

B. Court of Appeal for Ontario, 2019 ONCA 376, 47 E.T.R. (4th) 1 (Doherty, Rouleau and Hourigan JJ.A.)

17 The Toronto Star's appeal was allowed, unanimously, and the sealing orders were lifted.

18 The Court of Appeal considered the two interests advanced before the application judge in support of the orders to seal the probate files. As to the need to protect the privacy and dignity of the victims of violent crime and their loved ones, it recalled that the kind of interest that is properly protected by a sealing order must have a public interest component. Citing *Sierra Club*, the Court of Appeal wrote that "[p]ersonal concerns cannot, without more, justify an order sealing material that would normally be available to the public under the open court principle" (para. 10). It concluded that the privacy interest for which the Trustees sought protection lacked this quality of public interest.

19 While it recognized the personal safety of individuals as an important public interest generally, the Court of Appeal wrote that there was no evidence in this case that could warrant a finding that disclosure of the contents of the estate files posed a real risk to anyone's physical safety. The application judge had erred on this point: "the suggestion that the beneficiaries and trustees are somehow at risk because the Shermans were murdered is not an inference, but is speculation. It provides no basis for a sealing order" (para. 16).

20 The Court of Appeal concluded that the Trustees had failed the first stage of the test for obtaining orders sealing the probate files. It therefore allowed the appeal and set aside the orders.

C. Subsequent Proceedings

21 The Court of Appeal's order setting aside the sealing orders has been stayed pending the disposition of this appeal. The Toronto Star brought a motion to adduce new evidence on this appeal, comprised of land titles documents, transcripts of the cross-examination of a detective on the murder investigation, and various news articles. This evidence, it says, supports the conclusion that the sealing orders should be lifted. The motion was referred to this panel.

IV. Submissions

22 The Trustees have appealed to this Court seeking to restore the sealing orders made by the application judge. In addition to contesting the motion for new evidence, they maintain that the orders are necessary to prevent a serious risk to the privacy and physical safety of the affected individuals and that the salutary effects of sealing the court probate files outweigh the harmful effects of limiting court openness. The Trustees argue that two legal errors led the Court of Appeal to conclude otherwise.

23 First, they submit the Court of Appeal erred in holding that privacy is a personal concern that cannot, without more, constitute an important interest under *Sierra Club* . The Trustees say the application judge was right to characterize privacy and dignity as an important public interest which, as it was subject to a serious risk, justified the orders. They ask this Court to recognize that privacy in itself is an important public interest for the purposes of the analysis.

24 Second, the Trustees submit that the Court of Appeal erred in overturning the application judge's conclusion that there was a serious risk of physical harm. They argue that the Court of Appeal failed to recognize that courts have the ability to draw reasonable inferences by applying reason and logic even in the absence of specific evidence of the alleged risk.

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25 The Trustees say that these errors led the Court of Appeal to mistakenly set aside the sealing orders. In answer to questions at the hearing, the Trustees acknowledged that an order redacting certain documents in the file or a publication ban could assist in addressing some of their concerns, but maintained neither is a reasonable alternative to the sealing orders in the circumstances.

26 The Trustees submit further that the protection of these interests outweighs the deleterious effects of the orders. They argue that the importance of the open court principle is attenuated by the nature of these probate proceedings. Given that it is non-contentious and not strictly speaking necessary for the transfer of property at death, probate is a court proceeding of an "administrative" character, which diminishes the imperative of applying the open court principle here (paras. 113-14).

27 The Toronto Star takes the position that the Court of Appeal made no mistake in setting aside the sealing orders and that the appeal should be dismissed. In the Toronto Star's view, while privacy can be an important interest where it evinces a public component, the Trustees have only identified a subjective desire for the affected individuals in this case to avoid further publicity, which is not inherently harmful. According to the Toronto Star and some of the interveners, the Trustees' position would allow that measure of inconvenience and embarrassment that arises in every court proceeding to take precedence over the interest in court openness protected by the *Canadian Charter of Rights and Freedoms* in which all of society has a stake. The Toronto Star argues further that the information in the court files is not highly sensitive. On the issue of whether the sealing orders were necessary to protect the affected individuals from physical harm, the Toronto Star submits that the Court of Appeal was right to conclude that the Trustees had failed to establish a serious risk to this interest.

28 In the alternative, even if there were a serious risk to one or another important interest, the Toronto Star says the sealing orders are not necessary because the risk could be addressed by an alternative, less onerous order. Furthermore, it says the orders are not proportionate. In seeking to minimize the importance of openness in probate proceedings, the Trustees invite an inflexible approach to balancing the effects of the order that is incompatible with the principle that openness applies to all court proceedings. In any event, there is a public interest in openness specifically here, given that the certificates sought can affect the rights of third parties and that openness ensures the fairness of the proceedings, whether they are contested or not.

V. Analysis

29 The outcome of the appeal turns on whether the application judge should have made the sealing orders pursuant to the test for discretionary limits on court openness from this Court's decision in *Sierra Club* .

30 Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*[1996] 3 S.C.R. 480, at para. 23; *Vancouver Sun (Re)*2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 23-26). Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. "In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so" (*Khuja v. Times Newspapers Ltd*, 2017 UKSC 49, [2019] A.C. 161 (U.K. S.C.), at para. 16, citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1339-40, per Cory J.). Limits on openness in service of other public interests have been recognized, but sparingly and always with an eye to preserving a strong presumption that justice should proceed in public view (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 878; *R. v. Mentuck*2001 SCC 76, [2001] 3 S.C.R. 442, at paras. 32-39; *Sierra Club*, at para. 56). The test for discretionary limits on court openness is directed at maintaining this presumption while offering sufficient flexibility for courts to protect these other public interests where they arise (*Mentuck*, at para. 33). The parties agree that this is the appropriate framework of analysis for resolving this appeal.

31 The parties and the courts below disagree, however, about how this test applies to the facts of this case and this calls for clarification of certain points of the *Sierra Club* analysis. Most centrally, there is disagreement about how an important interest in the protection of privacy could be recognized such that it would justify limits on openness, and in particular when privacy can be a matter of public concern. The parties bring two settled principles of this Court's jurisprudence to bear in support of their respective positions. First, this Court has often observed that privacy is a fundamental value necessary to the preservation of a

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free and democratic society (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 25; *Dagg v. Canada (Minister of Finance)*[1997] 2 S.C.R. 403, at paras. 65-66, per La Forest J. (dissenting but not on this point); *New Brunswick*, at para. 40). Courts have invoked privacy, in some instances, as the basis for an exception to openness under the *Sierra Club* test (see, e.g., *R. v. Henry*2009 BCCA 86, 270 B.C.A.C. 5, at paras. 11 and 17). At the same time, the jurisprudence acknowledges that some degree of privacy loss — resulting in inconvenience, even in upset or embarrassment — is inherent in any court proceeding open to the public (*New Brunswick*, at para. 40). Accordingly, upholding the presumption of openness has meant recognizing that neither individual sensibilities nor mere personal discomfort associated with participating in judicial proceedings are likely to justify the exclusion of the public from court (*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185; *New Brunswick*, at para. 41). Determining the role of privacy in the *Sierra Club* analysis requires reconciling these two ideas, which is the nub of the disagreement between the parties. The right of privacy is not absolute; the open court principle is not without exceptions.

32 For the reasons that follow, I disagree with the Trustees that the ostensibly unbounded privacy interest they invoke qualifies as an important public interest within the meaning of *Sierra Club* . Their broad claim fails to focus on the elements of privacy that are deserving of public protection in the open court context. That is not to say, however, that privacy can never ground an exceptional measure such as the sealing orders sought in this case. While the mere embarrassment caused by the dissemination of personal information through the open court process does not rise to the level justifying a limit on court openness, circumstances do exist where an aspect of a person's private life has a plain public interest dimension.

33 Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest relevant under *Sierra Club* . Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.

34 This public interest in privacy appropriately focuses the analysis on the impact of the dissemination of sensitive personal information, rather than the mere fact of this dissemination, which is frequently risked in court proceedings and is necessary in a system that privileges court openness. It is a high bar — higher and more precise than the sweeping privacy interest relied upon here by the Trustees. This public interest will only be seriously at risk where the information in question strikes at what is sometimes said to be the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings.

35 I hasten to say that applicants for an order making exception to the open court principle cannot content themselves with an unsubstantiated claim that this public interest in dignity is compromised any more than they could by an unsubstantiated claim that their physical integrity is endangered. Under *Sierra Club*, the applicant must show on the facts of the case that, as an important interest, this dignity dimension of their privacy is at "serious risk". For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

36 In the present case, the information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons; the Trustees have failed to show how the lifting of the sealing orders engages the dignity of the affected individuals. I am therefore not convinced that the intrusion on their privacy raises a serious risk to an important public interest as required by *Sierra Club* . Moreover, as I shall endeavour to explain, there was no serious risk of physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star's new evidence is moot. I propose to dismiss the appeal.

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A. The Test for Discretionary Limits on Court Openness

37 Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).

38 The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

(1) court openness poses a serious risk to an important public interest;

(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

39 The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No.1)*, (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law ... thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

40 The test ensures that discretionary orders are subject to no lower standard than a legislative enactment limiting court openness would be (*Mentuck*, at para. 27; *Sierra Club*, at para. 45). To that end, this Court developed a scheme of analysis by analogy to the *Oakes* test, which courts use to understand whether a legislative limit on a right guaranteed under the *Charter* is reasonable and demonstrably justified in a free and democratic society (*Sierra Club*, at para. 40, citing *R. v. Oakes*, [1986] 1 S.C.R. 103; see also *Dagenais*, at p. 878; *Vancouver Sun*, at para. 30).

41 The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the "fairness of the trial" (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the "proper administration of justice" (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an "important interest, including a commercial interest, in the context of litigation" (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that case, a harm to a particular business interest would not have been sufficient, but the "general commercial interest of preserving confidential information" was an important interest because of its public character (para. 55). This is consistent with the fact that this test was developed in reference to the *Oakes* jurisprudence that focuses on the "pressing and substantial" objective of legislation of general application (*Oakes*, at pp. 138-39; see also *Mentuck*, at para. 31). The term "important interest" therefore captures a broad array of public objectives.

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42 While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.'s sense, explained in *Sierra Club*, that courts must be "cautious" and "alive to the fundamental importance of the open court rule" even at the earliest stage when they are identifying important public interests (para. 56). Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55). By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.

43 The test laid out in *Sierra Club* continues to be an appropriate guide for judicial discretion in cases like this one. The breadth of the category of "important interest" transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause (see, e.g., P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (4th ed. 2020), at para. 3.185; J. Bailey and J. Burkell, "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" (2016), 48 *Ottawa L. Rev.* 143, at pp. 154-55). At the same time, however, the requirement that a serious risk to an important interest be demonstrated imposes a meaningful threshold necessary to maintain the presumption of openness. Were it merely a matter of weighing the benefits of the limit on court openness against its negative effects, decision-makers confronted with concrete impacts on the individuals appearing before them may struggle to put adequate weight on the less immediate negative effects on the open court principle. Such balancing could be evasive of effective appellate review. To my mind, the structure provided by *Dagenais*, *Mentuck*, and *Sierra Club* remains appropriate and should be affirmed.

44 Finally, I recall that the open court principle is engaged by all judicial proceedings, whatever their nature (*MacIntyre* at pp. 185-86; *Vancouver Sun*, at para. 31). To the extent the Trustees suggested, in their arguments about the negative effects of the sealing orders, that probate in Ontario does not engage the open court principle or that the openness of these proceedings has no public value, I disagree. The certificates the Trustees sought from the court are issued under the seal of that court, thereby bearing the imprimatur of the court's authority. The court's decision, even if rendered in a non-contentious setting, will have an impact on third parties, for example by establishing the testamentary paper that constitutes a valid will (see *Otis v. Otis*, (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at paras. 23-24). Contrary to what the Trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding and the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action.

45 It is true that other non-probate estate planning mechanisms may allow for the transfer of wealth outside the ordinary avenues of testate or intestate succession — that is the case, for instance, for certain insurance and pension benefits, and for certain property held in co-ownership. But this does not change the necessarily open court character of probate proceedings. That non-probate transfers keep certain information related to the administration of an estate out of public view does not mean that the Trustees here, by seeking certificates from the court, somehow do not engage this principle. The Trustees seek the benefits that flow from the public judicial probate process: transparency ensures that the probate court's authority is administered fairly and efficiently (*Vancouver Sun*, at para. 25; *New Brunswick*, at para. 22). The strong presumption in favour of openness plainly applies to probate proceedings and the Trustees must satisfy the test for discretionary limits on court openness.

B. The Public Importance of Privacy

46 As mentioned, I disagree with the Trustees that an unbounded interest in privacy qualifies as an important public interest under the test for discretionary limits on court openness. Yet in some of its manifestations, privacy does have social importance beyond the person most immediately concerned. On that basis, it cannot be excluded as an interest that could justify, in the right circumstances, a limit to court openness. Indeed, the public importance of privacy has been recognized by this Court in

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various settings, and this sheds light on why the narrower aspect of privacy related to the protection of dignity is an important public interest.

47 I respectfully disagree with the manner in which the Court of Appeal disposed of the claim by the Trustees that there is a serious risk to the interest in protecting personal privacy in this case. For the appellate judges, the privacy concerns raised by the Trustees amounted to "[p]ersonal concerns" which cannot, "without more", satisfy the requirement from *Sierra Club* that an important interest be framed as a public interest (para. 10). The Court of Appeal in our case relied, at para. 10, on *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321, in which it was held that "[p]urely personal interests cannot justify non-publication or sealing orders" (para. 25). Citing as authority judgments of this Court in *MacIntyre* and *Sierra Club*, the court continued by observing that "personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test" (para. 25). Respectfully stated, the emphasis that the Court of Appeal placed on personal concerns as a means of deciding that the sealing orders failed to meet the necessity requirement in this case and in *Williams* is, I think, mistaken. Personal concerns that relate to aspects of the privacy of an individual who is before the courts can coincide with a public interest in confidentiality.

48 Like the Court of Appeal, I do agree with the view expressed particularly in the pre-*Charter* case of *MacIntyre*, that where court openness results in an intrusion on privacy which disturbs the "sensibilities of the individuals involved" (p. 185), that concern is generally insufficient to justify a sealing or like order and does not amount to an important public interest under *Sierra Club* . But I disagree with the Court of Appeal in this case and in *Williams* that this is because the intrusion only occasions "personal concerns". Certain personal concerns — even "without more" — can coincide with important public interests within the meaning of *Sierra Club* . To invoke the expression of Binnie J. in *F.N. (Re)*2000 SCC 35, [2000] 1 S.C.R. 880, at para. 10, there is a "public interest in confidentiality" that is felt, first and foremost, by the person involved and is most certainly a personal concern. Even in *Williams*, the Court of Appeal was careful to note that where, without privacy protection, an individual would face "a substantial risk of serious debilitating emotional ... harm", an exception to openness should be available (paras. 29-30). The means of discerning whether a privacy interest reflects a "public interest in confidentiality" is therefore not whether the interest reflects or is rooted in "personal concerns" for the privacy of the individuals involved. Some personal concerns relating to privacy overlap with public interests in confidentiality. These interests in privacy can be, in my view, important public interests within the meaning of *Sierra Club* . It is true that an individual's privacy is pre-eminently important to that individual. But this Court has also long recognized that the protection of privacy is, in a variety of settings, in the interest of society as a whole.

49 The proposition that privacy is important, not only to the affected individual but to our society, has deep roots in the jurisprudence of this Court outside the context of the test for discretionary limits on court openness. This background helps explain why privacy cannot be rejected as a mere personal concern. However, the key differences in these contexts are such that the public importance of privacy cannot be transposed to open courts without adaptation. Only specific aspects of privacy interests can qualify as important public interests under *Sierra Club* .

50 In the context of s. 8 of the *Charter* and public sector privacy legislation, La Forest J. cited American privacy scholar Alan F. Westin for the proposition that privacy is a fundamental value of the modern state, first in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28 (concurring), and then in *Dagg*, at para. 65 (dissenting but not on this point). In the latter case, La Forest J. wrote: "The protection of privacy is a fundamental value in modern, democratic states. An expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy — the freedom to engage in one's own thoughts, actions and decisions" (para. 65 (citations omitted)). That statement was endorsed unanimously by this Court in *Lavigne*, at para. 25.

51 Further, in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401* 2013 SCC 62, [2013] 3 S.C.R. 733 ("*UFCW*"), decided in the context of a statute regulating the use of information by organizations, the objective of providing an individual with some control over their information was recognized as "intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values" (para. 24). The importance of privacy, its "quasi-constitutional status" and its role in protecting moral autonomy continues to find expression in our recent jurisprudence (see, e.g., *Lavigne*, at para. 24; *Bragg*, at para. 18, per Abella J., citing *Toronto Star Newspaper Ltd. v. R.*, 2012 ONCJ 27, 289

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C.C.C. (3d) 549, at paras. 40-41 and 44; *Douez v. Facebook, Inc.* 2017 SCC 33, [2017] 1 S.C.R. 751, at para. 59). In *Douez*, Karakatsanis, Wagner (as he then was) and Gascon JJ. underscored this same point, adding that "the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person's privacy interests" (para. 59).

52 Privacy as a public interest is underlined by specific aspects of privacy protection present in legislation at the federal and provincial levels (see, e.g., *Privacy Act*, R.S.C. 1985, c. P-21; *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("PIPEDA"); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31; *Charter of Human Rights and Freedoms*, CQLR, c. C-12, s. 5; *Civil Code of Québec*, arts. 35 to 41). [3] Further, in assessing the constitutionality of a legislative exception to the open court principle, this Court has recognized that the protection of individual privacy can be a pressing and substantial objective (*Edmonton Journal*, at p. 1345, per Cory J.; see also the concurring reasons of Wilson J., at p. 1354, in which "the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process" was explicitly noted). There is also continued support for the social and public importance of individual privacy in the academic literature (see, e.g., A. J. Cockfield, "Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies" (2007), 40 *U.B.C. L. Rev*. 41, at p. 41; K. Hughes, "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012), 75 *Mod. L. Rev*. 806, at p. 823; P. Gewirtz, "Privacy and Speech" (2001), *Sup. Ct. Rev*. 139, at p. 139). It is therefore inappropriate, in my respectful view, to dismiss the public interest in protecting privacy as merely a personal concern. This does not mean, however, that privacy generally is an important public interest in the context of limits on court openness.

53 The fact that the case before the application judge concerned individuals who were advancing their own privacy interests, which were undeniably important to them as individuals, does not mean that there is no public interest at stake. In *F.N. (Re)*, this was the personal interest that young offenders had in remaining anonymous in court proceedings as a means of encouraging their personal rehabilitation (para. 11). All of society had a stake, according to Binnie J., in the young person's personal prospect for rehabilitation. This same idea from *F.N. (Re)* was cited in support of finding the interest in *Sierra Club* to be a public interest. That interest, rooted first in an agreement of personal concern to the contracting parties involved, was a private matter that evinced, alongside its personal interest to the parties, a "public interest in confidentiality" (*Sierra Club*, at para. 55). Similarly, while the Trustees have a personal interest in preserving their privacy, this does not mean that the public has no stake in this same interest because — as this Court has made clear — it is related to moral autonomy and dignity which are pressing and substantial concerns.

54 In this appeal, the Toronto Star suggests that legitimate privacy concerns would be effectively protected by a discretionary order where there is "something more" to elevate them beyond personal concerns and sensibilities (R.F., at para. 73). The Income Security Advocacy Centre, by way of example, submits that privacy serves the public interests of preventing harm and of ensuring individuals are not dissuaded from accessing the courts. I agree that these concepts are related, but in my view care must be taken not to conflate the public importance of privacy with that of other interests; aspects of privacy, such as dignity, may constitute important public interests in and of themselves. A risk to personal privacy may be tied to a risk to psychological harm, as it was in *Bragg* (para. 14; see also J. Rossiter, *Law of Publication Bans, Private Hearings, and Sealing Orders* (loose-leaf), s. 2.4.1). But concerns for privacy may not always coincide with a desire to avoid psychological harm, and may focus instead, for example, on protecting one's professional standing (see, e.g., *R. v. Paterson*(1998), 102 B.C.A.C. 200, at paras. 76, 78 and 87-88). Similarly, there may be circumstances where the prospect of surrendering the personal information necessary to pursue a legal claim may deter an individual from bringing that claim (see *S. v. Lamontagne*2020 QCCA 663, at paras. 34-35 (CanLII)). In the same way, the prospect of surrendering sensitive commercial information would have impaired the conduct of the party's defence in *Sierra Club* (at para. 71), or could pressure an individual into settling a dispute prematurely (K. Eltis, *Courts, Litigants and the Digital Age* (2nd ed. 2016), at p. 86). But this does not necessarily mean that a public interest in privacy is wholly subsumed by such concerns. I note, for example, that access to justice concerns do not apply where the privacy interest to be protected is that of a third party to the litigation, such as a witness, whose access to the courts is not at stake and who has no choice available to terminate the litigation and avoid any privacy impacts (see, e.g., *Himel v. Greenberg*2010 ONSC 2325, 93 R.F.L. (6th) 357, at para. 58; see also Rossiter, s. 2.4.2(2)). In any event, the recognition of these related and valid

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important public interests does not answer the question as to whether aspects of privacy in and of themselves are important public interests and does not diminish the distinctive public character of privacy, considered above.

55 Indeed, the specific harms to privacy occasioned by open courts have not gone unnoticed nor been discounted as merely personal concerns. Courts have exercised their discretion to limit court openness in order to protect personal information from publicity, including to prevent the disclosure of sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), HIV status (see, e.g., *A.B. v. Canada (Citizenship and Immigration)*2017 FC 629, at para. 9 (CanLII),) and a history of substance abuse and criminality (see, e.g., *R. v. Pickton*2010 BCSC 1198, at paras. 11 and 20 (CanLII)). This need to reconcile the public interest in privacy with the open court principle has been highlighted by this Court (see, e.g., *Edmonton Journal*, at p. 1353, per Wilson J.). Writing extra-judicially, McLachlin C.J. explained that "[i]f we are serious about peoples' private lives, we must preserve a modicum of privacy. Equally, if we are serious about our justice system, we must have open courts. The question is how to reconcile these dual imperatives in a fair and principled way" ("Courts, Transparency and Public Confidence — To the Better Administration of Justice" (2003), 8 *Deakin L. Rev*. 1, at p. 4). In seeking that reconciliation, the question becomes whether the relevant dimension of privacy amounts to an important public interest that, when seriously at risk, would justify rebutting the strong presumption favouring open courts.

C. The Important Public Interest in Privacy Bears on the Protection of Individual Dignity

56 While the public importance of privacy has clearly been recognized by this Court in various settings, caution is required in deploying this concept in the test for discretionary limits on court openness. It is a matter of settled law that open court proceedings by their nature can be a source of discomfort and embarrassment and these intrusions on privacy are generally seen as of insufficient importance to overcome the presumption of openness. The Toronto Star has raised the concern that recognizing privacy as an important public interest will lower the burden for applicants because the privacy of litigants will, in some respects, always be at risk in court proceedings. I agree that the requirement to show a serious risk to an important interest is a key threshold component of the analysis that must be preserved in order to protect the open court principle. The recognition of a public interest in privacy could threaten the strong presumption of openness if privacy is cast too broadly without a view to its public character.

57 Privacy poses challenges in the test for discretionary limits on court openness because of the necessary dissemination of information that openness implies. It bears recalling that when Dickson J., as he then was, wrote in *MacIntyre* that "covertness is the exception and openness the rule", he was explicitly treating a privacy argument, returning to and dismissing the view, urged many times before, "that the 'privacy' of litigants *requires* that the public be excluded from court proceedings" (p. 185 (emphasis added)). Dickson J. rejected the view that personal privacy concerns require closed courtroom doors, explaining that "[a]s a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings" (ibid).

58 Though writing before *Dagenais*, and therefore not commenting on the specific steps of the analysis as we now understand them, to my mind, Dickson J. was right to recognize that the open court principle brings necessary limits to the right to privacy. While individuals may have an expectation that information about them will not be revealed in judicial proceedings, the open court principle stands presumptively in opposition to that expectation. For example, in *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, LeBel J. held that "a party who institutes a legal proceeding waives his or her right to privacy, at least in part" (para. 42). *MacIntyre* and cases like it recognize — in stating that openness is the rule and covertness the exception — that the right to privacy, however defined, in some measure gives way to the open court ideal. I share the view that the open court principle presumes that this limit on the right to privacy is justified.

59 The Toronto Star is therefore right to say that the privacy of individuals will very often be at some risk in court proceedings. Disputes between and concerning individuals that play out in open court necessarily reveal information that may have otherwise remained out of public view. Indeed, much like the Court of Appeal in this case, courts have explicitly adverted to this concern when concluding that mere inconvenience is insufficient to cross the initial threshold of the test (see, e.g., *3834310 Canada inc. v. Chamberland* 2004 CanLII 4122(Que. C.A.), at para. 30). Saying that any impact on individual privacy is sufficient to establish a serious risk to an important public interest for the purposes of the test for discretionary limits on court openness could

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render this initial requirement moot. Many cases would turn on the balancing at the proportionality stage. Such a development would amount to a departure from *Sierra Club*, which is the appropriate framework and one which must be preserved.

60 Further, recognizing an important interest in privacy generally could prove to be too open-ended and difficult to apply. Privacy is a complex and contextual concept (*Dagg*, at para. 67; see also B. McIsaac, K. Klein and S. Brown, *The Law of Privacy in Canada* (loose-leaf), vol. 1, at pp. 1-4; D. J. Solove, "Conceptualizing Privacy" (2002), 90 *Cal. L. Rev.* 1087, at p. 1090). Indeed, this Court has described the nature of limits of privacy as being in a state of "theoretical disarray" (*R. v. Spencer*2014 SCC 43, [2014] 2 S.C.R. 212, at para. 35). Much turns on the context in which privacy is invoked. I agree with the Toronto Star that a bald recognition of privacy as an important interest in the context of the test for discretionary limits on court openness, as the Trustees advance here, would invite considerable confusion. It would be difficult for courts to measure a serious risk to such an interest because of its multi-faceted nature.

61 While I acknowledge these concerns have merit, I disagree that they require that privacy never be considered in determining whether there is a serious risk to an important public interest. I reach this conclusion for two reasons. First, the problem of privacy's complexity can be attenuated by focusing on the purpose underlying the public protection of privacy as it is relevant to the judicial process, in order to fix precisely on that aspect which transcends the interests of the parties in this context. That narrower dimension of privacy is the protection of dignity, an important public interest that can be threatened by open courts. Indeed, rather than attempting to apply a single unwieldy concept of privacy in all contexts, this Court has generally fixed on more specific privacy interests tailored to the particular situation (*Spencer*, at para. 35; *Edmonton Journal*, at p. 1362, per Wilson J.). That is what must be done here, with a view to identifying the public aspect of privacy that openness might inappropriately undermine.

62 Second, I recall that in order to pass the first stage of the analysis one must not simply invoke an important interest, but must also overcome the presumption of openness by showing a serious risk to this interest. The burden of showing a risk to such an interest on the facts of a given case constitutes the true initial threshold on the person seeking to restrict openness. It is never sufficient to plead a recognized important public interest on its own. The demonstration of a serious risk to this interest is still required. What is important is that the interest be accurately defined to capture only those aspects of privacy that engage legitimate public objectives such that showing a serious risk to that interest remains a high bar. In this way, courts can effectively maintain the guarantee of presumptive openness.

63 Specifically, in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases. Nothing here displaces the principle that covertness in court proceedings must be exceptional. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness (*MacIntyre*, at p. 185; *New Brunswick*, at para. 40; *Williams*, at para. 30; *Coltsfoot Publishing Ltd. v. Foster-Jacques*2012 NSCA 83, 320 N.S.R. (2d) 166, at para. 97). These principles do not preclude recognizing the public character of a privacy interest as important when it is related to the protection of dignity. They merely require that a serious risk be shown to exist in respect of this interest in order to justify, exceptionally, a limit on openness, as is the case with any important public interest under *Sierra Club* . As Professors Sylvette Guillemard and Séverine Menétrey explain, [TRANSLATION] "[t]he confidentiality of the proceedings may be justified, in particular, in order to protect the parties' privacy .... However, the jurisprudence indicates that embarrassment or shame is not a sufficient reason to order that proceedings be held *in camera* or to impose a publication ban" (*Comprendre la procédure civile québécoise* (2nd ed. 2017), at p. 57).

64 How should the privacy interest at issue be understood as raising an important public interest relevant to the test for discretionary limits on court openness in this context? It is helpful to recall that the orders below were sought to limit access to documents and information in the court files. The Trustees' argument on this point focused squarely on the risk of immediate and widespread dissemination of the personally identifying and other sensitive information contained in the sealed materials by the Toronto Star. The Trustees submit that this dissemination would constitute an unwarranted intrusion into the privacy of the affected individuals beyond the upset they have already suffered as a result of the publicity associated with the death of the Shermans.

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65 In my view, there is value in leaving individuals free to restrict when, how and to what extent highly sensitive information about them is communicated to others in the public sphere, because choosing how we present ourselves in public preserves our moral autonomy and dignity as individuals. This Court has had occasion to underscore the connection between the privacy interest engaged by open courts and the protection of dignity specifically. For example, in *Edmonton Journal*, Wilson J. noted that the impugned provision which would limit publication about matrimonial proceedings addressed "a somewhat different aspect of privacy, one more closely related to the protection of one's dignity ... namely the personal anguish and loss of dignity that may result from having embarrassing details of one's private life printed in the newspapers" (pp. 1363-64). In *Bragg*, as a further example, the protection of a young person's ability to control sensitive information was said to foster respect for "dignity, personal integrity and autonomy" (para. 18, citing *Toronto Star Newspaper Ltd.*, at para. 44).

66 Consistent with this jurisprudence, I note by way of example that the Quebec legislature expressly highlighted the preservation of dignity when the *Sierra Club* test was codified in the *Code of Civil Procedure*, CQLR, c. C-25.01 ("*C.C.P.*"), art. 12 (see also Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile*, *chapitre C-25.01* (2015), art. 12). Under art. 12 *C.C.P.*, a discretionary exception to the open court principle can be made by the court if "public order, in particular the preservation of the dignity of the persons involved or the protection of substantial and legitimate interests", requires it.

67 The concept of public order evidences flexibility analogous to the concept of an important public interest under *Sierra Club* yet it recalls that the interest invoked transcends, in importance and consequence, the purely subjective sensibilities of the persons affected. Like the "important public interest" that must be at serious risk to justify the sealing orders in the present appeal, public order encompasses a wide array of general principles and imperative norms identified by a legislature and the courts as fundamental to a given society (see *Goulet v. Transamerica Life Insurance Co. of Canada*2002 SCC 21, [2002] 1 S.C.R. 719, at paras. 42-44, citing *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561 (C.A.), at p. 2570, aff'd [1997] 3 S.C.R. 844). As one Quebec judge wrote, referring to *Sierra Club* prior to the enactment of art. 12 *C.C.P.*, the interest must be understood as defined [TRANSLATION] "in terms of a public interest in confidentiality" (see *3834310 Canada inc.*, at para. 24, per Gendreau J.A. for the Court of appeal). From among the various considerations that make up the concept of public order and other legitimate interests to which art. 12 *C.C.P.* alludes, it is significant that dignity, and not an untailored reference to either privacy, harm or access to justice, was given pride of place. Indeed, it is that narrow aspect of privacy considered to be a fundamental right that courts had fixed upon before the enactment of art. 12 *C.C.P.* — [TRANSLATION] "what is part of one's personal life, in short, what constitutes a minimum personal sphere" (*Godbout*, at p. 2569, per Baudouin J.A.; see also *A. v. B.* 1990 CanLII 3132(Que. C.A.), at para. 20, per Rothman J.A.).

68 The "preservation of the dignity of the persons involved" is now consecrated as the archetypal public order interest in art. 12 *C.C.P.* It is the exemplar of the *Sierra Club* important public interest in confidentiality that stands as justification for an exception to openness (S. Rochette and J.-F. Côté, "Article 12", in L. Chamberland, ed., *Le grand collectif: Code de procédure civile — Commentaires et annotations* (5th ed. 2020), vol. 1, at p. 102; D. Ferland and B. Emery, *Précis de procédure civile du Québec* (6th ed. 2020), vol. 1, at para. 1-111). Dignity gives concrete expression to this public order interest because all of society has a stake in its preservation, notwithstanding its personal connections to the individuals concerned. This codification of *Sierra Club* 's notion of important public interest highlights the superordinate importance of human dignity and the appropriateness of limiting court openness on this basis as against an overbroad understanding of privacy that might be otherwise unsuitable to the open court context.

69 Consistent with this idea, understanding privacy as predicated on dignity has been advanced as useful in connection with challenges brought by digital communications (K. Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context" (2011), 56 *McGill L.J.* 289, at p. 314).

70 It is also significant, in my view, that the application judge in this case explicitly recognized, in response to the relevant arguments from the Trustees, an interest in "protecting the privacy *and dignity* of victims of crime and their loved ones" (para. 23 (emphasis added)). This elucidates that the central concern for the affected individuals on this point is not merely protecting their privacy for its own sake but privacy where it coincides with the public character of the dignity interests of these individuals.

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71 Violations of privacy that cause a loss of control over fundamental personal information about oneself are damaging to dignity because they erode one's ability to present aspects of oneself to others in a selective manner (D. Matheson, "Dignity and Selective Self-Presentation", in I. Kerr, V. Steeves and C. Lucock, eds., *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (2009), 319, at pp. 327-28; L. M. Austin, "Re-reading Westin" (2019), 20 *Theor. Inq. L.* 53, at pp. 66-68; Eltis (2016), at p. 13). Dignity, used in this context, is a social concept that involves presenting core aspects of oneself to others in a considered and controlled manner (see generally Matheson, at pp. 327-28; Austin, at pp. 66-68). Dignity is eroded where individuals lose control over this core identity-giving information about themselves, because a highly sensitive aspect of who they are that they did not consciously decide to share is now available to others and may shape how they are seen in public. This was even alluded to by La Forest J., dissenting but not on this point, in *Dagg*, where he referred to privacy as "[a]n expression of an individual's unique personality or personhood" (para. 65).

72 Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress (see generally *Bragg*, at para. 23). La Forest J., concurring, observed in *Dyment* that privacy is essential to the well-being of individuals (p. 427). Viewed in this way, a privacy interest, where it shields the core information associated with dignity necessary to individual well-being, begins to look much like the physical safety interest also raised in this case, the important and public nature of which is neither debated, nor, in my view, seriously debatable. The administration of justice suffers when the operation of courts threatens physical well-being because a responsible court system is attuned to the physical harm it inflicts on individuals and works to avoid such effects. Similarly, in my view, a responsible court must be attuned and responsive to the harm it causes to other core elements of individual well-being, including individual dignity. This parallel helps to understand dignity as a more limited dimension of privacy relevant as an important public interest in the open court context.

73 I am accordingly of the view that protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test.

74 Focusing on the underlying value of privacy in protecting individual dignity from the exposure of private information in open court overcomes the criticisms that privacy will always be at risk in open court proceedings and is theoretically complex. Openness brings intrusions on personal privacy in virtually all cases, but dignity as a public interest in protecting an individual's core sensibility is more rarely in play. Specifically, and consistent with the cautious approach to the recognition of important public interests, this privacy interest, while determined in reference to the broader factual setting, will be at serious risk only where the sensitivity of the information strikes at the subject's more intimate self.

75 If the interest is ultimately about safeguarding a person's dignity, that interest will be undermined when the information reveals something sensitive about them as an individual, as opposed to generic information that reveals little if anything about who they are as a person. Therefore the information that will be revealed by court openness must consist of intimate or personal details about an individual — what this Court has described in its jurisprudence on s. 8 of the *Charter* as the "biographical core" — if a serious risk to an important public interest is to be recognized in this context (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; *R. v. Tessling*2004 SCC 67, [2004] 3 S.C.R. 432, at para. 60; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 46). Dignity transcends personal inconvenience by reason of the highly sensitive nature of the information that might be revealed. This Court in *Cole* drew a similar line between the sensitivity of personal information and the public interest in protecting that information in reference to the biographical core. It held that "reasonable and informed Canadians" would be more willing to recognize the existence of a privacy interest where the relevant information cuts to the "biographical core" or, "[p]ut another way, the more personal and confidential the information" (para. 46). The presumption of openness means that mere discomfort associated with lesser intrusions of privacy will generally be tolerated. But there is a public interest in ensuring that openness does not unduly entail the dissemination of this core information that threatens dignity — even if it is "personal" to the affected person.

76 The test for discretionary limits on court openness imposes on the applicant the burden to show that the important public interest is at serious risk. Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This

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threshold is fact specific. It addresses the concern, noted above, that personal information can frequently be found in court files and yet finding this sufficient to pass the serious risk threshold in every case would undermine the structure of the test. By requiring the applicant to demonstrate the sensitivity of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.

77 There is no need here to provide an exhaustive catalogue of the range of sensitive personal information that, if exposed, could give rise to a serious risk. It is enough to say that courts have demonstrated a willingness to recognize the sensitivity of information related to stigmatized medical conditions (see, e.g., *A.B.*, at para. 9), stigmatized work (see, e.g., *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario*2021 ONSC 1100, at para. 28 (CanLII)), sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), and subjection to sexual assault or harassment (see, e.g., *Fedeli v. Brown*2020 ONSC 994, at para. 9 (CanLII)). I would also note the submission of the intervener the Income Security Advocacy Centre, that detailed information about family structure and work history could in some circumstances constitute sensitive information. The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

78 I pause here to note that I refer to cases on s. 8 of the *Charter* above for the limited purpose of providing insight into types of information that are more or less personal and therefore deserving of public protection. If the impact on dignity as a result of disclosure is to be accurately measured, it is critical that the analysis differentiate between information in this way. Helpfully, one factor in determining whether an applicant's subjective expectation of privacy is objectively reasonable in the s. 8 jurisprudence focuses on the degree to which information is private (see, e.g., *R. v. Marakah*2017 SCC 59, [2017] 2 S.C.R. 608, at para. 31; *Cole*, at paras. 44-46). But while these decisions may assist for this limited purpose, this is not to say that the remainder of the s. 8 analysis has any relevance to the application of the test for discretionary limits on court openness. For example, asking what the Trustees' reasonable expectation of privacy was here could invite a circular analysis of whether they reasonably expected their court files to be open to the public or whether they reasonably expected to be successful in having them sealed. Therefore, it is only for the limited purpose described above that the s. 8 jurisprudence is useful.

79 In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. While this is obviously a fact-specific determination, some general observations may be made here to guide this assessment.

80 I note that the seriousness of the risk may be affected by the extent to which information would be disseminated without an exception to the open court principle. If the applicant raises a risk that the personal information will come to be known by a large segment of the public in the absence of an order, this is a plainly more serious risk than if the result will be that a handful of people become aware of the same information, all else being equal. In the past, the requirement that one be physically present to acquire information in open court or from a court record meant that information was, to some extent, protected because it was "practically obscure" (D. S. Ardia, "Privacy and Court Records: Online Access and the Loss of Practical Obscurity"(2017), 4 *U. Ill. L. Rev*. 1385, at p. 1396). However, today, courts should be sensitive to the information technology context, which has increased the ease with which information can be communicated and cross-referenced (see Bailey and Burkell, at pp. 169-70; Ardia, at pp. 1450-51). In this context, it may well be difficult for courts to be sure that information will not be broadly disseminated in the absence of an order.

81 It will be appropriate, of course, to consider the extent to which information is already in the public domain. If court openness will simply make available what is already broadly and easily accessible, it will be difficult to show that revealing the information in open court will actually result in a meaningful loss of that aspect of privacy relating to the dignity interest to which I refer here. However, just because information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk to privacy. Privacy is not a binary concept, that is, information is not simply either private or public, especially because, by reason of technology in particular, absolute confidentiality is best thought of as elusive (see generally *R. v. Quesnelle*2014 SCC 46, [2014] 2 S.C.R. 390, at para. 37; *UFCW*, at para. 27). The fact that certain information is already available somewhere in the public sphere does not preclude further harm to the privacy interest by additional dissemination, particularly if the feared dissemination of highly sensitive information

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is broader or more easily accessible (see generally Solove, at p. 1152; Ardia, at p. 1393-94; E. Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000), 50 *U.T.L.J.* 305, at p. 346).

82 Further, the seriousness of the risk is also affected by the probability that the dissemination the applicant suggests will occur actually occurs. I hasten to say that implicit in the notion of risk is that the applicant need not establish that the feared dissemination will certainly occur. However, the risk to the privacy interest related to the protection of dignity will be more serious the more likely it is that the information will be disseminated. While decided in a different context, this Court has held that the magnitude of risk is a product of both the gravity of the feared harm and its probability (*R. v. Mabior*2012 SCC 47, [2012] 2 S.C.R. 584, at para. 86).

83 That said, the likelihood that an individual's highly sensitive personal information will be disseminated in the absence of privacy protection will be difficult to quantify precisely. It is best to note as well that probability in this context need not be identified in mathematical or numerical terms. Rather, courts may merely discern probability in light of the totality of the circumstances and balance this one factor alongside other relevant factors.

84 Finally, and as discussed above, individual sensitivities alone, even if they can be notionally associated with "privacy", are generally insufficient to justify a restriction on court openness where they do not rise above those inconveniences and discomforts that are inherent to court openness (*MacIntyre*, at p. 185). An applicant will only be able to establish that the risk is sufficient to justify a limit on openness in exceptional cases, where the threatened loss of control over information about oneself is so fundamental that it strikes meaningfully at individual dignity. These circumstances engage "social values of superordinate importance" beyond the more ordinary intrusions inherent to participating in the judicial process that Dickson J. acknowledged could justify curtailing public openness (pp. 186-87).

85 To summarize, the important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, to be sure, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. Although measured by reference to the facts of each case, the risk to this interest will be serious only where the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. Recognizing this interest is consistent with this Court's emphasis on the importance of privacy and the underlying value of individual dignity, but is also tailored to preserve the strong presumption of openness.

D. The Trustees Have Failed to Establish a Serious Risk to an Important Public Interest

86 As *Sierra Club* made plain, a discretionary order limiting court openness can only be made where there is a serious risk to an important public interest. The arguments on this appeal concerned whether privacy is an important public interest and whether the facts here disclose the existence of serious risks to privacy and safety. While the broad privacy interest invoked by the Trustees cannot be relied on to justify a limit on openness, the narrower concept of privacy understood in relation to dignity is an important public interest for the purposes of the test. I also recognize that a risk to physical safety is an important public interest, a point on which there is no dispute here. Accordingly, the relevant question at the first step is whether there is a serious risk to one or both of these interests. For reasons that follow, the Trustees have failed to establish a serious risk to either. This alone is sufficient to conclude that the sealing orders should not have been issued.

(1) The Risk to Privacy Alleged in this Case Is Not Serious

87 As I have said, the important public interest in privacy must be understood as one tailored to the protection of individual dignity and not the broadly defined interest the Trustees have asked this Court to recognize. In order to establish a serious risk to this interest, the information in the court files about which the Trustees are concerned must be sufficiently sensitive in that it strikes at the biographical core of the affected individuals. If it is not, there is no serious risk that would justify an exception to openness. If it is, the question becomes whether a serious risk is made out in light of the facts of this case.

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88 The application judge never explicitly identified a serious risk to the privacy interest he identified but, to the extent he implicitly reached this conclusion, I respectfully do not share his view. His finding was limited to the observation that "[t]he degree of intrusion on that privacy and dignity [i.e., that of the victims and their loved ones] has already been extreme and, I am sure, excruciating" (para. 23). But the intense scrutiny faced by the Shermans up to the time of the application is only part of the equation. As the sealing orders can only protect against the disclosure of the information in these court files relating to probate, the application judge was required to consider the sensitivity of the specific information they contained. He made no such measure. His conclusion about the seriousness of the risk then focused entirely on the risk of physical harm, with no indication that he found that the Trustees met their burden as to the serious risk to the privacy interest. Said very respectfully and with the knowledge that the application judge did not have the benefit of the above framework, the failure to assess the sensitivity of the information constituted a failure to consider a required element of the legal test. This warranted intervention on appeal.

89 Applying the appropriate framework to the facts of this case, I conclude that the risk to the important public interest in the affected individuals' privacy, as I have defined it above in reference to dignity, is not serious. The information the Trustees seek to protect is not highly sensitive and this alone is sufficient to conclude that there is no serious risk to the important public interest in privacy so defined.

90 There is little controversy in this case about the likelihood and extent of dissemination of the information contained in the estate files. There is near certainty that the Toronto Star will publish at least some aspects of the estate files if it is provided access. Given the breadth of the audience of its media organization, and the high-profile nature of the events surrounding the death of the Shermans, I have no difficulty in concluding that the affected individuals would lose control over this information to a significant extent should the files be open.

91 With regard to the sensitivity of the information, however, the information contained in these files does not reveal anything particularly private about the affected individuals. What would be revealed might well cause inconvenience and perhaps embarrassment, but it has not been shown that it would strike at their biographical core in a way that would undermine their control over the expression of their identities. Their privacy would be troubled, to be sure, but the relevant privacy interest bearing on the dignity of the affected persons has not been shown to be at serious risk. At its highest, the information in these files will reveal something about the relationship between the deceased and the affected individuals, in that it may reveal to whom the deceased entrusted the administration of their estates and those who they wished or were deemed to wish to be beneficiaries of their property at death. It may also reveal some basic personal information, such as addresses. Some of the beneficiaries might well, it may fairly be presumed, bear family names other than Sherman. I am mindful that the deaths are being investigated as homicides by the Toronto Police Service. However, even in this context, none of this information provides significant insight into who they are as individuals, nor would it provoke a fundamental change in their ability to control how they are perceived by others. The fact of being linked through estate documents to victims of an unsolved murder is not in itself highly sensitive. It may be the source of discomfort but has not been shown to constitute an affront to dignity in that it does not probe deeply into the biographical core of these individuals. As a result, the Trustees have failed to establish a serious risk to an important public interest as required by *Sierra Club* .

92 The fact that some of the affected individuals may be minors is also insufficient to cross the seriousness threshold. While the law recognizes that minors are especially vulnerable to intrusions of privacy (see *Bragg*, at para. 17), the mere fact that information concerns minors does not displace the generally applicable analysis (see, e.g., *Bragg*, at para. 11). Even taking into account the increased vulnerability of minors who may be affected individuals in the probate files, there is no evidence that they would lose control of information about themselves that reveals something close to the core of their identities. Merely associating the beneficiaries or trustees with the Shermans' unexplained deaths is not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity.

93 Further, while the intense media scrutiny on the family following the deaths suggests that the information would likely be widely disseminated, it is not in itself indicative of the sensitivity of the information contained in the probate files.

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94 Showing that the information that would be revealed by court openness is sufficiently sensitive and private such that it goes to the biographical core of the affected individual is a necessary prerequisite to showing a serious risk to the relevant public interest aspect of privacy. The Trustees did not advance any specific reason why the contents of these files are more sensitive than they may seem at first glance. When asserting a privacy risk, it is essential to show not only that information about individuals will escape the control of the person concerned — which will be true in every case — but that this particular information concerns who the individuals are as people in a manner that undermines their dignity. This the Trustees have not done.

95 Therefore, while some of the material in the court files may well be broadly disseminated, the nature of the information has not been shown to give rise to a serious risk to the important public interest in privacy, as appropriately defined in this context in reference to dignity. For that reason alone, I conclude that the Trustees have failed to show a serious risk to this interest.

(2) The Risk to Physical Safety Alleged in this Case is Not Serious

96 Unlike the privacy interest raised in this case, there was no controversy that there is an important public interest in protecting individuals from physical harm. It is worth underscoring that the application judge correctly treated the protection from physical harm as a distinct important interest from that of the protection of privacy and found that this risk of harm was "foreseeable" and "grave" (paras. 22-24). The issue is whether the Trustees have established a serious risk to this interest for the purpose of the test for discretionary limits on court openness. The application judge observed that it would have been preferable to include objective evidence of the seriousness of the risk from the police service conducting the homicide investigation. He nevertheless concluded there was sufficient proof of risk to the physical safety of the affected individuals to meet the test. The Court of Appeal says that was a misreading of the evidence, and the Toronto Star agrees that the application judge's conclusion as to the existence of a serious risk to safety was mere speculation.

97 At the outset, I note that direct evidence is not necessarily required to establish a serious risk to an important interest. This Court has held that it is possible to identify objectively discernable harm on the basis of logical inferences (*Bragg*, at paras. 15-16). But this process of inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation (*R. v. Chanmany*2016 ONCA 576, 352 O.A.C. 121, at para. 45).

98 As the Trustees correctly argue, it is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. The question is ultimately whether this record allowed the application judge to objectively discern a serious risk of physical harm.

99 This conclusion was not open to the application judge on this record. There is no dispute that the feared physical harm is grave. I agree with the Toronto Star, however, that the probability of this harm occurring was speculative. The application judge's conclusion as to the seriousness of the risk of physical harm was grounded on what he called "the degree of mystery that persists regarding both the perpetrator and the motives" associated with the deaths of the Shermans and his supposition that this motive might be "transported" to the trustees and beneficiaries (para. 5; see also paras. 19 and 23). The further step in reasoning that the unsealed estate files would lead to the perpetrator's next crime, to be visited upon someone mentioned in the files, is based on speculation, not the available affidavit evidence, and cannot be said to be a proper inference or some kind of objectively discerned harm or risk thereof. If that were the case, the estate files of every victim of an unsolved murder would pass the initial threshold of the test for a sealing order.

100 Further, I recall that what is at issue here is not whether the affected individuals face a safety risk in general, but rather whether they face such a risk as a result of the openness of these court files. In light of the contents of these files, the Trustees had to point to some further reason why the risk posed by this information becoming publicly available was more than negligible.

101 The speculative character of the chain of reasoning leading to the conclusion that a serious risk of physical harm exists in this case is underlined by differences between these facts and those cases relied on by the Trustees. In *X. v. Y.*, 2011 BCSC 943, 21

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B.C.L.R. (5th) 410, the risk of physical harm was inferred on the basis that the plaintiff was a police officer who had investigated "cases involving gang violence and dangerous firearms" and wrote sentencing reports for such offenders which identified him by full name (para. 6). In *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455, Watt J.A. considered it "self-evident" that the disclosure of identifiers of an undercover operative working in counter-terrorism would compromise the safety of the operative (para. 41). In both cases, the danger flowed from facts establishing that the applicants were in antagonistic relationships with alleged criminal or terrorist organizations. But in this case, the Trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the Shermans' deaths and the association of the affected individuals with the deceased is not reasonably possible on this record. It is not a reasonable inference but, as the Court of Appeal noted, a conclusion resting on speculation.

102 Were the mere assertion of grave physical harm sufficient to show a serious risk to an important interest, there would be no meaningful threshold in the analysis. Instead, the test requires the serious risk asserted to be well grounded in the record or the circumstances of the particular case (*Sierra Club*, at para. 54; *Bragg*, at para. 15). This contributes to maintaining the strong presumption of openness.

103 Again, in other cases, circumstantial facts may allow a court to infer the existence of a serious risk of physical harm. Applicants do not necessarily need to retain experts who will attest to the physical or psychological risk related to the disclosure. But on this record, the bare assertion that such a risk exists fails to meet the threshold necessary to establish a serious risk of physical harm. The application judge's conclusion to the contrary was an error warranting the intervention of the Court of Appeal.

E. There Would Be Additional Barriers to a Sealing Order on the Basis of the Alleged Risk to Privacy

104 While not necessary to dispose of the appeal, it bears mention that the Trustees would have faced additional barriers in seeking the sealing orders on the basis of the privacy interest they advanced. I recall that to meet the test for discretionary limits on court openness, a person must show, in addition to a serious risk to an important interest, that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality (*Sierra Club*, at para. 53).

105 Even if the Trustees had succeeded in showing a serious risk to the privacy interest they assert, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. The condition that the order be necessary requires the court to consider whether there are alternatives to the order sought and to restrict the order as much as reasonably possible to prevent the serious risk (*Sierra Club*, at para. 57). An order imposing a publication ban could restrict the dissemination of personal information to only those persons consulting the court record for themselves and prohibit those individuals from spreading the information any further. As I have noted, the likelihood and extent of dissemination may be relevant factors in determining the seriousness of a risk to privacy in this context. While the Toronto Star would be able to consult the files subject to a publication ban, for example, which may assist it in its investigations, it would not be able to publish and thereby broadly disseminate the contents of the files. A publication ban would seem to protect against this latter harm, which has been the focus of the Trustees' argument, while allowing some access to the file, which is not possible under the sealing orders. Therefore, even if a serious risk to the privacy interest had been made out, it would likely not have justified a sealing order, because a less onerous order would have likely been sufficient to mitigate this risk effectively. I hasten to add, however, that a publication ban is not available here since, as noted, the seriousness of the risk to the privacy interest at play has not been made out.

106 Further, the Trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order, including the negative impact on the open court principle (*Sierra Club*, at para. 53). In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same information. This contextual balancing, informed

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by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

VI. Conclusion

107 The conclusion that the Trustees have failed to establish a serious risk to an important public interest ends the analysis. In such circumstances, the Trustees are not entitled to any discretionary order limiting the open court principle, including the sealing orders they initially obtained. The Court of Appeal rightly concluded that there was no basis for asking for redactions because the Trustees had failed at this stage of the test for discretionary limits on court openness. This is dispositive of the appeal. The decision to set aside the sealing orders rendered by the application judge should be affirmed. Given that I propose to dismiss the appeal on the existing record, I would dismiss the Toronto Star's motion for new evidence as being moot.

108 For the foregoing reasons, I would dismiss the appeal. The Toronto Star requests no costs given the important public issues in dispute. As such, there will be no order as to costs.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 As noted in the title of proceedings, the appellants in this matter have been referred to consistently as the "Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate." In these reasons the appellants are referred to throughout as the "Trustees" for convenience.

2 The use of "Toronto Star" as a collective term referring to both respondents should not be taken to suggest that only Toronto Star Newspapers Ltd. is participating in this appeal. Mr. Donovan is the only respondent to have been a party throughout. Toronto Star Newspapers Ltd. was a party in first instance, but was removed as a party on consent at the Court of Appeal. By order of Karakatsanis J. dated March 25, 2020, Toronto Star Newspapers Ltd. was added as a respondent in this Court.

3 At the time of writing the House of Commons is considering a bill that would replace part one of *PIPEDA*: Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess., 43rd Parl., 2020.

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2012 ABQB 412
Alberta Court of Queen's Bench

Romspen Investment Corp. v. Hargate Properties Inc.

2012 CarswellAlta 1101, 2012 ABQB 412, [2012] A.W.L.D. 3821, [2012] A.W.L.D. 3824, [2012] A.J. No. 667, 218 A.C.W.S. (3d) 838, 99 C.B.R. (5th) 319

Romspen Investment Corporation Plaintiff and Hargate Properties Inc., 1410973 Alberta Ltd., Voipus Canada Ltd., 1333183 Alberta Ltd., Bellavera Green Condominium Corp. and Kevyn Ronald Frederick Also Known As Kevyn Frederick, Kevin Frederic, Kevyn Sheldon Frederick or Kevin Frederick and Chateau Lacombe Capital Partners Ltd. Defendants

Donald Lee J.

Heard: June 14, 2012
Judgment: June 22, 2012
Docket: Edmonton 1103-17749

Counsel: Schuyler V. Wensel, Q.C. for Plaintiff
Lindsay Miller for Second Mortgagee, Allied Hospitalities Services Inc.
Scott Stevens for Receiver, D. Manning & Associates Inc.
Russel A. Rimer for BDO Canada Ltd.
Atul Omkar for Dr. Singh
Lyle Brookes for Victory Christian Centre Inc.

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

Related Abridgment Classifications

Debtors and creditors

VII Receivers

VII.6 Conduct and liability of receiver

VII.6.a General conduct of receiver

Evidence

XIV Privilege

XIV.9 Miscellaneous

Headnote

Debtors and creditors --- Receivers — Conduct and liability of receiver — General conduct of receiver

Receiver brought application for sealing order with respect to its report about sale process for hotel to protect confidentiality of process, and sought to disburse funds — Primary creditor supported receiver's application but two other interested parties opposed it — Application granted in part — Receiver already released marketing reports and appraisal to primary creditor and counsel for second mortgagee — Counsel for two other interested parties should also be allowed to see reports on same confidential basis since there would be no adverse consequences and these parties had legitimate financial interest in process — Sealing order was granted with exception that documents sealed and future related documents would be released two interested parties confidentially — Court ordered that from funds held by receiver of $632,110.26, there would be hold-back of $120,000 with respect to any potential claims by employees of hotel under Wage Earning Protection Plan — Receiver was required to pay $5,985.57 to Canada Revenue Agency (CRA) in satisfaction of its secured claim for unremitted source deductions.

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous

Sealing order — Receiver brought application for sealing order with respect to its report about sale process for hotel to protect confidentiality of process — Primary creditor supported receiver's application but two other interested parties opposed it — Application granted in part — Receiver already released marketing reports and appraisal to primary creditor and counsel for

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second mortgagee — Counsel for two other interested parties should also be allowed to see reports on same confidential basis since there would be no adverse consequences and these parties had legitimate financial interest in process — Sealing order was granted with exception that documents sealed and future related documents would be released to interested parties confidentially.

Table of Authorities

Cases considered by *Donald Lee J.*:

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

APPLICATION by receiver for sealing order with respect to its report about sale process for hotel and other relief.

***Donald Lee J.*:**

I. Background

1 This is an application by the Receiver, D. Manning & Associates Inc. for a sealing order with respect to the Receiver's report dated June 4, 2012; as well as for directions with respect to the disbursement of certain funds recovered by the Receiver from the accounts of Chateau Lacombe Capital Partners Ltd. ["CLCPL"]. There is also an application by the primary creditor for a one day redemption order in a related foreclosure application.

2 The Receiver's report dated June 4, 2012 provides details with respect to the ongoing sale process of the Chateau Lacombe Hotel in downtown Edmonton, including the realtors marketing reports and appraisal of the hotel. The Receiver submits that the protection of the commercial interest herein forms a proper basis for the issuance of a sealing order as there is an ongoing sales process. In the absence of the sealing order with respect to the appraisal and marketing reports, it is submitted that there is a serious risk that the integrity of the sales process will be adversely affected and that all parties involved in this matter will suffer financially.

3 The primary creditor in this matter, Romspen Investment Corporation ("Romspen"), supports the Receiver's application for a sealing order. Romspen is owed approximately 35 million dollars presently, and submits that the sealing order is required to protect the confidentiality of the sales process. The second mortgagee, Allied Hospitality Services Inc., ["Allied"] also supports the sealing order application.

4 Opposing the sealing order, however, are counsel for Dr. Singh who has claimed a first mortgage on properties known as the "Church lands." The priority of Dr. Singh's claim as first mortgagee on the Church lands is in dispute as Romspen received an apparent postponement in it's favor from Dr. Singh when it financed the hotel purchase in 2010. These lands consist of 20 acres on Ellerslie Road located in a rapidly developing residential suburban area of Edmonton which the principal of CLCPL, Kevin Frederick, had purchased from the Victory Christian Church in August 2008, for 18 million dollars.

5 Counsel for the Victory Christian Church also opposes the sealing order request, arguing that concept of "Marshalling" could be applicable with respect to the Church lands given that the Church has now received an assignment of the 12 million dollar vendor take-back mortgage given by Kevin Frederick in it's favor at the time of the 2008 purchase by his numbered company. The Victory Christian Church advises that at the present time as a result of the current developments in the case, the 20 acres of prime Edmonton real estate sold for 18 million dollars has resulted in no realisable funds to the Church. The Church is now also the subject of a potential removal proceeding from the lands that it uses for its worship services because of Romspen's present foreclosure application.

6 Counsel for Dr. Singh, a retired dentist, and the Church submit that they must have access to the marketing and appraisal reports that the Receiver, Romspen, and Allied Properties already have with respect to the Chateau Lacombe Hotel site. Counsel for Dr. Singh and the Church submit that it is only through their receipt of these marketing reports and appraisal that they will be able to determine that the best price is being obtained for the Chateau Lacombe Hotel site.

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7 The present appraisal comes in at a price well below that which is owed to the creditors, so all counsel supporting the granting of the sealing order argue that no useful purpose would be served in disclosing this information any further. They further submit that it is inevitable, and in fact, they wish the Court to direct as part of another application presently before me that a redemption order for the Church property be issued setting the redemption period at one day.

8 Counsel for Dr. Singh, the first mortgagee on the Church lands, points out that the City of Edmonton's current valuation of the Chateau Lacombe Hotel for municipal tax purposes is approximately 32 million dollars, and at the time the hotel was purchased in 2010 it was 38 million dollars. Based on three appraisals done in 2010, the Chateau Lacombe Hotel property was worth between 57 to 70 million dollars. The property was purchased in October 2010 for 47.8 million dollars by Mr. Frederick's company, Hargate Properties Inc. ["Hargate"], with Romspen advancing 32 million dollars, a take-back second mortgage by Allied of 11+ million dollars, and Kevin Frederick's 6 million dollar contribution. The 6 million dollars appears to have come from Dr. Singh's first mortgage loan secured on the Church lands. The Church's 12 million dollar vendor take-back mortgage on its lands from Mr. Frederick has been defaulted on and it has been assigned back to the Church, although curiously, the purchase price for the Church lands was listed at Land Titles as 10 million dollars. The Marshalling concept as I understand it involves certain other Leduc properties owned by Kevin Frederick that are also under foreclosure currently.

9 The argument then of counsel for Dr. Singh and for the Church is that the Chateau Lacombe Hotel property could or should have a value far greater than intimated by the Receiver presently, and if there are proper marketing efforts, all creditors and primarily Romspen would benefit. However, in order to ascertain the validity of the present appraisal and marketing efforts, counsel for Dr. Singh and for the Church need access to the most current reports, which to date has been refused by the Receiver

II. Conclusion

10 All parties agree that the relevant case law is found in the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.J. No. 42, [2002] 2 S.C.R. 522 (S.C.C.) at paragraph 53 which reads as follows:

> A confidentiality order under Rule 151 should only be grated when:
>
> > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effect of the confidentiality order, including the effect on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

11 The commercial interest as stated in *Sierra Club* in presumed in the present case, but as the Supreme Court of Canada also stated at paragraph 57 "reasonably alternative measures" requires the judge to consider whether reasonable alternatives to the confidentiality order are available as well as to restrict the order as much as reasonably possible while preserving the commercial interest in question. Counsel for the Receiver is not prepared to release the marketing and appraisals even to counsel for Dr. Singh and for the church on any basis.

12 I conclude that the Receiver has already released the marketing reports and the appraisal to counsel for Rompsen, the primary creditor, and to counsel for the second mortgagee, Allied, with no adverse consequences, to the sales process as they are entitled to receive that information on a confidential basis. I conclude that counsel for Dr. Singh and for the Church should also be allowed to see those reports on the same confidential basis, and I am satisfied that there will be no adverse consequences as a result notwithstanding the objections of counsel for the Receiver, Romspen and Allied Properties. It is in everyone's financial interest amongst this group including Dr. Singh and the Church to see that the Chateau Lacombe Hotel property is sold for the most monies. The release of the requested sales process and appraisal reports is no reflection that there is anything deficient in the present sales efforts which appear to have been conducted quite efficiently. It is only a recognition of the legitimate financial interest in this process of Dr. Singh and the Church.

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13 The application to Seal is granted with the exception that the documents sealed, and future related documents, will be released to counsel for Dr. Singh and for the Church confidentially, in addition to them being released to Romspen and Allied. Pending the receipt of these reports and appraisal, including the results of the current final June 22 bidding round, the application for a one day redemption period on the Church lands pursuant to the foreclosure application presently before me, will be adjourned to July 5, 2012, at which point it will be considered.

III. The CLCPL Application

14 With respect to counsel for BDO Canada's issues regarding the Receiver's request to distribute all of the remaining funds in that company, I understand BDO's objection to be that the Canada Revenue Agency ["CRA"] has a secured priority claims under the Wage Earning Protection Program ("WEPP"), and with respect to certain unremitted employee source deductions.

15 Hargate Properties Inc. purchased the hotel from the previous owner, Chateau Lacombe Limited Partnership in October 2010, financing the purchase in part by a 32 million dollar loan from Romspen. The assets purchased by Hargate formed a substantial part of the security taken by Romspen for the loan. Additional security came from the allegedly improper/fraudulent postponement of the first mortgage on the Church lands that Dr. Singh had advanced to a numbered company controlled by Kevin Frederick. Concurrent with Hargate's acquisition of the assets of the Chateau Lacombe Hotel, unbeknownst to Romspen even at the time I granted the original receivership order to Romspen, in apparent contradiction in the terms of Romspen's security documentation, CLCPL began operating the Chateau Lacombe Hotel.

16 There were no formal agreements between Hargate and CLCPL with respect to the buyers use of Hargate's assets. CLCPL did not render any payments to Hargate for the use of the assets. CLCPL did not appear to have had any assets of its own, yet it received and retained all the revenues generated through the operation of the hotel (with the exception of some of the revenues generated under a lease between Hargate and ImPark in relationship to the hotel's parkade.) Kevin Frederick was the principal and operating mind of both Hargate and CLCPL at all material times, and it is alleged that Mr. Frederick converted at least some of the revenues generated by the hotel to his own use.

17 I have considered the concerns of the bankruptcy trustee of CLCPL BDO Canada Ltd. and I am satisfied that the CRA has properly been notified with respect to any priorities it may have in this matter. From the funds held by the Receiver of $632,110.26, there will be a $120,000 hold-back with respect to any protential WEPP claim made by the employees of CLCPL, although non-union employees were terminated by the Receiver upon his appointment. The Receiver has paid all outstanding wages since the date of their appointment, and has continued to pay vacation pay as it becomes due, payable to non-union and union employees. The hold back will also cover any costs of the Receiver-Manager prior to discharge. The Receiver shall pay $5,985.57 to the CRA in satisfaction of it's secured claim for unremitted source deductions.

18 Additionally, the CRA shall provide the Receiver with notice of any opposition to the payout described above within 14 days of service of these directions.

19 If the CRA does not provide notice to the Receiver within 14 days of service of these directions, then it shall be deemed forever barred from making or enforcing any claim, interest or right of any nature or kind whatsoever, whether arising by statute, at law or in equity (a "Claim") to the Funds, as well as any Claim(s) arising out of or relating to the Funds or the source of the Funds, and all such Claim(s) shall be forever extinguished, barred and released.

Application granted in part.

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COURT FILE NUMBER	2401-15969
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY



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

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF ANGUS A2A GP INC., ANGUS MANOR PARK A2A GP INC., ANGUS MANOR PARK A2A CAPITAL CORP., ANGUS MANOR PARK A2A DEVELOPMENTS INC., HILLS OF WINDRIDGE A2A GP INC., WINDRIDGE A2A DEVELOPMENTS, LLC, FOSSIL CREEK A2A GP INC., FOSSIL CREEK A2A DEVELOPMENTS, LCC, A2A DEVELOPMENTS INC., SERENE COUNTRY HOMES (CANADA) INC. and A2A CAPITAL SERVICES CANADA INC.

DOCUMENT **CCAA INITIAL ORDER**

I hereby certify this to be a true copy of the original
Dated this 14 day of November 2024
for Clerk of the Court

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Fasken Martineau DuMoulin LLP
3400, 340 7th Avenue SW
Calgary, AB T2P 3N9

Attention: **Robyn Gurofsky / Kaitlyn Wong**
Telephone: (403) 261-9469
Email: rgurofsky@fasken.com / kwong@fasken.com
File No. 321102-00017

DATE ON WHICH ORDER WAS PRONOUNCED: November 14, 2024

LOCATION WHERE ORDER WAS PRONOUNCED: Calgary, Alberta

JUSTICE WHO MADE THIS ORDER: The Honourable Justice C. Feasby

LEGAL*66555422.8

UPON the application of Michael Edwards, Paul Lauzon, Isabelle Brousseau, Pat Wedlund and Brian Richards (the "**Applicant Investors**"); **AND UPON** having read the Originating Application, the Affidavit of Michael Edwards sworn on November 12, 2024, the Affidavit of Paul Lauzon sworn on November 12, 2024, the Affidavit of Isabelle Brousseau, sworn November 8, 2024, the Affidavit of Pat Wedlund, sworn November 12, 2024, the Affidavit of Brian Richards, sworn November 12, 2024 and the Affidavit of Kim Picard sworn November 12, 2024; **AND UPON** reading the consent of Alvarez & Marsal Canada Inc. ("**A&M**") to act as Monitor (in such capacity, the "**Monitor**") with enhanced powers; **AND UPON** being advised that the interested parties who are likely to be affected by the charges created herein have been provided notice of this application; **AND UPON** hearing counsel for the Applicant Investors and Counsel for the proposed Monitor and any other party in attendance; **AND UPON** reading the Pre-Filing Report of A&M, in its capacity as proposed Monitor with enhanced powers for (together, the "**Debtor Companies**"); **IT IS HEREBY ORDERED AND DECLARED THAT**:

SERVICE

1. The time for service of the notice of application for this order (the "**Order**") is hereby abridged and deemed good and sufficient and this application is properly returnable today.

APPLICATION

2. Angus A2A GP Inc., Angus Manor Park A2A GP Inc., Angus Manor Park A2A Capital Corp., Angus Manor Park A2A Developments Inc., Hills of Windridge A2A GP Inc., Windridge A2A Developments, LLC, Fossil Creek A2A GP Inc., Fossil Creek A2A Developments, LLC, A2A Developments Inc., Serene Country Homes (Canada) Inc., and A2A Capital Services Canada Inc. (together, the "**Debtor Companies**") are companies to which the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**") applies.

AFFILIATED ENTITIES

3. Angus A2A Limited Partnership, Angus Manor A2A Limited Partnership, Hills of Windridge A2A LP, Hills of Windridge A2A Trust, Fossil Creek A2A Limited Partnership,

and Fossil Creek A2A Trust (together the "**Affiliated Entities**") are are integrally related to the Debtor Companies' business and the Applicant Investors' interests, and are hereby granted and shall have the same benefit, protections and authorizations provided to the Debtor Companies in this Order, and all the property and business of the Affiliated Entities shall henceforth be deemed to be the Property and Business (each as defined in paragraph 9 hereof) of the Debtor Companies, notwithstanding that none of these entities are a "company" pursuant to the CCAA.

CORPORATE REVIVAL

4. The Alberta Corporate Registrar is hereby directed to temporarily revive the corporate bodies of Angus A2A GP Inc., Angus Manor Park A2A GP Inc. and Fossil Creek A2A GP Inc. (together the "**Alberta Struck Companies**") for the limited purpose of facilitating these CCAA proceedings.

5. The Director of the federal Corporate Registrar is hereby directed to temporarily revive the corporate body of A2A Capital Services Canada Inc.(together with the "Alberta Struck Companies, the "**Struck Companies**") for the limited purpose of facilitating these CCAA proceedings.

6. The temporary revival of the Struck Companies shall expire upon the termination of the within CCAA proceedings, unless otherwise ordered by this Honourable Court.

7. The Monitor, in addition to its prescribed rights and obligations under the CCAA and this Order, is authorized and directed to execute all documents necessary for the purpose of reviving the Struck Companies and the Stuck Companies are hereby relieved of any obligation to file delinquent and future annual returns.

PLAN OF ARRANGEMENT

8. The Debtor Companies, under the direction of the Monitor, shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (a "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

9. The Monitor shall exercise the management and control of the Debtor Companies, and on behalf of the Debtor Companies, shall:

(a) permit the Debtor Companies to remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**");

(b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property; and

(c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

(d) be entitled to continue to utilize the central cash management system currently in place or, with the consent of the Monitor, replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System (i) shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Debtor Companies, through the Monitor, of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, (ii) shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Debtor Companies, pursuant to the terms of the documentation applicable to the Cash Management System, and (iii) shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under any Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

10. To the extent permitted by law, the Monitor on behalf of the Debtor Companies shall, be entitled but not required to make the following advances or payments of the following expenses, incurred prior to or after this Order:

    (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

    (b) the reasonable fees and disbursements of any Assistants retained or employed by the Debtor Companies or the Monitor on behalf of the Debtor Companies, in respect of these proceedings, at their standard rates and charges, including for periods prior to the date of this Order.

11. Except as otherwise provided to the contrary herein, the Monitor on behalf of the Debtor Companies shall be entitled but not required to pay all reasonable expenses incurred by the Debtor Companies in carrying out the provisions of this Order, which shall include, without limitation:

    (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance, maintenance and security services; and

    (b) payment for goods or services actually supplied to the Debtor Companies following the date of this Order.

12. The Monitor, on behalf of the Debtor Companies shall remit, in accordance with legal requirements, or pay:

    (a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority that are required to be deducted from employees' wages, including, without limitation, amounts in respect of:

        (i) employment insurance,

        (ii) Canada Pension Plan, and

(iv) income taxes,

but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after this Order, unless otherwise ordered by the Court;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Debtor Companies in connection with the sale of goods and services by the Debtor Companies, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

(c) any amount payable to the Crown in Right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and that are attributable to or in respect of the carrying on of the Business by the Debtor Companies.

13. Until such time as a real property lease is disclaimed or resiliated in accordance with the CCAA, the Monitor, on behalf of the Debtor Companies may pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the Monitor, on behalf of the Debtor Companies, from time to time for the period commencing from and including the date of this Order ("**Rent**"), but shall not pay rent in arrears.

14. Except as specifically permitted in this Order, the Monitor on behalf of the Debtor Companies is hereby directed, until further order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Debtor Companies to any of its creditors as of the date of this Order;

(b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and

(c) not to grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

15. The Monitor, on behalf of the Debtor Companies shall, subject to such requirements as are imposed by the CCAA have the right to:

(a) permanently or temporarily cease, downsize or shut down any portion of its business or operations and to dispose of redundant or non-material assets not exceeding **$500,000** in any one transaction or **$1,000,000** in the aggregate, provided that any sale that is either (i) in excess of the above thresholds, or (ii) in favour of a person related to any of the Debtor Companies (within the meaning of section 36(5) of the CCAA), shall require authorization by this Court in accordance with section 36 of the CCAA;

(b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate on such terms as may be agreed upon between the Monitor, on behalf of the Debtor Companies and such employee, or failing such agreement, to deal with the consequences thereof in the Plan

(c) disclaim or resiliate, in whole or in part, their arrangements or agreements of any nature whatsoever with whomsoever, whether oral or written, as the Monitor on behalf of the Debtor Companies deems appropriate, in accordance with section 32 of the CCAA; and

(d) pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Monitor, on behalf of the Debtor Companies, to proceed with an orderly restructuring of the Business (the "**Restructuring**").

16. The Monitor, on behalf of the Debtor Companies, shall provide each of the relevant landlords with notice of the Debtor Companies' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal. If the landlord disputes the Debtor Companies' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Monitor on behalf of the Debtor Companies, or by further order of this Court upon application by the Monitor on behalf of the Debtor Companies on at least two (2) days' notice to such landlord and any such secured creditors. If the Monitor, on behalf of the Debtor Companies disclaim or resiliate the lease governing such leased premises in accordance with section 32 of the CCAA, they shall not be required to pay Rent under such lease pending resolution of any such dispute other than Rent payable for the notice period provided for in section 32(5) of the CCAA, and the disclaimer or resiliation of the lease shall be without prejudice to the Debtor Companies' claim to the fixtures in dispute.

17. If a notice of disclaimer or resiliation is delivered by the Monitor on behalf of the Debtor Companies pursuant to section 32 of the CCAA, then:

    (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Monitor, on behalf of the Debtor Companies 24 hours' prior written notice; and

    (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Debtor Companies in respect of such lease or leased premises and such landlord shall be entitled to notify the Monitor, on behalf of the Debtor Companies of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation

to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE DEBTOR COMPANIES OR THE PROPERTY

18. Until and including November 24, 2024, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Debtor Companies, the Affiliated Entities or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Debtor Companies or the Affiliated Entities, or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

19. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**"), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Debtor Companies, the Affiliated Entities or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided that nothing in this Order shall:

    (a) empower the Debtor Companies to carry on any business that the Debtor Companies are not lawfully entitled to carry on;

    (b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA;

    (c) prevent the filing of any registration to preserve or perfect a security interest;

    (d) prevent the registration of a claim for lien; or

    (e) exempt the Debtor Companies from compliance with statutory or regulatory provisions relating to health, safety or the environment.

20. Nothing in this Order shall prevent any party from taking an action against the Debtor Companies or the Affiliated Entities where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

NO INTERFERENCE WITH RIGHTS

21. During the Stay Period, no person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor Companies or the Affiliated Entities except with the written consent of the Monitor on behalf of the Debtor Companies, or leave of this Court.

CONTINUATION OF SERVICES

22. During the Stay Period, all persons having:

    (a) statutory or regulatory mandates for the supply of goods and/or services; or

    (b) oral or written agreements or arrangements with the Debtor Companies or the Affiliated Entities, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business, the Debtor Companies or the Affiliated Entities;

    are hereby restrained until further order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Debtor Companies or Affiliated Entities or exercising any other remedy provided under such agreements or arrangements. The Debtor Companies and Affiliated Entities shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Debtor Companies in accordance with the payment practices of the Debtor

Companies, or such other practices as may be agreed upon by the supplier or service provider and each of the Monitor on behalf of the Debtor Companies and the Affiliated Entities, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

23. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any person, other than the Interim Lender where applicable, be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Debtor Companies.

CANADIAN REPRESENTATIVE COUNSEL

24. Fasken Martineau DuMoulin LLP ("**Canadian Rep Counsel**") is hereby appointed as counsel for all Canadian investors in the Business and Property of the Debtor Companies and the Affiliate Entities, including without limitation, the Applicant Investors (the "**Canadian Investors**") in these proceedings, any proceedings under the CCAA or the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") or in any other proceeding respecting the insolvency of the Debtor Companies that may be brought before this Court (collectively, the "**Insolvency Proceedings**"), for any issue affecting the Canadian Investors.

25. Canadian Rep Counsel shall be entitled but not required to commence the process of identifying no more than five (5) Canadian Investors to be nominated as Court-appointed representatives (the "**Canadian Representatives**") pursuant to a further Order of this Honourable Court, as soon as practicable. The Canadian Representatives, once appointed, shall represent the Canadian Investors in the Insolvency Proceedings, including without limitation, for the purpose of settling or compromising claims by the Canadian Investors in the within CCAA proceedings.

NON-CANADIAN REPRESENTATIVE COUNSEL

26. Norton Rose Fulbright Canada LLP ("**Offshore Rep Counsel**" and together with Canadian Representative Counsel, "**Investor Counsel**") is hereby appointed as counsel for all non-Canadian investors in in the Business and Property of the Debtor Companies (the "**Offshore Investors**") in the Insolvency Proceedings, for any issue affecting the Offshore Investors.

27. Offshore Rep Counsel shall be entitled but not required commence the process of identifying no more than five (5) Offshore Investors to be nominated as Court-appointed representatives (the "**Offshore Representatives**") pursuant to a further Order of this Honourable Court, as soon as practicable. The Offshore Representatives, once appointed, shall represent the Offshore Investors in the Insolvency Proceedings, including without limitation, for the purpose of settling or compromising claims by the Offshore Investors in the within CCAA proceedings.

DIRECTORS AND OFFICERS

28. All current and former directors and officers of the Debtor Companies shall have no further power or authority to manage or direct the Debtor Companies including, but not limited to, the power to direct the sale, transfer or other disposition of the Property or Business on behalf of the Debtor Companies, or incur any obligations on behalf of the Debtor Companies.

29. All of the current and former directors, officers, shareholders and Assistants of the Debtor Companies and all other persons acting on the instruction or behalf of any of the foregoing having notice of this Order shall and are hereby directed to co-operate with and provide the Monitor with reasonable access to the books and records of the Debtor Companies and Affiliate Entities.

APPOINTMENT OF MONITOR

30. A&M is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property, Business, and financial affairs of the Debtor Companies with the powers and obligations set out in the CCAA or set forth herein and that the Debtor

Companies and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Debtor Companies pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

31. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Debtor Companies' receipts and disbursements, Business and dealings with the Property;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein and immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the Debtor Companies;

(c) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form and other financial documents of the Debtor Companies to the extent that is necessary to adequately assess the Property, Business, and financial affairs of the Debtor Companies or to perform its duties arising under this Order;

(d) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(e) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the Debtor Companies and any other Person; and

(f) perform such other duties as are required by this Order or by this Court from time to time.

32. Without in any way limiting the powers and duties of the Monitor otherwise set out herein or in the CCAA, the Monitor is hereby empowered and authorized, but not obligated, to do

any of the following in the name of and on behalf of the Debtor Companies and the Affiliated Entities, where the Monitor considers it necessary or desirable:

(a) take any and all actions and steps to manage, operate and carry on the Business, including, without in any way limiting the generality of the foregoing:

(i) any actions or steps the Monitor considers necessary or desirable to proceed with an orderly restructuring or liquidation of the Business;

(ii) any and all steps of the Debtor Companies authorized by this Order and any other Order made in these proceedings, including making distributions or payments;

(iii) permanently or temporarily ceasing, downsizing or shutting down any of the Debtor Companies operations;

(iv) terminating the employment of or temporarily laying off employees of the Debtor Companies;

(v) preparing a Plan on behalf of the Debtor Companies;

(vi) entering into any agreements;

(vii) settling, extending or compromising any indebtedness owing to or by the Debtor Companies;

(viii) engaging and instructing Assistants from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's powers and duties, including those conferred by this Orde

(ix) purchasing or leasing machinery, equipment, inventories, supplies, premises or other assets to continue the Business, or any part or parts thereof;

(x) initiating, prosecuting and continuing the prosecution of any and all proceedings and defending all proceedings now pending or hereafter instituted with respect to the Debtor Companies, the Business, the Property

or the Monitor and to settle or compromise any such proceeding;

(xi) exercising any rights of the Debtor Companies;

(xii) applying for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and in the name of the Debtor Companies;

(xiii) taking any and all corporate governance actions for the Debtor Companies; and

(xiv) providing instruction and direction to the Assistants of the Debtor Companies;

(b) preserve, protect and exercise control over the Property, or any parts thereof, including, without in any way limiting the generality of the foregoing to:

(i) receive, collect and exercise control over all monies and accounts held by or owing to the Debtors, including any proceeds of the sale of any of the Property;

(ii) exercise all remedies of the Debtor Companies in collecting monies owed or hereafter owing to the Debtor Companies and to enforce any security held by the Debtor Companies;

(iii) execute, assign, issue and endorse documents of whatever nature in respect of any of the Property for any purpose pursuant to this Order; and

(iv) market, sell, convey, transfer, lease or assign the Property or any part of parts of the Property out of the ordinary course of business, including running a sales solicitation process without the approval of this Court, in respect of any one transaction not exceeding **[$500,000]** or **[$1,000,000]** in the aggregate and with the approval of this Court in respect of any other transaction;

(c) to report to, meet with and discuss with such affected persons as the Monitor deems appropriate on all matters relating to the Business and the Property, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;

(d) oversee and direct the preparation and dissemination of financial and other information of the Debtor Companies in these proceedings, including cash flow statements; and

(e) perform such other duties or take any steps reasonably incidental to the exercise of these powers and in each case where the Monitor takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other persons, including the Debtor Companies and without interference from any other person.

33. The Monitor is not and shall not, for any purposes, be deemed to be a principal, director, officer, or employee of the Debtor Companies.

34. Nothing in this Order shall constitute or be deemed to constitute the Monitor as receiver, assignee, liquidator, administrator, receiver-manager, agent of the creditors or legal representative of any of the Debtor Companies within the meaning of any relevant legislation, regulation, common law, or rule of law or equity. For greater clarity, any distribution to creditors of any of the Debtor Companies administered by the Monitor on behalf of any of the Debtor Companies will be deemed to have been made by any of the Debtor Companies, themselves.

35. The Monitor is not and shall not for the purposes of the *Income Tax Act* (Canada) ("**ITA**") be deemed to be a legal representative or person to whom s. 150(3) of that Act applies.

36. The Monitor is not, and shall not be deemed, to be the owner of the Property for any purpose and nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might be cause or contribute to a spill, discharge, release or deposit of a

substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the Canadian Environmental Protection Act or any other provincial or federal regulations in Canada or internationally ("**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation.

37. The Monitor shall provide any creditor of the Debtor Companies, including the Interim Lender, with information provided by the Debtor Companies in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Debtor Companies is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Debtor Companies may agree.

38. In addition to the rights and protections afforded the Monitor under the CCAA or as an Officer of this Court, the Monitor shall incur no liability or obligation, in its personal or corporate capacity, as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation. For greater certainty, The Monitor is not and shall not be deemed to incur liability for any act or omission of the Debtor Companies, including, without limitation, in relation to the payment of and/or accounting for any taxes (including, without limitation, any taxes, duties, fees, premiums, assessment, imposts, levies and other similar charges taxes imposed under the ITA, the *Excise Tax Act*, RSC 1985. C E-15, or any similar legislation and owing to the Receiver General, the Canada Revenue Agency or any governmental authority in a jurisdiction outside of Canada) on revenues earned or any indebtedness or obligations whatsoever or howsoever incurred by the Debtor Companies.

39. The enhancement of the Monitor's powers as set forth in this Order, the exercise by the Monitor of any of its powers, the performance by the Monitor of any of its duties, or the employment by the Monitor of any person in connection with its appointment and the performance of its powers and duties shall not constitute the Monitor as an employer, successor employer, or related employer of the employees of the Debtor Companies or any employee caused to be hired by the Debtor Companies by the Monitor within the meaning of any provincial, federal or municipal legislation, other relevant legislation, regulation, common law, or rule of law or equity governing employment, pensions, or labour standards for any purpose whatsoever or expose the Monitor to any liability to any individual arising from or relating to their employment or previous employment. Nothing in this Order shall, in and of itself, cause the Monitor to be liable for any employee-related liabilities or duties, including, without limitations, wages, severance pay, termination pay, vacation pay and pension or benefit amounts.

40. The Monitor, counsel to the Monitor in Canada and the United States (collectively, "**Monitor's Counsel**"), the Monitor's Assistants and Investor Counsel shall each be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements related to these CCAA proceedings), in each case at their standard rates and charges, by the Debtor Companies as part of the costs of these proceedings. The Debtor Companies are hereby authorized and directed to pay the accounts of the Monitor, Monitor's Counsel, and Investor Counsel on a bi-weekly basis unless otherwise agreed by the parties and the Monitor, on behalf of the Debtor Companies, are hereby authorized to pay the Monitor, Monitor's Counsel and Investor Counsel's retainers, to be held by them as security for payment of their respective fees and disbursements outstanding form time to time.

41. The Monitor, Monitor's Counsel, and Investor Counsel shall pass their accounts from time to time.

42. The Monitor, Monitor's Counsel and Assistants, and Investor Counsel, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate

amount of $250,000 as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 47 and 49 hereof.

43. Section 10(2)(b) of the CCAA is hereby waived and the report containing the prescribed representations of the Debtor Companies regarding the preparation of the cash flow statement is hereby dispensed with.

INTERIM FINANCING

44. The Monitor, on behalf of the Debtor Companies is hereby authorized and empowered to obtain and borrow under a credit facility from Pillar Capital Corp. (the "**Interim Lender**") in order to finance the Debtor Companies' working capital requirement and other general corporate purposes and capital expenditures, provided that the initial principal amount of the credit facility not exceed **$500,000** unless permitted by further order of this Court.

45. Such credit facility shall be on the terms and subject to the conditions set forth in the term sheet between the Monitor (in accordance with its court-ordered enhanced powers) on behalf of the Debtor Companies and the Interim Lender dated as of November 13, 2024 (the "**Term Sheet**").

46. The Monitor, on behalf of the Debtor Companies is hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs, and security documents, guarantees an other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the Term Sheet or as may be reasonably required by the Interim Lender pursuant to the terms thereof, and the Monitor on behalf of the Debtor Companies' are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities, and obligations to the Interim Lender under and pursuant to the Term Sheet and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

47. The Interim Lender shall be entitled to the benefits of and is hereby granted a charge (the "**Interim Lender's Charge**") on the Property to secure all obligations under the Term Sheet and/or Definitive Documents incurred on or after the date of this Order which charges shall not exceed the aggregate amount advanced on or after the date of this Order under the Term Sheet and/or Definitive Documents. The DIP Lender's Charge shall not secure any obligation existing before the date this Order is made. The Interim Lender's Charge shall have the priority set out in paragraphs 48 and 50 hereof.

48. Notwithstanding any other provision of this Order:

(a) the Interim Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Interim Lender's Charge or any of the Definitive Documents;;

(b) upon the occurrence of an event of default under the Definitive Documents or the Interim Lender's Charge, the Interim Lender, upon **ten** days notice to the Monitor on behalf of the Debtor Companies, may exercise any and all of its rights and remedies against the Debtor Companies or the Property under or pursuant to the Term Sheet, Definitive Documents, and the Interim Lender's Charge, including without limitation, to cease making advances to the Monitor on behalf of the Debtor Companies and set off and/or consolidate any amounts owing by the Interim Lender to the Debtor Companies against the obligations of the Debtor Companies to the Interim Lender under the Term Sheet, the Definitive Documents or the Interim Lender's Charge, to make demand, accelerate payment, and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Debtor Companies and for the appointment of a trustee in bankruptcy of the Debtor Companies; and

(c) the foregoing rights and remedies of the Interim Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Debtor Companies or the Property.

49. The Interim Lender shall be treated as unaffected in any plan of arrangement or compromise file by the Debtor Companies under the CCAA, or any proposal filed by the Debtor Companies under the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**"), with respect to any advances made under the Definitive Documents

VALIDITY AND PRIORITY OF CHARGES

50. The priorities of the Administration Charge, and the Interim Lender's Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $250,000); and

Second – Interim Lender's Charge (to the maximum amount of $500,000).

51. The filing, registration or perfection of the Administration Charge and the Interim Lender's Charge (collectively, the "**Charges**") shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

52. Each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

53. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Debtor Companies shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges unless the Debtor Companies also obtains the prior written consent of the Monitor and the beneficiaries of Charges, or further order of this Court.

54. The Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the Interim Lender thereunder shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made in this Order;

(b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") that binds the Debtor Companies, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof, including the New Facility Letter or the Definitive Documents, shall create or be deemed to constitute a new breach by the Debtor Companies of any Agreement to which it is a party;

(ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges, the Debtor Companies execution, delivery or performance of the New Facility Letter or the Definitive Documents; and

(iii) the payments made by the Debtor Companies pursuant to this Order, including pursuant to the New Facility Letter or the Definitive Documents, and the granting of the Charges do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

ALLOCATION

55. Any interested Person may apply to this Court on notice to any other party likely to be affected for an order to allocate the Charges amongst the various assets comprising the Property.

SERVICE AND NOTICE PROTOCOL

56. The Monitor shall (i) without delay, publish in the *National Post*, the *Globe and Mail* (National Edition), the *Dallas Morning News*, and subject to the Monitor's discretion, *The Straits Times, Philippine Daily Inquirer, Star Media Group Berhad* and the *South China Morning Post* a notice containing the information prescribed under the CCAA as well as particulars of the Comeback Hearing and the potential expansion of the Interim Lender's Charge to attach to the interest of the Offshore Investors; (ii) within five (5) days after the date of this Order (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Debtor Companies of more than $1,000 and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with section 23(1)(a) of the CCAA and the regulations made thereunder.

57. The Monitor shall establish a case website in respect of the within proceedings at **alvarezandmarsal.com/A2A** (the "**Monitor's Website**").

58. The Monitor, on its own behalf and on behalf of the Debtor Companies, is at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence to all investors, by posting notice of these proceedings, the Monitor's Website and contact information for Investor Counsel on the "Concerned A2A Investors" Facebook page at *https://www.facebook.com/groups/265791773886300/*, and where the Monitor deems appropriate, on LinkedIn and Reddit.

59. Any person that wishes to be served with any application and other materials in these proceedings by ordinary mail, courier, or electronic transmission must deliver to the

Monitor by way of ordinary mail, courier, or electronic transmission, a request to be added to the service list (the "**Service List**") to be maintained by the Monitor.

60. Where the Monitor takes the steps referenced in paragraphs 54 to 57 hereof in addition to effecting service on the Service List (together, the "**Notice Protocol**"), such notice shall deemed good and sufficient service thereof for the purposes of any subsequent hearings scheduled in these proceedings.

COMEBACK HEARING

61. A comeback application in these proceedings is hereby scheduled to be heard before this Honourable Court at 2:00 p.m. on November 21, 2024 (the "**Comeback Hearing**").

GENERAL

62. The Monitor and Investor Counsel may from time to time apply to this Court for advice and directions in the discharge of their powers and duties hereunder.

63. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Monitor will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence. The Monitor's reports shall be filed by the Court Clerk notwithstanding that they do not include an original signature.

64. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager or a trustee in bankruptcy of the Debtor Companies, the Business or the Property.

65. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction, to give effect to this Order and to assist the Monitor on behalf of the Debtor Companies and on its own behalf, and the Monitor's respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Monitor on behalf of the Debtor

Companies and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Monitor on behalf of the Debtor Companies and on its own behalf, and its respective agents in carrying out the terms of this Order.

66. The Monitor is at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Monitor is authorized and empowered to act as a representative in respect of the within proceeding for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

67. Subject to local law, rules and regulations:

(a) The Monitor is hereby authorized and empowered to act as the foreign representative (in such capacity, the "**Foreign Representative**") in respect of the within proceedings for the purpose of having these proceedings recognized and approved in a jurisdiction outside of Canada.

(b) The Foreign Representative is hereby authorized to apply for recognition of these proceedings, as necessary, in any jurisdiction outside of Canada, including in the United States Bankruptcy Court for the Northern District of Texas pursuant to Chapter 15 of Title 11 of the United States Code, 11 U.S.C. §§ 101-1532.

68. Any interested party (including the Debtor Companies and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

69. This Order and all of its provisions are effective as of ~~12:01 a.m.~~ 3:05 pm. Mountain ~~Daylight~~ Standard Time on the date of this Order

Justice of the Court of King's Bench of Alberta



COURT FILE NUMBER	2501-03316
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, C c-36, as amended

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF OKR GOVERNANCE CO. INC., OLD KENT ROAD FINANCIAL ADMINCO LTD., OKR PREMIUM FUND GP I LTD., OKR PREMIM FUND II GP INC., OKR PREMIUM FUND III GP INC., OLD KENT ROAD INCOME FUND I GP – A INC., OKR DIVERSIFIED FUND I GP INC., OKR INSTITUTIONAL FUND GP I INC., OKR INSTITUTIONAL FUND GP II INC., and OKR INCOME FUND SPV GP I INC.

DOCUMENT	**INITIAL ORDER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

LAWSON LUNDELL LLP
Barristers and Solicitors
Brookfield Place
1100, 225 – 6th Ave SW
Calgary, AB T2P 1N2
Lawyers: William L. Roberts / Alexis Teasdale / Angad Bedi /Candace Formosa / Eloise Hirst
Telephone: (604) 631-9163 / (403) 218-7564
Fax: (604) 631-9163 / (403) 269-9494
Email: wroberts@lawsonlundell.com / ateasdale@lawsonlundell.com / abedi@lawsonlundell.com / cformosa@lawsonlundell.com / ehirst@lawsonlundell.com

DATE ON WHICH ORDER WAS PRONOUNCED:	**March 7, 2025**
LOCATION WHERE ORDER WAS PRONOUNCED:	**Calgary, Alberta**
NAME OF JUSTICE WHO MADE THIS ORDER:	**Justice G.A. Campbell**

UPON THE APPLICATION of the Applicants; **AND UPON HAVING READ** the Originating Application, Affidavit #1 of Llewellyn Turnquist affirmed February 26, 2025 (the "**First Turnquist Affidavit**"), Affidavit #2 of Llewellyn Turnquist affirmed February 26, 2025, and the

Bench Brief of the Applicants; **AND UPON** reading the consent of PricewaterhouseCoopers Inc. LIT ("**PwC**") to act as monitor (in such capacity, the "**Monitor**"); **AND UPON** being advised that the secured creditors who are likely to be affected by the charges created herein have been provided notice of this application; **AND UPON HEARING FROM** counsel for the applicants, counsel for the Monitor, and counsel for all other interested parties present;

IT IS HEREBY ORDERED AND DECLARED THAT:

DEFINED TERMS

1. Capitalized terms used but not otherwise defined in this order (the "**Order**") shall have the meaning given to them in the First Turnquist Affidavit.

SERVICE

2. The time for service of the notice of application for this Order is hereby abridged and deemed good and sufficient and this application is properly returnable today.

APPLICATION

3. The "**Applicants**", as set out in Schedule "A" hereto under the headings Administrative Companies and General Partners, are companies to which the *Companies' Creditors Arrangement Act* of Canada (the "**CCAA**") applies. Although not Applicants, the non-applicant entities as set out in Schedule "A" hereto under the headings Limited Partnerships Trusts, Trustees, US Entities and Other Related Entities (collectively, the "**Non-Applicant Entities**") shall enjoy the benefits of the protections and authorizations provided by this Order.

PLAN OF ARRANGEMENT

4. The Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

5. The Applicants and Non Applicant Entities (collectively, the "**OKR Entities**") shall:

(a) remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**");

(b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property;

(c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order; and

(d) be entitled to continue to utilize the central cash management system currently in place as described in the First Turnquist Affidavit or replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System (i) shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the OKR Entities of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, (ii) shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the OKR Entities, pursuant to the terms of the documentation applicable to the Cash Management System, and (iii) shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

6. To the extent permitted by law, the OKR Entities shall be entitled but not required to make the following advances or payments of the following expenses, incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

(b) the reasonable fees and disbursements of any Assistants retained or employed by the OKR Entities in respect of these proceedings, at their standard rates and charges, including for periods prior to the date of this Order.

7. Except as otherwise provided to the contrary herein, the OKR Entities shall be entitled but not required to pay all reasonable expenses incurred by the OKR Entities in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers' insurance), maintenance and security services; and

(b) payment for goods or services actually supplied to the OKR Entities following the date of this Order.

8. The OKR Entities shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority that are required to be deducted from employees' wages, including, without limitation, amounts in respect of:

(i) employment insurance,

(ii) Canada Pension Plan,

(iii) Quebec Pension Plan, and

(iv) income taxes,

but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after the date of this Order, unless otherwise ordered by the Court;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the OKR Entities in connection with the sale of goods and services by the OKR Entities, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

(c) any amount payable to the Crown in Right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and that are attributable to or in respect of the carrying on of the Business by the OKR Entities.

9. Until such time as a real property lease is disclaimed or resiliated in accordance with the CCAA, the OKR Entities may pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the OKR Entities from time to time for the period commencing from and including the date of this Order ("**Rent**"), but shall not pay any rent in arrears.

10. Except as specifically permitted in this Order, the OKR Entities are hereby directed, until further order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the OKR Entities to any of their creditors as of the date of this Order;

(b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and

(c) not to grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

11. The OKR Entities shall, subject to such requirements as are imposed by the CCAA have the right to:

(a) permanently or temporarily cease, downsize or shut down any portion of their business or operations and to dispose of redundant or non-material assets not exceeding $500,000 in any one transaction or $1,000,000 in the aggregate, provided that any sale that is either (i) in excess of the above thresholds, or (ii) in favour of a person related to the OKR Entities (within the meaning of section 36(5) of the CCAA), shall require authorization by this Court in accordance with section 36 of the CCAA;

(b) terminate the employment of such of their employees or temporarily lay off such of their employees as it deems appropriate on such terms as may be agreed upon between the OKR Entities and such employee, or failing such agreement, to deal with the consequences thereof in the Plan;

(c) disclaim or resiliate, in whole or in part, with the prior consent of the Monitor (as defined below) or further Order of the Court, their arrangements or agreements of any nature whatsoever with whomsoever, whether oral or written, as the OKR Entities deem appropriate, in accordance with section 32 of the CCAA; and

(d) pursue all avenues of refinancing of their Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the OKR Entities to proceed with an orderly restructuring of the Business (the "**Restructuring**").

12. The OKR Entities shall provide each of the relevant landlords with notice of the OKR Entities' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal. If the landlord

disputes the OKR Entities' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the OKR Entities, or by further order of this Court upon application by the OKR Entities on at least two (2) days' notice to such landlord and any such secured creditors. If the OKR Entities disclaim or resiliate the lease governing such leased premises in accordance with section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute other than Rent payable for the notice period provided for in section 32(5) of the CCAA, and the disclaimer or resiliation of the lease shall be without prejudice to the OKR Entities' claim to the fixtures in dispute.

13. If a notice of disclaimer or resiliation is delivered pursuant to section 32 of the CCAA, then:

(a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the OKR Entities and the Monitor 24 hours' prior written notice; and

(b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the OKR Entities in respect of such lease or leased premises and such landlord shall be entitled to notify the OKR Entities of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE OKR ENTITIES OR THE PROPERTY

14. Until and including March 17, 2025, or such later date as this Court may order (the "**Stay Period**"), with the exception of proceedings or processes by the Alberta Securities Commission, no proceeding process in any court (each, a "**Proceeding**") shall be commenced or continued against or in respect of the OKR Entities or the Monitor, or

affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the OKR Entities or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

15. Any and all payments to Grey King Endeavours Inc. shall be stayed, pending the outcome of the Comeback Hearing (as defined herein).

NO EXERCISE OF RIGHTS OR REMEDIES

16. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**"), whether contractual, judicial or extra-judicial, statutory or non-statutory, including but not limited to any redemption rights of any investor, equity holder or unit holder, against or in respect of the OKR Entities or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded, continued or exercised except with leave of this Court, provided that nothing in this Order shall:

    (a) empower the OKR Entities to carry on any business that the OKR Entities are not lawfully entitled to carry on;

    (b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA;

    (c) prevent the filing of any registration to preserve or perfect a security interest;

    (d) prevent the registration of a claim for lien; or

    (e) exempt the OKR Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment.

17. Nothing in this Order shall prevent any party from taking an action against the OKR Entities where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be

taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

NO INTERFERENCE WITH RIGHTS

18. During the Stay Period, no person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the OKR Entities, except with the written consent of the OKR Entities and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

19. During the Stay Period, all persons having:

    (a) statutory or regulatory mandates for the supply of goods and/or services; or

    (b) oral or written agreements or arrangements with the OKR Entities, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the OKR Entities

    are hereby restrained until further order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the OKR Entities or exercising any other remedy provided under such agreements or arrangements. The OKR Entities shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the OKR Entities in accordance with the payment practices of the OKR Entities, or such other practices as may be agreed upon by the supplier or service provider and each of the OKR Entities and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

20. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any person be under any

obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the OKR Entities.

APPOINTMENT OF MONITOR

21. PwC is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property, Business, and financial affairs and the OKR Entities with the powers and obligations set out in the CCAA or set forth herein and that the OKR Entities and their shareholders, officers, directors, and Assistants shall advise the OKR Entities of all material steps taken by the OKR Entities pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

22. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

    (a) monitor the OKR Entities' receipts and disbursements, Business and dealings with the Property;

    (b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein and immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the OKR Entities;

    (c) advise the OKR Entities in their development of the Plan and any amendments to the Plan;

    (d) assist the OKR Entities, to the extent required by the OKR Entities, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

    (e) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form and other financial documents of the OKR Entities to the extent that is necessary to adequately assess the Property,

Business, and financial affairs of the OKR Entities or to perform their duties arising under this Order;

(f) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(g) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the OKR Entities and any other Person; and

(h) perform such other duties as are required by this Order or by this Court from time to time.

23. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintain possession or control of the Business or Property, or any part thereof. Nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management of any of the Property that might be environmentally contaminated, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal or waste or other contamination, provided however that this Order does not exempt the Monitor from any duty to report or make disclosure imposed by applicable environmental legislation or regulation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order be deemed to be in possession of any of the Property within the meaning of any federal or provincial environmental legislation.

24. The Monitor shall provide any creditor of the OKR Entities with information provided by the OKR Entities in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the OKR Entities is

confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the OKR Entities may agree.

25. In addition to the rights and protections afforded the Monitor under the CCAA or as an Officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

26. The Monitor, counsel to the Monitor, and counsel to the OKR Entities shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements related to these CCAA proceedings), in each case at their standard rates and charges, by the OKR Entities as part of the costs of these proceedings. OKR Entities are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the OKR Entities on a monthly basis and, in addition, the OKR Entities are hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the OKR Entities, retainers in the respective amounts of $100,000 (with respect to the OKR Entities' counsel) and $50,000 (with respect to the Monitor), to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

27. The Monitor and its legal counsel shall pass their accounts from time to time.

28. The Monitor, counsel to the Monitor, if any, and the OKR Entities' counsel, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $250,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraph 29 hereof.

VALIDITY AND PRIORITY OF CHARGES

29. The filing, registration or perfection of the Administration Charge shall not be required, and the Administration Charge shall be valid and enforceable for all purposes, including as

against any right, title or interest filed, registered, recorded or perfected subsequent to the Administration Charge coming into existence, notwithstanding any such failure to file, register, record or perfect.

30. The Administration Charge (as constituted and defined herein) shall constitute a charge on the Property and subject always to section 34(11) of the CCAA shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

31. Except as otherwise expressly provided for herein, or as may be approved by this Court, the OKR Entities shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with the Administration Charge, unless the OKR Entities also obtain the prior written consent of the Monitor and the beneficiaries of the Administration Charge, or further order of this Court.

32. The Administration Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made in this Order;

(b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") that binds the OKR Entities, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof shall create or be deemed to constitute a new breach by the OKR Entities of any Agreement to which it is a party;

(ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Administration Charge; and

(iii) the payments made by the OKR Entities pursuant to this Order, and the granting of the Administration Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

ALLOCATION

33. Any interested Person may apply to this Court on notice to any other party likely to be affected for an order to allocate the Administration Charge amongst the various assets comprising the Property.

SERVICE AND NOTICE

34. The Monitor shall (i) without delay, publish in the National Post a notice containing the information prescribed under the CCAA; (ii) within five (5) days after the date of this Order (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the OKR Entities of more than $1,000, which, for the unit holders of the Funds, is satisfied by the Applicants uploading the filed materials and any notice to Exempt Edge, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with section 23(1)(a) of the CCAA and the regulations made thereunder.

35. The OKR Entities and the Monitor shall be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by either (i) forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery,

facsimile transmission or e-mail to the OKR Entities' creditors or other interested Persons at their respective addresses as last shown on the records of the OKR Entities or (ii) in respect of the unit holders of the Funds, by uploading such materials to Exempt Edge or by email, and that any such service or notice by courier, personal delivery, facsimile transmission or e-mail shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing. The Monitor shall establish a case website in respect of the within proceedings at **www.pwc.com/ca/okr-group** and shall post there as soon as practicable:

(a) all materials prescribed by statute or regulation to be made public ally available; and

(b) all applications, reports, affidavits, orders or other materials filed in these proceedings by or on behalf of the Monitor, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

36. Any person that wishes to be served with any application and other materials in these proceedings by ordinary mail courier, or electronic transmission must deliver to the Monitor by way of ordinary mail, courier, or electronic transmission, a request to be added to the service list (the "**Service List**") to be maintained by the Monitor.

GENERAL

37. The comeback hearing scheduled for 2:00 pm MST on March 17, 2025 (the "**Comeback Hearing**") shall be a hearing *de novo* without prejudice to any party's rights to challenge whether relief should be granted to the OKR Entities pursuant to the CCAA.

38. The OKR Entities or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

39. The requirement for Old Kent Road Premium Fund III Trustee Inc. to requisition a special general meeting regarding appointment of board members is hereby waived.

40. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Monitor will report to the Court from time to time, which reporting is not

required to be in affidavit form and shall be considered by this Court as evidence. The Monitor's reports shall be filed by the Court Clerk notwithstanding that they do not include an original signature.

41. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager or a trustee in bankruptcy of the OKR Entities, the Business or the Property.

42. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction, to give effect to this Order and to assist the OKR Entities, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the OKR Entities and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the OKR Entities and the Monitor and their respective agents in carrying out the terms of this Order.

43. Each of the OKR Entities and the Monitor be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Monitor is authorized and empowered to act as a representative in respect of the within proceeding for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

44. Any interested party (including the OKR Entities and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

45. This Order and all of its provisions are effective as of 11:30 a.m. Mountain Standard Time on the date of this Order.

Justice C.T. Bomdell

Justice of the Court of King's Bench Alberta

SCHEDULE "A"

A. ADMINISTRATIVE COMPANIES

- OKR Governance Co. Inc.
- Old Kent Road Financial AdminCo Ltd.

B. GENERAL PARTNERS

- OKR Premium Fund GP I Ltd.
- OKR Premium Fund II GP Inc.
- OKR Premium Fund III GP Inc.
- Old Kent Road Income Fund I GP – A Inc.
- OKR Diversified Fund I GP Inc.
- OKR Institutional Fund GP I Inc.
- OKR Institutional Fund GP II Inc.
- OKR Income Fund SPV GP I Inc.

C. LIMITED PARTNERSHIPS

- OKR Premium Fund I LP
- OKR Premium Fund II LP
- OKR Premium Fund III LP
- Old Kent Road Income Fund I LP – A
- OKR Diversified Fund I Limited Partnership
- OKR Institutional Fund LP I
- OKR Institutional Fund LP II
- OKR Institutional Fund LP III
- OKR Income Fund SPV LP I
- OKR Financial Venture Fund I LP

D. TRUSTS

- Old Kent Road Premium Fund I
- Old Kent Road Premium Fund II
- Old Kent Road Premium Fund III
- Old Kent Road Income Fund I
- Old Kent Road Diversified Fund I
- Old Kent Road Financial Venture Fund I

E. TRUSTEES

- Old Kent Road Premium Fund I Trustee Inc.
- Old Kent Road Premium Fund II Trustee Inc.
- Old Kent Road Premium Fund III Trustee Inc.

- Old Kent Road Income Fund I Trustee Inc.
- Old Kent Road Diversified Fund I Trustee Inc.
- Old Kent Road Financial Venture Fund I Trustee Inc.

F. US ENTITIES

- OKR Premium Fund II US GP LLC.
- OKR Premium Fund II US LP
- OKR Premium Fund II ULC

G. OTHER RELATED ENTITIES

- OKR Financial Venture Fund I GP Inc.
- Old Kent Road Financial Limited
- OKR Vitaminlabs Hold Corp.

Court File No. CV-23-00693758-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	MONDAY, THE 30TH
	)	
JUSTICE OSBORNE	)	DAY OF JANUARY, 2023

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 **ORIGINAL TRADERS ENERGY LTD. AND 2496750 ONTARIO INC.** (each, an "**Applicant**" and collectively, the "**Applicants**")

INITIAL ORDER

THIS APPLICATION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day by judicial videoconference via Zoom in Toronto, Ontario.

ON READING the affidavit of Scott Hill sworn January 27, 2023 and the Exhibits thereto (the "**Hill Affidavit**"), the second affidavit of Scott Hill sworn January 27, 2023 and the Exhibits thereto (the "**Second Hill Affidavit**"), the pre-filing report of the proposed monitor, KPMG Inc. ("**KPMG**") dated January 27, 2023 (the "**Pre-Filing Report**"), and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for the Applicants, OTE Logistics LP and Original Traders Energy LP (with OTE Logistics LP, the "**Partnerships**" and collectively with the Applicants, the "**OTE Group**"), counsel for Royal Bank of Canada ("**RBC**") and such other counsel who were present, and on reading the consent of KPMG to act as the monitor (the "**Monitor**"),

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

DEFINED TERMS

2. THIS COURT ORDERS that capitalized terms used within this Order shall have the meanings ascribed to them in the Hill Affidavit or the Pre-Filing Report, as applicable, if they are not otherwise defined herein.

APPLICATION

3. THIS COURT ORDERS AND DECLARES that the Applicants are companies to which the CCAA applies. Although not Applicants, the Partnerships shall enjoy the benefits of the protections and authorizations provided by this Order.

PLAN OF ARRANGEMENT

4. THIS COURT ORDERS that the Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**") between, *inter alia*, one or more of the OTE Group.

POSSESSION OF PROPERTY AND OPERATIONS

5. THIS COURT ORDERS that the OTE Group shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the OTE Group shall continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property. The OTE Group are authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

6. THIS COURT ORDERS that the OTE Group shall be entitled to continue to utilize the central cash management system currently in place as described in the Hill Affidavit or replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the OTE Group of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the OTE Group, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under any future Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

7. THIS COURT ORDERS that the OTE Group shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) the fees and disbursements of any Assistants retained or employed by the OTE Group in respect of these proceedings, at their standard rates and charges;

(c) with the consent of the Monitor and the OTE Group, amounts owing for goods or services actually supplied to any of the OTE Group prior to the date of this Order by third party suppliers, up to a maximum aggregate amount of $6,375,000, if such third party is critical to the Business and ongoing operations of the OTE Group; and

(d) amounts owing to the Ministry of Finance relating to an agreement reached with the Ministry of Finance on January 26, 2023 regarding the extension of certain fuel and gas tax licenses.

8. THIS COURT ORDERS that, except as otherwise provided to the contrary herein, the OTE Group shall be entitled but not required to pay all reasonable expenses incurred by the OTE Group in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services;

(b) any payments required by RBC under the existing credit facilities extended by RBC to certain of the OTE Group; and

(c) payment for goods or services actually supplied to the OTE Group following the date of this Order.

9. THIS COURT ORDERS that the OTE Group shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the OTE Group in connection with the sale of goods and services by the OTE Group, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any

nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the OTE Group.

10. THIS COURT ORDERS that until a real property lease is disclaimed in accordance with the CCAA, the OTE Group shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the OTE Group and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

11. THIS COURT ORDERS that, except as specifically permitted herein, the OTE Group are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the OTE Group to any of its creditors as of this date, save and except for RBC; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

CARVE-OUT

12. THIS COURT ORDERS that RBC shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA.

RESTRUCTURING

13. THIS COURT ORDERS that the OTE Group shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as hereinafter defined), have the right to:

(a) permanently or temporarily cease, downsize or shut down any of its business or operations;

(b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

(c) pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the OTE Group to proceed with an orderly restructuring of the Business (the "**Restructuring**").

14. THIS COURT ORDERS that the OTE Group shall provide each of the relevant landlords with notice of the OTE Group's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the OTE Group's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the OTE Group, or by further Order of this Court upon application by the OTE Group on at least two (2) days notice to such landlord and any such secured creditors. If the OTE Group disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the OTE Group's claim to the fixtures in dispute.

15. THIS COURT ORDERS that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the OTE Group and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the OTE Group in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE OTE GROUP OR THE PROPERTY

16. THIS COURT ORDERS that until and including February 9, 2023, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court, tribunal, agency or other legal or, subject to paragraph 19, regulatory body (each, a "**Proceeding**") shall be commenced or continued against or in respect of the OTE Group or the Monitor or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, except with the prior written consent of the OTE Group and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the OTE Group or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

17. THIS COURT ORDERS that the Stay Period does not apply to the rights and remedies of RBC as it pertains to security provided by the OTE Group in favour of RBC.

NO EXERCISE OF RIGHTS OR REMEDIES

18. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, regulatory body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person"), other than RBC, against or in respect of the OTE Group or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the OTE Group and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the OTE Group to carry on any business which the OTE Group is not lawfully entitled to carry on, (ii) subject to paragraph 19, affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

19. THIS COURT ORDERS that notwithstanding Section 11.1 of the CCAA, all rights and remedies of provincial and federal regulators and/or border authorities that have authority with respect to the importation and exportation of fuel, petroleum, diesel and/or gasoline against or in respect of the OTE Group or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, are hereby stayed and suspended during the

Stay Period except with the written consent of the OTE Group and the Monitor, or leave of this Court on notice to the Service List, such that no licenses held by any of the OTE Group may be revoked or expire during the Stay Period and same are further extended during the course of these CCAA proceedings.

NO INTERFERENCE WITH RIGHTS

20. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the OTE Group, except with the written consent of the OTE Group and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

21. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with the OTE Group or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the OTE Group, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the OTE Group, and that the OTE Group shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the OTE Group in accordance with normal payment practices of the OTE Group or such other practices as may be agreed upon by the supplier or service provider and each of the OTE Group and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

22. THIS COURT ORDERS that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-

advance any monies or otherwise extend any credit to the OTE Group. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

23. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the OTE Group with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the OTE Group whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the OTE Group, if one is filed, is sanctioned by this Court or is refused by the creditors of the OTE Group or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

24. THIS COURT ORDERS that the OTE Group shall jointly and severally indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the OTE Group after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

25. THIS COURT ORDERS that the directors and officers of the OTE Group shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $**250,000**, as security for the indemnity provided in paragraph 24 of this Order. The Directors' Charge shall have the priority set out in paragraphs 36 and 38 herein.

26. THIS COURT ORDERS that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the OTE Group's directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 24 of this Order.

APPOINTMENT OF MONITOR

27. THIS COURT ORDERS that KPMG is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the OTE Group with the powers and obligations set out in the CCAA or set forth herein and that the OTE Group and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the OTE Group pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

28. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the OTE Group’s receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) advise the OTE Group in its development of the Plan and any amendments to the Plan;

(d) assist the OTE Group, to the extent required by the OTE Group, with the holding and administering of creditors’ or shareholders’ meetings for voting on the Plan;

(e) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the OTE Group, to the extent that is necessary to adequately assess the OTE Group’s business and financial affairs or to perform its duties arising under this Order;

(f) compel the production, from time to time, from any Person having possession, custody or control of any books, records, accountings, documents, correspondences or papers, electronically stored or otherwise, relating to the OTE Group (the “**Requested Information**”);

(g) require any Requested Information to be delivered within thirty (30) days of the Monitor's request or such a longer time period as the Monitor may agree to in its discretion;

(h) conduct investigations from time to time, including examinations under oath of any Person reasonably thought to have knowledge relating to the Requested Information;

(i) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

(j) perform such other duties as are required by this Order or by this Court from time to time.

29. THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

30. THIS COURT ORDERS that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

31. THIS COURT ORDERS that the Monitor shall provide any creditor of the OTE Group with information provided by the OTE Group in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the OTE Group is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the OTE Group may agree.

32. THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

33. THIS COURT ORDERS that the Monitor, counsel to the Monitor and counsel to the OTE Group shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the OTE Group as part of the costs of these proceedings, whether incurred prior to, on, or subsequent to the date of this Order, by the OTE Group as part of the costs of these proceedings. The OTE Group is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the OTE Group on a weekly basis and, in addition, the Applicant is hereby authorized to pay to the Monitor, counsel to the Monitor and counsel to the Applicant, retainers in the approximate amount of **$950,000** to be held by them as security for payment of their respective fees and disbursements outstanding for certain pre- and post-filing costs.

34. THIS COURT ORDERS that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

ADMINISTRATION CHARGE

35. THIS COURT ORDERS that the Monitor, counsel to the Monitor, and the OTE Group's counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $**500,000**, as

security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 36 and 38 hereof.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

36. THIS COURT ORDERS that the priorities of the existing security held by RBC (the "**RBC Security**"), the Directors' Charge and the Administration Charge, as among them, shall be as follows:

First – RBC Security;

Second – Administration Charge; and

Third – Directors' Charge.

37. THIS COURT ORDERS that the filing, registration or perfection of the Directors' Charge, the Administration Charge or the RBC Security (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

38. THIS COURT ORDERS that each of the Directors' Charge, the Administration Charge and the RBC Security (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

39. THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, the OTE Group shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Directors' Charge, the Administration Charge or the RBC Security, unless the OTE Group also obtains the prior written

consent of the Monitor and the beneficiaries of the Directors' Charge, the RBC Security and the Administration Charge, or further Order of this Court.

40. THIS COURT ORDERS that the Directors' Charge, the Administration Charge and the RBC Security shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the OTE Group, and notwithstanding any provision to the contrary in any Agreement:

(a) the creation of the Charges shall not create or be deemed to constitute a breach by the OTE Group of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the OTE Group entering into the creation of the Charges; and

(c) the payments made by the OTE Group pursuant to this Order and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

41. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the OTE Group's interest in such real property leases.

SERVICE AND NOTICE

42. THIS COURT ORDERS that the Monitor shall (i) without delay, publish in the Globe and Mail (National Edition) a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the OTE Group of more than $1000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

43. THIS COURT ORDERS that the Monitor shall create, maintain and update as necessary a list of all Persons appearing in person or by counsel in this proceeding (the "**Service List**"). The Monitor shall post the Service List, as may be updated from time to time, on the Monitor's website as part of the public materials to be recorded thereon in relation to this proceeding. Notwithstanding the foregoing, the Monitor shall have no liability in respect of the accuracy of or the timeliness of making any changes to the Service List.

44. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL '<https://home.kpmg/ca/en/home/services/advisory/deal-advisory/creditorlinks/original-traders-energy-group.html>.

45. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the OTE Group and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal

delivery or facsimile transmission to the OTE Group's creditors or other interested parties at their respective addresses as last shown on the records of the OTE Group and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

46. THIS COURT ORDERS that the OTE Group or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

47. THIS COURT ORDERS that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the OTE Group, the Business or the Property.

48. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the OTE Group, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the OTE Group and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the OTE Group and the Monitor and their respective agents in carrying out the terms of this Order.

49. THIS COURT ORDERS that each of the OTE Group and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

50. THIS COURT ORDERS that any interested party (including the OTE Group and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days

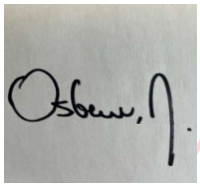
notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

51. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

52. THIS COURT ORDERS that this Order is effective from today's date and is enforceable without the need for entry or filing.

SEALING RELIEF

53. THIS COURT ORDERS that the Second Hill Affidavit shall be and is hereby sealed, kept confidential, and shall not form part of the public record until the earlier of (a) the vacating of the sealing order appended as Exhibit B to the Second Hill Affidavit (the "**Foreign Sealing Order**"), without being replaced by another sealing order granted by a court of a foreign jurisdiction, (b) the vacating of any sealing order that may granted by a court of a foreign jurisdiction to replace the Foreign Sealing Order, or (c) further Order of this Court.


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OSBORNE, J.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36, AS AMENDED AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF ORIGINAL TRADERS ENERGY LTD. AND 2496750 ONTARIO INC.

Court File No. CV-23-00693758-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

INITIAL ORDER

AIRD & BERLIS LLP
Barristers and Solicitors
Brookfield Place
181 Bay Street
Suite 1800
Toronto, ON M5J 2T9

Steven Graff (LSO# 31871V)
Miranda Spence (LSO# 60621M)
Tamie Dolny (LSO#77958U)
Samantha Hans (LSO# 84373H)

Tel: 416.863.1500
Fax: 416.863.1515

Lawyers for the OTE Group

Court File No. CV-23-00693758-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	THURSDAY, THE 9TH
JUSTICE OSBORNE	)	DAY OF FEBRUARY, 2023

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 **ORIGINAL TRADERS ENERGY LTD. AND 2496750 ONTARIO INC.** (each, an "**Applicant**" and collectively, the "**Applicants**")

AMENDED AND RESTATED INITIAL ORDER

THIS MOTION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an order amending and restating the Initial Order (the "**Initial Order**") dated January 30, 2023 (the "**Initial Filing Date**") was heard this day by judicial videoconference via Zoom in Toronto, Ontario.

ON READING the affidavit of Scott Hill sworn January 27, 2023 and the Exhibits thereto (the "**Hill Affidavit**"), the second affidavit of Scott Hill sworn January 27, 2023 and the Exhibits thereto (the "**Second Hill Affidavit**"), the third affidavit of Scott Hill sworn February 7, 2023 and the Exhibits thereto (the "**Third Hill Affidavit**") the pre-filing report of the proposed monitor, KPMG Inc. ("**KPMG**") dated January 27, 2023 (the "**Pre-Filing Report**"), the first report of KPMG dated February 8, 2023 (the "**First Report**") and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for the Applicants, OTE Logistics LP and Original Traders Energy LP (with OTE Logistics LP, the "**Partnerships**" and collectively with the Applicants, the "**OTE Group**"), counsel for Royal Bank of Canada ("**RBC**") and such other

counsel who were present, and on reading the consent of KPMG to act as the monitor (the "**Monitor**"),

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

DEFINED TERMS

2. THIS COURT ORDERS that capitalized terms used within this Order shall have the meanings ascribed to them in the Hill Affidavit or the Pre-Filing Report, as applicable, if they are not otherwise defined herein.

APPLICATION

3. THIS COURT ORDERS AND DECLARES that the Applicants are companies to which the CCAA applies. Although not Applicants, the Partnerships shall enjoy the benefits of the protections and authorizations provided by this Order.

PLAN OF ARRANGEMENT

4. THIS COURT ORDERS that the Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**") between, *inter alia*, one or more of the OTE Group.

POSSESSION OF PROPERTY AND OPERATIONS

5. THIS COURT ORDERS that the OTE Group shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the OTE Group shall continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property. The OTE Group are authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or

employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

6. THIS COURT ORDERS that the OTE Group shall be entitled to continue to utilize the central cash management system currently in place as described in the Hill Affidavit or replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the OTE Group of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the OTE Group, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under any future Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

7. THIS COURT ORDERS that the OTE Group shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) the fees and disbursements of any Assistants retained or employed by the OTE Group in respect of these proceedings, at their standard rates and charges;

(c) with the consent of the Monitor and the OTE Group, amounts owing for goods or services actually supplied to any of the OTE Group prior to the date of this Order by third party suppliers, up to a maximum aggregate amount of $6,375,000, if such third party is critical to the Business and ongoing operations of the OTE Group; and

(d) amounts owing to the Ministry of Finance relating to an agreement reached with the Ministry of Finance on January 26, 2023 regarding the extension of certain fuel and gas tax licenses.

8. THIS COURT ORDERS that, except as otherwise provided to the contrary herein, the OTE Group shall be entitled but not required to pay all reasonable expenses incurred by the OTE Group in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services;

(b) any payments required by RBC under the existing credit facilities extended by RBC to certain of the OTE Group; and

(c) payment for goods or services actually supplied to the OTE Group following the date of this Order.

9. THIS COURT ORDERS that the OTE Group shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the OTE Group in connection with the sale of goods and services by the OTE Group, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the OTE Group.

10. THIS COURT ORDERS that until a real property lease is disclaimed in accordance with the CCAA, the OTE Group shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the OTE Group and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

11. THIS COURT ORDERS that, except as specifically permitted herein, the OTE Group are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the OTE Group to any of its creditors as of this date, save and except for RBC; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

CARVE-OUT

12. THIS COURT ORDERS that RBC shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA.

RESTRUCTURING

13. THIS COURT ORDERS that the OTE Group shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as hereinafter defined), have the right to:

(a) permanently or temporarily cease, downsize or shut down any of its business or operations;

(b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

(c) pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the OTE Group to proceed with an orderly restructuring of the Business (the "**Restructuring**").

14. THIS COURT ORDERS that the OTE Group shall provide each of the relevant landlords with notice of the OTE Group's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the OTE Group's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the OTE Group, or by further Order of this Court upon application by the OTE Group on at least two (2) days notice to such landlord and any such secured creditors. If the OTE Group disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the OTE Group's claim to the fixtures in dispute.

15. THIS COURT ORDERS that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the OTE Group and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the OTE Group in respect of such lease or leased premises, provided that nothing

herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE OTE GROUP OR THE PROPERTY

16. THIS COURT ORDERS that until and including April 28, 2023, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court, tribunal, agency or other legal or, subject to paragraph 19, regulatory body (each, a "**Proceeding**") shall be commenced or continued against or in respect of the OTE Group or the Monitor or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, except with the prior written consent of the OTE Group and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the OTE Group or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

17. THIS COURT ORDERS that the Stay Period does not apply to the rights and remedies of RBC as it pertains to security provided by the OTE Group in favour of RBC.

NO EXERCISE OF RIGHTS OR REMEDIES

18. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, regulatory body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person"), other than RBC, against or in respect of the OTE Group or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the OTE Group and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the OTE Group to carry on any business which the OTE Group is not lawfully entitled to carry on, (ii) subject to paragraph 19, affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

19. THIS COURT ORDERS that subject to paragraph 20 and notwithstanding Section 11.1 of the CCAA, those rights and remedies of provincial and federal regulators and border authorities that have authority with respect to the importation and exportation of fuel, petroleum,

diesel or gasoline against or in respect of the OTE Group or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, which would materially impair the operation of OTE Group as a going concern, including the revocation or expiry of applicable licenses held by any member of the OTE Group, are hereby stayed and suspended during the Stay Period except with the written consent of the OTE Group and the Monitor, or leave of this Court obtained by motion on no less than ten (10) days' notice to the Service List, such that any applicable license held by any member of the OTE Group is otherwise extended during the Stay Period.

20. THIS COURT ORDERS that nothing in this Order shall prevent any government or regulatory agency or body from taking any action it deems necessary:

(a) to protect public or employee health and/or safety;

(b) to address exigent environmental contamination, hazards or other adverse effects; or

(c) to investigate and prosecute criminal and quasi-criminal offences under federal or provincial laws, but enforcement of monetary orders arising therefrom are stayed subject to further order of this Court.

NO INTERFERENCE WITH RIGHTS

21. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the OTE Group, except with the written consent of the OTE Group and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

22. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with the OTE Group or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the OTE Group, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of

such goods or services as may be required by the OTE Group, and that the OTE Group shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the OTE Group in accordance with normal payment practices of the OTE Group or such other practices as may be agreed upon by the supplier or service provider and each of the OTE Group and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

23. THIS COURT ORDERS that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the OTE Group. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

24. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the OTE Group with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the OTE Group whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the OTE Group, if one is filed, is sanctioned by this Court or is refused by the creditors of the OTE Group or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

25. THIS COURT ORDERS that the OTE Group shall jointly and severally indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the OTE Group after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

26. THIS COURT ORDERS that the directors and officers of the OTE Group shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $**2,250,000**, as security for the indemnity provided in paragraph 25 of this Order. The Directors' Charge shall have the priority set out in paragraphs 37 and 39 herein.

27. THIS COURT ORDERS that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the OTE Group's directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 25 of this Order.

APPOINTMENT OF MONITOR

28. THIS COURT ORDERS that KPMG is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the OTE Group with the powers and obligations set out in the CCAA or set forth herein and that the OTE Group and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the OTE Group pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

29. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the OTE Group's receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) advise the OTE Group in its development of the Plan and any amendments to the Plan;

(d) assist the OTE Group, to the extent required by the OTE Group, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(e) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the OTE Group, to the extent that is necessary to adequately assess the OTE Group's business and financial affairs or to perform its duties arising under this Order;

(f) compel the production, from time to time, from any Person having possession, custody or control of any books, records, accountings, documents, correspondences or papers, electronically stored or otherwise, relating to the OTE Group (the "**Requested Information**");

(g) require any Requested Information to be delivered within thirty (30) days of the Monitor's request or such a longer time period as the Monitor may agree to in its discretion;

(h) conduct investigations from time to time, including examinations under oath of any Person reasonably thought to have knowledge relating to the Requested Information;

(i) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

(j) perform such other duties as are required by this Order or by this Court from time to time.

30. THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

31. THIS COURT ORDERS that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated,

might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

32. THIS COURT ORDERS that the Monitor shall provide any creditor of the OTE Group with information provided by the OTE Group in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the OTE Group is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the OTE Group may agree.

33. THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

34. THIS COURT ORDERS that the Monitor, counsel to the Monitor and counsel to the OTE Group shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the OTE Group as part of the costs of these proceedings, whether incurred prior to, on, or subsequent to the date of this Order, by the OTE Group as part of the costs of these proceedings. The OTE Group is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the OTE Group on a weekly basis and, in

addition, the Applicant is hereby authorized to pay to the Monitor, counsel to the Monitor and counsel to the Applicant, retainers in the approximate amount of **$950,000** to be held by them as security for payment of their respective fees and disbursements outstanding for certain pre- and post-filing costs.

35. THIS COURT ORDERS that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

ADMINISTRATION CHARGE

36. THIS COURT ORDERS that the Monitor, counsel to the Monitor, and the OTE Group's counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $**500,000**, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 37 and 39 hereof.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

37. THIS COURT ORDERS that the priorities of the existing security held by RBC (the "**RBC Security**"), the Directors' Charge and the Administration Charge, as among them, shall be as follows:

First – RBC Security;

Second – Administration Charge; and

Third – Directors' Charge.

38. THIS COURT ORDERS that the filing, registration or perfection of the Directors' Charge, the Administration Charge or the RBC Security (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the

Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

39. THIS COURT ORDERS that each of the Directors' Charge, the Administration Charge and the RBC Security (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

40. THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, the OTE Group shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Directors' Charge, the Administration Charge or the RBC Security, unless the OTE Group also obtains the prior written consent of the Monitor and the beneficiaries of the Directors' Charge, the RBC Security and the Administration Charge, or further Order of this Court.

41. THIS COURT ORDERS that the Directors' Charge, the Administration Charge and the RBC Security shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the OTE Group, and notwithstanding any provision to the contrary in any Agreement:

(a) the creation of the Charges shall not create or be deemed to constitute a breach by the OTE Group of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the OTE Group entering into the creation of the Charges; and

(c) the payments made by the OTE Group pursuant to this Order and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

42. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the OTE Group's interest in such real property leases.

SERVICE AND NOTICE

43. THIS COURT ORDERS that the Monitor shall (i) without delay, publish in the Globe and Mail (National Edition) a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the OTE Group of more than $1000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

44. THIS COURT ORDERS that the Monitor shall create, maintain and update as necessary a list of all Persons appearing in person or by counsel in this proceeding (the "**Service List**"). The Monitor shall post the Service List, as may be updated from time to time, on the Monitor's website as part of the public materials to be recorded thereon in relation to this proceeding. Notwithstanding the foregoing, the Monitor shall have no liability in respect of the accuracy of or the timeliness of making any changes to the Service List.

45. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-

protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL '<https://home.kpmg/ca/en/home/services/advisory/deal-advisory/creditorlinks/original-traders-energy-group.html>.

46. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the OTE Group and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the OTE Group's creditors or other interested parties at their respective addresses as last shown on the records of the OTE Group and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

47. THIS COURT ORDERS that the OTE Group or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

48. THIS COURT ORDERS that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the OTE Group, the Business or the Property.

49. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the OTE Group, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the OTE Group and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to

assist the OTE Group and the Monitor and their respective agents in carrying out the terms of this Order.

50. THIS COURT ORDERS that each of the OTE Group and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

51. THIS COURT ORDERS that any interested party (including the OTE Group and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

52. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

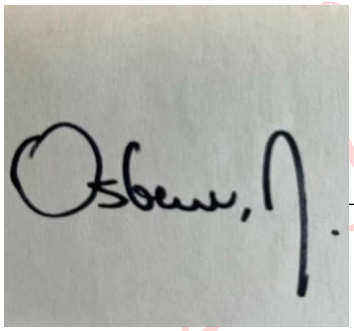
53. THIS COURT ORDERS that this Order is effective from today's date and is enforceable without the need for entry or filing.

SEALING RELIEF

54. THIS COURT ORDERS that the Second Hill Affidavit shall be and is hereby sealed, kept confidential, and shall not form part of the public record until the earlier of (a) the vacating of the sealing order appended as Exhibit B to the Second Hill Affidavit (the "**Foreign Sealing Order**"), without being replaced by another sealing order granted by a court of a foreign jurisdiction, (b) the vacating of any sealing order that may granted by a court of a foreign jurisdiction to replace the Foreign Sealing Order, or (c) further Order of this Court.

INITIAL ORDER AND INITIAL FILING DATE

55. THIS COURT ORDERS that the Initial Order, reflecting the Initial Filing Date, shall be amended and restated as provided for above.



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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 THE COMPROMISE OR ARRANGEMENT OF ORIGINAL TRADERS ENERGY LTD. AND 2496750 ONTARIO INC.

Court File No. CV-23-00693758-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

AMENDED AND RESTATED INITIAL ORDER

AIRD & BERLIS LLP
Barristers and Solicitors
Brookfield Place
181 Bay Street
Suite 1800
Toronto, ON M5J 2T9

Steven Graff (LSO# 31871V)
Miranda Spence (LSO# 60621M)
Tamie Dolny (LSO#77958U)
Samantha Hans (LSO# 84373H)

Tel: 416.863.1500
Fax: 416.863.1515

Lawyers for the OTE Group



COURT FILE NUMBER	2403 15089
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENTS ACT*, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF FREEDOM CANNABIS INC.
APPLICANT	FREEDOM CANNABIS INC.
DOCUMENT	**INITIAL ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**CHAITONS LLP** Barristers and Solicitors 5000 Yonge Street, 10th Floor Toronto, ON M2N 7E9 Attn: **Harvey Chaiton / Danish Afroz** Tel: (416) 218-1129 Email: harvey@chaitons.com / dafroz@chaitons.com **File No.: ●**

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DATE ON WHICH ORDER WAS PRONOUNCED:	August 8, 2024
NAME OF JUSTICE WHO MADE THIS ORDER:	Justice M. Lema
LOCATION OF HEARING:	Edmonton, Alberta

UPON the application of **Freedom Cannabis Inc.** (the "**Applicant**"); **AND UPON** having read the Originating Application, the First Affidavit of JohnFrank Potestio, sworn on August 5, 2024 (the "**First Potestio Affidavit**"); and the Affidavit of Service of Richelle Bergquist, filed herewith; **AND UPON** reading the consent of **KPMG Inc.** to act as Monitor, and the Pre-Filing Report of KPMG Inc. dated August 6, 2024; **AND UPON** being advised that the secured creditors who are likely to be affected by the charges created herein have been provided notice of this application and either have not indicated their opposition or alternatively consent to the within Order; **AND UPON** hearing counsel for the Applicant, 2563138 Alberta Ltd. and 2399751 Alberta Ltd. (each a "**Non-**

Applicant Stay Party" and collectively the "**Non-Applicant Stay Parties**", together with the Applicant, the "**Freedom Group**") and counsel for any other parties present; **IT IS HEREBY ORDERED AND DECLARED THAT**:

SERVICE

1. The time for service of the notice of application for this order (the "**Order**") is hereby abridged and deemed good and sufficient and this application is properly returnable today.

APPLICATION

2. The Applicant is a company to which the *Companies' Creditors Arrangement Act* RSC, c C-36, as amended (the "**CCAA**") applies. Although not an Applicant, the Non-Applicant Stay Parties shall enjoy the benefits of the protections and authorizations provided under the terms of this Order.

PLAN OF ARRANGEMENT

3. The Applicant shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. The Applicant shall:

   (a) remain in possession and control of its current and future assets, licenses, authorizations, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**");

   (b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property;

   (c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order; and

(d) and each of the Non-Applicant Stay Parties shall, be entitled to continue to utilize the central cash management system currently in place as described in the First Potestio Affidavit or replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank or credit union providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicant of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicant, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

5. To the extent permitted by law, the Applicant shall be entitled but not required to make the following advances or payments of the following expenses, incurred prior to, on or after the date of this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable prior to, on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements, and all other payroll and benefits processing expenses;

(b) the reasonable fees and disbursements of any Assistants retained or employed by the Applicant in respect of these proceedings, at their standard rates and charges, including for periods prior to the date of this Order; and

(c) in accordance with the Cash Flow Forecast, for goods and services actually supplied to the Applicant, including for periods prior to the date of this Order by third party supplies, up to a maximum aggregate amount of $500,000, if, in the opinion of the Monitor, the supplier or vendor of such goods or services is critical

to the Business and ongoing operations of the Applicant or necessary for the operation or preservation of the Business or the Property.

6. Except as otherwise provided to the contrary herein, the Applicant shall be entitled but not required to pay all reasonable expenses incurred by the Applicant in carrying on the Business in the ordinary course on, or after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

   (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and

   (b) payment for goods or services actually supplied to the Applicant on or following the date of this Order.

7. The Applicant shall remit, in accordance with legal requirements, or pay:

   (a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority that are required to be deducted from employees' wages, including, without limitation, amounts in respect of:

      (i) employment insurance,

      (ii) Canada Pension Plan, and

      (iii) income taxes,

   but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after the date of this Order, unless otherwise ordered by the Court;

   (b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicant in connection with the sale of goods and services by the Applicant, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order;

(c) any taxes, duties or other payments required under the Cannabis Legislation (as defined below) (collectively, the "**Cannabis Taxes**"), but only where such Cannabis Taxes are accrued or collected after the date of this Order; and

(d) any amount payable to the Crown in Right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and that are attributable to or in respect of the carrying on of the Business by the Applicant.

8. Until such time as a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicant may pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the Applicant from time to time for the period commencing from and including the date of this Order ("**Rent**"), but shall not pay any rent in arrears.

9. Except as specifically permitted in this Order, the Applicant is hereby directed, until further order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicant to any of its creditors as of the date of this Order;

(b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and

(c) not to grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

10. The Applicant shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as hereinafter defined in paragraph 33), have the right to:

(a) permanently or temporarily cease, downsize or shut down any portion of its business or operations and to dispose of redundant or non-material assets not

exceeding $250,000 in any one transaction or $1,000,000 in the aggregate, provided that any sale that is either (i) in excess of the above thresholds, or (ii) in favour of a person related to the Applicant (within the meaning of section 36(5) of the CCAA), shall require authorization by this Court in accordance with section 36 of the CCAA;

(b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate on such terms as may be agreed upon between the Applicant and such employee, or failing such agreement, to deal with the consequences thereof in the Plan;

(c) disclaim or resiliate, in whole or in part, with the prior consent of the Monitor (as defined below) or further Order of the Court, their arrangements or agreements of any nature whatsoever with whomsoever, whether oral or written, as the Applicant deems appropriate, in accordance with section 32 of the CCAA; and

(d) pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Applicant to proceed with an orderly restructuring of the Business (the "**Restructuring**").

11. The Applicant shall provide each of the relevant landlords with notice of the Applicant's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal. If the landlord disputes the Applicant's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicant, or by further order of this Court upon application by the Applicant on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicant disclaims or resiliates the lease governing such leased premises in accordance with section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute other than Rent payable for the notice period provided for in section 32(5) of the CCAA, and the disclaimer or resiliation of the lease shall be without prejudice to the Applicant's claim to the fixtures in dispute.

12. If a notice of disclaimer or resiliation is delivered pursuant to section 32 of the CCAA, then:

    (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicant and the Monitor 24 hours' prior written notice; and

    (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicant in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicant of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANT, THE NON-APPLICANT STAY PARTIES OR THEIR RESPECTIVE PROPERTY

13. Until and including August 18, 2024, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicant, the Non-Applicant Stay Parties or the Monitor, or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, except with the written consent of the Applicant and the Monitor, or leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicant, the Non-Applicant Stay Parties or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court or the written consent of the Applicant and the Monitor.

NO EXERCISE OF RIGHTS OR REMEDIES

14. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**"), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Applicant, the Non-Applicant Stay Parties or the Monitor, or their respective representatives acting in such capacities, or affecting the

Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with the written consent of the Applicant and the Monitor or leave of this Court, provided that nothing in this Order shall:

(a) empower any entity within the Freedom Group to carry on any business that such entity of the Freedom Group is not lawfully entitled to carry on;

(b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA;

(c) prevent the filing of any registration to preserve or perfect a security interest;

(d) prevent the registration of a claim for lien; or

(e) exempt the Applicant from compliance with statutory or regulatory provisions relating to health, safety or the environment.

15. Nothing in this Order shall prevent any party from taking an action against the Applicant where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

NO INTERFERENCE WITH RIGHTS

16. During the Stay Period, no person shall accelerate, suspend, discontinue, fail to honour or renew, alter, interfere with, repudiate, rescind, terminate or cease to perform any right, renewal right, contract, agreement, lease, licence, authorization or permit in favour of or held by the Applicant or the Non-Applicant Stay Parties, except with the written consent of the Applicant, the relevant Non-Applicant Stay Party and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

17. During the Stay Period, all persons having:

(a) statutory or regulatory mandates for the supply of goods and/or services; or

(b) oral or written agreements or arrangements with any entity within the Freedom Group, including without limitation all computer software, communication and

other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Freedom Group

are hereby restrained until further order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Freedom Group or exercising any other remedy provided under such agreements or arrangements. The Freedom Group shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Freedom Group in accordance with the payment practices of the Freedom Group, or such other practices as may be agreed upon by the supplier or service provider and each of the Freedom Group and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

18. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any person, other than the DIP Lender where applicable, be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicant.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

19. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph 15 of this Order, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Freedom Group with respect to any claim against the directors or officers that arose before the date of this Order and that relates to any obligations of the Freedom Group whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicant, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicant or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

20. The Applicant shall indemnify its directors and officers against obligations and liabilities that they may incur as directors and or officers of the Applicant after the commencement of the within proceedings except to the extent that, with respect to any officer or director, the obligation was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

21. The directors and officers of the Applicant shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $450,000, unless permitted by further Order of this Court, as security for the indemnity provided in paragraph 20 of this Order. The Directors' Charge shall have the priority set out in paragraphs 37 and 39 herein.

22. Notwithstanding any language in any applicable insurance policy to the contrary:

    (a) no insurer or indemnitor shall be entitled to be subrogated to or claim the benefit of the Directors' Charge; and

    (b) the Applicant's directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 20 of this Order.

APPOINTMENT OF MONITOR

23. KPMG Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property, Business, and financial affairs and the Applicant with the powers and obligations set out in the CCAA or set forth herein and that the Applicant and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicant pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

24. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicant's receipts and disbursements, Business and dealings with the Property;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein and immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the Applicant;

(c) assist the Applicant, to the extent required by the Applicant, in its dissemination to the DIP Lender and its counsel on a bi-weekly basis of financial and other information as agreed to between the Applicant and the DIP Lender which may be used in these proceedings, including reporting on a basis as reasonably required by the DIP Lender;

(d) advise the Applicant in its preparation of the Applicant's cash flow statements and reporting required by the DIP Lender, which information shall be reviewed with the Monitor and delivered to the DIP Lender and its counsel on a periodic basis, but not less than monthly**,** or as otherwise agreed to by the DIP Lender;

(e) advise the Applicant in its development of the Plan and any amendments to the Plan;

(f) assist the Applicant, to the extent required by the Applicant, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(g) assist the Applicant in communications with their stakeholders, including creditors and governmental authorities;

(h) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form and other financial documents of the Applicant to the extent that is necessary to adequately assess the Property, Business, and financial affairs of the Applicant or to perform its duties arising under this Order;

(i) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(j) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the Applicant and any other Person; and

(k) perform such other duties as are required by this Order or by this Court from time to time.

25. The Monitor shall not take possession of the Property, nor be deemed to take possession of the Property, pursuant to any provision of any federal, provincial or other law respecting, among other things, the manufacturing, possession, processing and distribution of cannabis or cannabis products including, without limitation, under the *Cannabis Act* S.C. 2018, c. 16, as amended, the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, as amended, the *Excise Act*, *2001*, S.C. 2002, c. 22, as amended, the Ontario *Cannabis Licence Act*, S.O. 2018, c. 12, Sched. 2, as amended, the Ontario *Cannabis Control Act*, S.O. 2017, c. 26, Sched. 1, as amended, the *Ontario Cannabis Retail Corporation Act*, 2017, S.O. 2017, c. 26, as amended, the British Columbia *Cannabis Control and Licensing Act*, S.B.C. 2018, c. 29, as amended, the British Columbia *Cannabis Distribution Act*, S.B.C. 2018, c. 28, as amended, the Alberta *Gaming, Liquor and Cannabis Act*, R.S.A. 2000, c. G-1, as amended, the Alberta *Gaming, Liquor and Cannabis Regulation,* Alta. Reg. 143/996, as amended, *The Cannabis Control (Saskatchewan) Act*, S.S. 2018, c. C-2.111, as amended, the Saskatchewan *Cannabis Control (Saskatchewan) Regulations,* R.R.S. c. C-2.111 Reg. 1, the Manitoba *The Liquor, Gaming and Cannabis Control Act*, C.C.S.M. c. L153, as amended, the Manitoba *Cannabis Regulation*, M.R. 120/2018, as amended, the Newfoundland and Labrador *Cannabis Control Act*, S.N.L. 2018, c. C-4.1, as amended, the Newfoundland and Labrador *Cannabis Control Regulations*, NLR. Reg. 93/18, as amended, the Newfoundland and Labrador *Cannabis Licensing and Operations Regulations*, NLR. Reg. 94/18, as amended, the Nova Scotia *Cannabis Control Act*, S.N.S. 2018, c 3, as amended, the Nova Scotia *Cannabis Retail Regulations*, NS. Reg. 203/2019, the Prince Edward Island *Cannabis Control Act*, R.S.P.E.I. 1998, c. C-1.2, as amended, the Prince Edward Island *Cannabis Control Regulations*, PEI. Reg. EC575/18, as amended, the New Brunswick *Cannabis Control Act*, S.N.B. 2018, c. 2, the Yukon *Cannabis Control and Regulation Act*, S.Y. 2018, c. 4, as amended, the Yukon *Cannabis Control and Regulation*, YOIC. 2018/139, the Yukon *Cannabis Control and Regulation*

General Regulation, YOIC. 2018/184, the Yukon *Cannabis Licensing Regulation*, YOIC. 2019/43, the Yukon *Cannabis Remote Sales Regulation*, YOIC. 2022/29, the Northwest Territories *Cannabis Legalization and Regulation Implementation Act*, S.N.W.T. 2018, c. 6, as amended, or other such applicable federal, provincial or other legislation or regulations (collectively, the "**Cannabis Legislation**"), and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintain possession or control of the Business or Property, or any part thereof within the meaning of any Cannabis Legislation or otherwise, and nothing in this Order shall be construed as resulting in the Monitor being an employer or successor employer within the meaning of any statute, regulation or rule of law or equity for any purpose whatsoever. Nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management of any of the Property that might be environmentally contaminated, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal or waste or other contamination, provided however that this Order does not exempt the Monitor from any duty to report or make disclosure imposed by applicable environmental legislation or regulation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order be deemed to be in possession of any of the Property within the meaning of any federal or provincial environmental legislation.

26. The Monitor shall provide any creditor of the Applicant and the DIP Lender with information provided by the Applicant in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicant is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicant may agree.

27. In addition to the rights and protections afforded the Monitor under the CCAA or as an Officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, including under any Cannabis Legislation, save and except for any gross negligence or wilful misconduct on

its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

28. The Monitor, counsel to the Monitor, and counsel to the Applicant including insolvency and litigation counsel, shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements related to these CCAA proceedings), in each case at their standard rates and charges, whether incurred prior to, on, or subsequent to the date of this Order, by the Applicant as part of the costs of these proceedings. The Applicant is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicant in accordance with such parties' retainer agreements. For greater clarity, the Monitor, counsel to the Monitor and counsel to the Applicant shall be paid its reasonable fees and disbursements (including any pre-filing fees and disbursements related to these CCAA proceedings) by the Applicant for its work in preparing for and obtaining this Initial Order up to and including the August 8, 2024 hearing of the application for this Order (the "**Initial Order Fees and Disbursements**").

29. The Monitor and its legal counsel shall pass their accounts from time to time.

30. The Monitor, counsel to the Monitor, if any, and the Applicant's counsel as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $250,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 37 and 39 hereof.

DIP FINANCING

31. The Applicant is hereby authorized and empowered to obtain and borrow under an interim credit facility from JL Legacy Ltd. (the "**DIP Lender**") in order to finance the Applicant's working capital requirements and other general corporate purposes and capital expenditures, including the costs of these proceedings, provided that borrowings under such credit facility shall not exceed $1,000,000 unless permitted by further order of this Court.

32. Such credit facility shall be on the terms and subject to the conditions set forth in the DIP Term Sheet between the Applicant and the DIP Lender dated as of August 6, 2024 (the "**DIP Term Sheet**"), filed.

33. The Applicant is hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs, and security documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the DIP Term Sheet or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Applicant is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities, and obligations to the DIP Lender under and pursuant to the DIP Term Sheet and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

34. The DIP Lender shall be entitled to the benefits of and is hereby granted a charge (the "**DIP Lender's Charge**") on the Property to secure all obligations under the Definitive Documents incurred on or after the date of this Order which charge shall not exceed the aggregate amount advanced on or after the date of this Order under the Definitive Documents plus interest and costs. The DIP Lender's Charge shall not secure any obligation existing before this the date this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 37 and 39 hereof.

35. Notwithstanding any other provision of this Order:

    (a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

    (b) upon the occurrence of an event of default under the DIP Term Sheet or the Definitive Documents or the DIP Lender's Charge, the DIP Lender may, upon 3 business days notice to the Applicant and the Monitor, may exercise any and all of its rights and remedies against the Applicant or the Property under or pursuant to the DIP Term Sheet, Definitive Documents, and the DIP Lender's Charge, including without limitation, to cease making advances to the Applicant and set off and/or consolidate any amounts owing by the DIP Lender to the Applicant against the obligations of the Applicant to the DIP Lender under the DIP Term

Sheet, the Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment, and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicant and for the appointment of a trustee in bankruptcy of the Applicant; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicant or the Property.

36. The DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicant under the CCAA, or any proposal filed by the Applicant under the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**"), with respect to any advances made under the Definitive Documents.

VALIDITY AND PRIORITY OF CHARGES

37. The priorities of the Administration Charge, the Directors' Charge and the DIP Lender's Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $250,000);

Second – Directors' Charge (to the maximum amount of $450,000); and

Third – DIP Lender's Charge (to the maximum principal amount of $1,000,000).

38. The filing, registration or perfection of the Directors' Charge, the Administration Charge or the DIP Lender's Charge (collectively, the "**Charges**") shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

39. Each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, provided that the Charges shall rank behind Encumbrances in favour of any Persons that have not been served with notice of this application. The

Applicant and the beneficiaries of the Charges shall be entitled to seek priority of the Charges ahead of such Encumbrances on a subsequent motion on notice to those parties.

40. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicant shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless the Applicant also obtains the prior written consent of the Monitor, the DIP Lender, and the beneficiaries of the Directors' Charge and the Administration Charge, or further order of this Court.

41. The Charges and the DIP Term Sheet shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the DIP Lender thereunder shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made in this Order;

(b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") that binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof including the DIP Term Sheet or the Definitive Documents shall create or be deemed to constitute a new breach by the Applicant of any Agreement to which it is a party;

(ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the

creation of the Charges, the Applicant entering into the DIP Term Sheet, or the execution, delivery or performance of the Definitive Documents; and

(iii) the payments made by the Applicant pursuant to this Order, including the DIP Term Sheet or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

ALLOCATION

42. Any interested Person may apply to this Court on notice to any other party likely to be affected for an order to allocate the Administration Charge, the DIP Charge, and the Directors' Charge amongst the various assets comprising the Property.

"STATUS QUO" OF APPLICANT'S LICENSE

43. The status quo in respect of the Applicant's Health Canada licenses and the cannabis excise license (collectively, the "**Licenses**") shall be preserved and maintained during the pendency of the Stay Period, including the Applicant's ability to sell cannabis inventory in the ordinary course under the Licenses, and to the extent any Licenses may expire during the Stay Period, the term of such License shall be deemed to be extended by a period equal to the Stay Period.

SERVICE AND NOTICE

44. The Monitor shall (i) without delay, publish in The Globe and Mail (National Edition), Calgary Herald, and Edmonton Journal a notice containing the information prescribed under the CCAA; (ii) within five (5) days after the date of this Order (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicant of more than $1,000 and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with section 23(1)(a) of the CCAA and the regulations made thereunder; provided that the Monitor shall not be required to make the claims, names and addresses of individuals who are creditors publicly available unless otherwise ordered by this Court.

45. The Monitor shall establish a case website in respect of the within proceedings at https://kpmg.com/ca/freedom (the "**Monitor's Website**").

46. The Applicant and the Monitor and their respective counsel are at liberty to serve this Order, any other materials and orders as may be reasonably required in these proceedings, including any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, recorded mail, courier, personal delivery or electronic transmission to the Applicant's creditors or other interested parties at their respective addresses as last shown on the records of the Applicant and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail or recorded mail, on the seventh day after mailing. Any person that wishes to be served with any application and other materials in these proceedings must deliver to the Applicant or the Monitor by way of ordinary mail, courier, or electronic transmission, a request to be added to the service list (the "**Service List**") to be maintained by the Monitor.

47. Any party to these proceedings may serve any court materials in these proceedings by emailing a PDF or other electronic copy of such materials to counsel's email addresses as recorded on the Service List from time to time, and the Monitor shall post a copy of all prescribed materials on the Monitor's website.

GENERAL

48. The Applicant or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

49. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Monitor will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence. The Monitor's reports shall be filed by the Court Clerk notwithstanding that they do not include an original signature.

50. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager or a trustee in bankruptcy of the Applicant, the Business or the Property.

51. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction, to give effect to this Order and to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

52. Each of the Applicant and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Monitor is authorized and empowered to act as a representative in respect of the within proceeding for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

53. Any interested party (including the Applicant and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

54. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Standard Time on the date of this Order.



Justice of the Court of King's Bench of Alberta

Court File No.: CV-23-00703350-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	TUESDAY, THE 22ND
	)	
JUSTICE CONWAY	)	DAY OF AUGUST, 2023

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 ALEAFIA HEALTH INC., EMBLEM CORP., EMBLEM CANNABIS CORPORATION, EMBLEM REALTY LTD., GROWWISE HEALTH LIMITED., CANABO MEDICAL CORPORATION, ALEAFIA INC., ALEAFIA FARMS INC., ALEAFIA BRANDS INC., ALEAFIA RETAIL INC., 2672533 ONTARIO INC., and 2676063 ONTARIO INC.

(collectively, the "**Applicants**")

ORDER
(Re: SISP Approval)

THIS MOTION, made by the Applicants, for an order approving, among other things: (i) the Sale and Investment Solicitation Process in respect of the Applicants as attached hereto at Schedule "A" (the "**SISP**"); and (ii) the Stalking Horse Agreement (as defined herein) pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, was heard this day by judicial videoconference.

ON READING the affidavit of Patricia Symmes-Rizakos sworn July 24, 2023 and the Exhibits thereto (the "**Initial Symmes Affidavit**"), the affidavit of Patricia Symmes-Rizakos sworn July 26, 2023 and the Exhibits thereto (the "**Comeback Affidavit**"), the affidavit of Patricia Symmes-Rizakos sworn August 11, 2023 and the Exhibits thereto (the "**Third Affidavit**"), the pre-filing report of KSV Restructuring Inc. ("**KSV**"), in its capacity as proposed monitor of the Applicants dated July 24, 2023, the First Report of KSV, in its capacity as monitor (in such

capacity, the "**Monitor**"), dated August 1, 2023 (the "**First Report**"), and the Second Report of the Monitor, dated August 17, 2023 (the "**Second Report**") and on hearing the submissions of counsel for the Applicants, counsel for the Monitor, counsel to Red White & Bloom Brands Inc. (the "**DIP Lender**"), and such other parties listed on the Counsel Slip, no one appearing for any other party although duly served as appears from the Affidavits of Service of S. Hans, as filed,

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that capitalized terms used in this Order and not otherwise defined herein shall have the meanings ascribed to them in the SISP or the Amended and Restated Initial Order granted by the Honourable Justice Penny on August 4, 2023 (the "**ARIO**"), as applicable.

STAY EXTENSION

3. **THIS COURT ORDERS** that the Stay Period is hereby extended until and including October 31, 2023.

APPROVAL OF THE SALE AND INVESTMENT SOLICITATION PROCESS

4. **THIS COURT ORDERS** that the SISP (subject to any amendments thereto that may be made in accordance therewith and with this Order) is hereby approved and the Applicants and the Monitor are hereby authorized to implement the SISP pursuant to the terms thereof. The Applicants and the Monitor are hereby authorized and directed to take any and all actions as may be necessary or desirable to implement and carry out the SISP in accordance with its terms and this Order.

5. **THIS COURT ORDERS** that the Applicants and the Monitor are authorized to immediately commence the SISP to solicit interest in the opportunity for a sale of or investment in all or part of the Applicants' (i) property, assets and undertaking or shares in the capital of one or more of the Applicants (collectively, the "**Property**") and (ii) business operations (the "**Business**") in accordance with the terms of the SISP.

6. **THIS COURT ORDERS** that each of the Applicants, the Monitor and their respective affiliates, partners, directors, employees, agents, consultants, advisors, experts, accountants, counsel and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities, of any nature or kind, to any Person in connection with or as a result of implementing or otherwise in connection with the SISP, except to the extent such losses, claims, damages or liabilities result from their respective gross negligence or wilful misconduct, as applicable, as determined by this Court.

7. **THIS COURT ORDERS** that, pursuant to section 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS), the Monitor and the Applicants are authorized and permitted to send, or cause or permit to be sent, commercial electronic messages to an electronic address of prospective bidders or offerors and to their advisors, but only to the extent required to provide information with respect to the SISP in these proceedings.

8. **THIS COURT ORDERS** that notwithstanding anything contained herein or in the SISP, and in no way limiting the protections provided to the Monitor in the ARIO, the Monitor shall not take possession of any Property or be deemed to take possession of any Property, including pursuant to any provision of the Cannabis Legislation.

APPROVAL OF THE STALKING HORSE AGREEMENT

9. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to enter into the stalking horse agreement (the "**Stalking Horse Agreement**") among Aleafia Health Inc., Emblem Cannabis Corporation, Canabo Medical Corporation, Aleafia Farms Inc., Aleafia Retail Inc., the DIP Lender and RWB (PV) Canada Inc., a wholly-owned subsidiary of the DIP Lender (the "**Purchaser**"), and attached as Exhibit "G" to the Third Affidavit, *nunc pro tunc,* with such minor amendments as may be acceptable to each of the parties thereto, with the prior written approval of the Monitor.

10. **THIS COURT ORDERS** that the Stalking Horse Agreement is hereby approved and accepted solely for the purposes of being the Stalking Horse Bid under the SISP; provided that, nothing herein approves the transactions contemplated in the Stalking Horse Bid, and the approval of any transactions contemplated by the Stalking Horse Agreement shall be considered by this

Court on a subsequent motion made to this Court if the Stalking Horse Agreement is the Successful Bid pursuant to the SISP.

11. **THIS COURT ORDERS** that the Expense Reimbursement (as defined in the Stalking Horse Agreement) is hereby approved and the Applicants party to the Stalking Horse Agreement are hereby authorized and directed to pay the Expense Reimbursement to the Purchaser (or as it may direct) subject to and in accordance with the terms of the Stalking Horse Agreement.

PROTECTION OF PERSONAL INFORMATION

12. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, the Monitor, the Applicants and their respective advisors are hereby authorized and permitted to disclose and transfer to prospective SISP participants (each, a "**SISP Participant**") and their advisors personal information of identifiable individuals ("**Personal Information**"), records pertaining to the Applicants' past and current employees, and information on specific customers, but only to the extent desirable or required to negotiate or attempt to complete a transaction under the SISP (a "**Transaction**"). Each SISP Participant to whom any Personal Information is disclosed shall maintain and protect the privacy of such Personal Information and limit the use of such Personal Information to its evaluation of a Transaction, and if it does not complete a Transaction, shall return all such information to the Applicants or the Monitor, or in the alternative destroy all such information and provide confirmation of its destruction if required by the Applicants or the Monitor. The Successful Bidder(s) shall maintain and protect the privacy of such information and, upon closing of the Transaction contemplated in the Successful Bid(s), shall be entitled to use the personal information provided to it that is related to the Business and/or Property acquired pursuant to the SISP in a manner that is in all material respects identical to the prior use of such information by the Applicants, and shall return all other personal information to the Applicants or the Monitor, or ensure that all other personal information is destroyed and provide confirmation of its destruction if requested by the Monitor or the Applicants.

"STATUS QUO" OF APPLICANTS' LICENSES

13. **THIS COURT ORDERS** that (a) the status quo in respect of the Applicants' Health Canada and cannabis excise licenses (collectively, the "**Licenses**") shall be preserved and

maintained during the pendency of the Stay Period, including the Applicants' ability to sell cannabis inventory in the ordinary course under the Licenses; and (b) to the extent any License may expire during the Stay Period, the term of such License shall be deemed to be extended by a period equal to the Stay Period.

GENERAL

14. **THIS COURT ORDERS** that each of the Applicants or the Monitor may, from time to time, apply to this Court to amend, vary or supplement this Order or for advice and directions in the discharge of their respective powers and duties under this Order or in the interpretation of this Order.

15. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

16. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, Germany or in Australia, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

17. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

18. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order without the need for entry or filing.



Schedule "A"

Bidding Procedures for the Sale and Investment Solicitation Process

Pursuant to an order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") made on July 25, 2023 (as amended and restated, the "**Initial Order**"), Aleafia Health Inc., Emblem Corp., Emblem Cannabis Corporation, Emblem Realty Ltd., Growwise Health Limited, Canabo Medical Corporation, Aleafia Inc., Aleafia Farms Inc., Aleafia Brands Inc., Aleafia Retail Inc., 2672533 Ontario Inc. and 2676063 Ontario Inc. (collectively, the "**Applicants**" or the "**Aleafia Group**") were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**" and the proceedings thereunder, the "**CCAA Proceedings**"), and KSV Restructuring Inc. ("**KSV**") was appointed monitor of the Applicants (in such capacity, the "**Monitor**").

On August 15, 2023, the Court granted an order (the "**SISP Order**"), authorizing the Monitor, with the assistance of the Aleafia Group's management team, to undertake a sale and investment solicitation process ("**SISP**") for the sale of the Aleafia Group's (i) property, assets and undertaking or shares in the capital of one or more of the Applicants (collectively, the "**Property**"), and (ii) business operations (the "**Business**"). The SISP will be conducted by the Monitor in the manner set forth herein and in accordance with the SISP Order.

Among other things, the SISP Order also: (a) approved the procedures set out in this Schedule (the "**Bidding Procedures**") for the solicitation of offers or proposals (each, a "**Bid**") for the acquisition of (i) the Grimsby Property, and (ii) the other Property and the Business or some portion thereof; and (b) approved the form of stalking horse agreement (as same may be amended from time to time pursuant to its terms and the SISP Order, the "**Stalking Horse Agreement**") to be entered into between each of Aleafia Health Inc., Emblem Cannabis Corporation, Canabo Medical Corporation, Aleafia Farms Inc. and Aleafia Retail Inc., as vendors, and (PV) Canada Inc.[1] (a wholly-owned subsidiary of the DIP Lender, the "**Stalking Horse Bidder**"), as purchaser, for the purposes of serving as the stalking horse bid in the SISP (the "**Stalking Horse Bid**"). For the avoidance of doubt, the implementation of the transactions contemplated by the Stalking Horse Agreement is conditional upon the Stalking Horse Bid being selected as a Successful Bid (as defined below) in accordance with the Bidding Procedures and Court approval of the Stalking Horse Agreement and the transactions contemplated therein on a subsequent motion to be brought by the Applicants following the completion of the SISP.

Defined Terms

1. Capitalized terms used in these Bidding Procedures and not otherwise defined herein have the meanings given to them in Appendix "**A**" hereto.

[1] Stalking Horse Agreement and Implementation Steps contemplate the assignment/pledge of the DIP and Senior Loans and security to the Purchaser.

Bidding Procedures

Opportunity

2. The SISP is intended to solicit interest in and opportunities for a sale of, or investment in, all or part of the Aleafia Group's Property and Business (the "**Opportunity**"). The Opportunity may include one or more of a restructuring, refinancing, recapitalization or other form of reorganization of the business and affairs of one or more entity comprising the Aleafia Group as a going concern, or a sale of all, substantially all or one or more components of the Aleafia Group's Property and Business as a going concern or otherwise.

3. Any sale of any of the Property or investment in the Business will be on an "*as is, where is*" basis and without surviving representations or warranties of any kind, nature, or description by the Monitor, the Aleafia Group or any of their respective agents, advisors or estates, and, in the event of a sale, all of the right, title and interest of the Aleafia Group in and to the Property to be acquired will be sold free and clear of, *inter alia*, all pledges, liens, security interests, encumbrances, claims, charges, options, and interests therein and thereon pursuant to Court orders, except as otherwise provided in such Court orders and definitive documents.

4. The Stalking Horse Agreement constitutes a Binding Offer (as defined below) by the Stalking Horse Bidder (which constitutes a Binding Offer Bidder (as defined below)) for all purposes and at all times under this SISP and will serve as the Stalking Horse Bid for purposes of this SISP and the Bidding Procedures and have the right to participate in the Auction (as defined below), if any. Notwithstanding the Stalking Horse Agreement and proposed transactions therein, all interested parties are encouraged to submit bids based on any form of Opportunity that they may elect to advance pursuant to the SISP, including as a Sale Proposal (as defined below), a Partial Sale Proposal (as defined below), an Investment Proposal (as defined below), or a Grimsby Proposal (as defined below). A copy of the Stalking Horse Agreement will be made available to all Qualified Bidders (as defined below) and a form of such agreement, to be uploaded to the VDR (as defined below), may be used as the basis for any Binding Offer made in the SISP. A form of purchase and sale agreement prepared by the Applicants and the Monitor in connection with the sale of the Grimsby Property (the "**Grimsby APS**"), will be made available to all Qualified Bidders that have expressed an interest in the Grimsby Property and uploaded to the VDR, and will be used as the basis for any Binding Offer for the Grimsby Property in the SISP.

5. The Bidding Procedures describe the manner in which prospective bidders may gain access to due diligence materials concerning the Aleafia Group, the Property and the Business, the manner in which bidders may participate in the SISP, the requirement of and the receipt and negotiation of bids received, the ultimate selection of a Successful Bidder (as defined below) and the requisite approvals to be sought from the Court in connection therewith.

   Subject to paragraph 18 below, the Monitor, in consultation with the Aleafia Group, may at any time and from time to time, modify, amend, vary or supplement the Bidding Procedures, without the need for obtaining an order of the Court or providing notice to

Qualified Bidders, Binding Offer Bidders, the Successful Bidder(s) or the Back-Up Bidder(s) (as defined below) provided that such modification, amendment, variation or supplement is expressly limited to changes that do not alter, amend or prejudice the rights of such bidders (including the rights of the Stalking Horse Bidder, except with the authorization of the Stalking Horse Bidder) and are necessary or useful in order to give effect to the substance of the SISP, the Bidding Procedures or the SISP Order. Notwithstanding the foregoing, the dates or time limits indicated in the table contained below may be extended by the Monitor, as the Monitor deems necessary or appropriate, and with the consent of the DIP Lender, acting reasonably, or by order of the Court.

The Monitor will post on the Monitor's website and serve on the service list maintained in the CCAA Proceedings, as soon as practicable, any such modification, amendment, variation or supplement to these Bidding Procedures and inform the bidders impacted by such modifications.

In the event of a dispute as to the interpretation or application of the SISP Order or these Bidding Procedures, the Court will have exclusive jurisdiction to hear and resolve such dispute. For the avoidance of doubt, all bidders shall be deemed to have consented to the jurisdiction of the Court in connection with any disputes relating to the SISP, including the qualification of bids, the construction and enforcement of the SISP, and closing of a Successful Bid, as applicable.

A summary of the key dates pursuant to the SISP is as follows:

Milestone	**Date**
Commence solicitation of interest from parties, including delivering NDA and Teaser Letter, and upon execution of NDA (each as defined below), Confidential Information Memorandum and access to VDR	No later than two (2) Business Days after the granting of the SISP Order
Grimsby Offer Deadline (as defined below)	September 6, 2023 at 5:00 p.m. EST
Binding Offer Deadline (as defined below)	October 2, 2023 at 5:00 p.m. EST
If no Binding Offers are received other than Stalking Horse Bid	

Selection of Stalking Horse Bid as Successful Bid	October 3, 2023
Approval Motion (as defined below)	October 11, 2023 or the earliest date available thereafter
Closing of Stalking Horse Bid	As soon as possible but no later than November 22, 2023
If Binding Offers are received other than Stalking Horse Bid	
Selection of Successful Bid in respect of the Grimsby Property, if any, and Back-Up Bidder, if needed	No later than September 8, 2023
Approval Motion in respect of the Grimsby Property	No later than September 22, 2023
Closing of the Successful Bid in respect of the Grimsby Property, if any	As soon as possible but no later than October 31, 2023
Deadline to notify Qualified Bidders of Auction	No later than October 6, 2023
Auction, if needed	October 10, 2023
Selection of Successful Bid and Back-Up Bidder, if needed	October 10, 2023 or such later date immediately thereafter if the Auction is not completed in one day
Approval Motion	No later than October 18, 2023
Closing of the Successful Bid	As soon as possible but no later than November 22, 2023

Solicitation of Interest: Notice of the SISP

6. As soon as reasonably practicable, but, in any event, by no later than two (2) Business Days after the granting of the SISP Order:

   (a) the Monitor, in consultation with the Aleafia Group, will prepare a list of potential bidders, including (i) parties that have approached the Applicants or the Monitor indicating an interest in the Opportunity, (ii) strategic and financial parties who the Monitor, in consultation with the Aleafia Group, believe may be interested in purchasing all or part of the Business or the Property or investing in the Aleafia Group pursuant to the SISP, and (iii) parties that showed an interest in the Aleafia Group and/or their Property prior to the date of the SISP Order including by way of the previous, out-of-court strategic review process, in each case whether or not such party has submitted a letter of intent or similar document (collectively, the "**Known Potential Bidders**");

   (b) a notice of the SISP (and such other relevant information which the Monitor, in consultation with the Aleafia Group, considers appropriate) (the "**Notice**") will be published by the Monitor in one or more trade industry and/or insolvency-related publications as may be considered appropriate by the Monitor;

   (c) the Aleafia Group will issue a press release setting out the information contained in the Notice and such other relevant information which the Monitor and the Applicants determine is appropriate; and

   (d) the Monitor, with the assistance of the Aleafia Group, will prepare (i) a process summary (the "**Teaser Letter**") describing the Opportunity, outlining the process under the SISP and inviting recipients of the Teaser Letter to express their interest pursuant to the SISP; and (ii) a non-disclosure agreement in form and substance satisfactory to the Monitor and Aleafia Group and their respective counsel, which shall enure to the benefit of any purchaser of the Business or Property or any part thereof (an "**NDA**"). The Monitor may prepare a separate Teaser Letter in respect of the solicitation of offers or proposals for the acquisition of the Grimsby Property.

7. The Monitor will cause the Teaser Letter and NDA to be sent to each Known Potential Bidder by no later than two (2) Business Days after the granting of the SISP Order, and to any other party who requests a copy of the Teaser Letter and NDA or who is identified to the Monitor as a potential bidder as soon as reasonably practicable after such request or identification, as applicable.

Virtual Data Room

8. A confidential virtual data room or rooms[2] (collectively, the "**VDR**") in relation to the Opportunity will be made available by the Aleafia Group and the Monitor to Potential Bidders (as defined below) that have executed the NDA. The VDR will be made available

[2] A separate VDR may be made available in respect of the solicitation of offers or proposals for the acquisition of the Grimsby Property.

as soon as practicable. The Monitor, in consultation with the Aleafia Group, may establish or cause the Aleafia Group to establish separate VDRs (including "**clean rooms**"), if the Aleafia Group reasonably determines that doing so would further the Aleafia Group's and any Potential Bidder's compliance with applicable antitrust and competition laws, or would prevent the distribution of commercially sensitive competitive information. The Monitor may also, in consultation with the Aleafia Group, limit the access of any Potential Bidder to any confidential information in the VDR where the Monitor, in consultation with the Aleafia Group, reasonably determines that such access could negatively impact the SISP, the ability to maintain the confidentiality of the information, the Business, the Property or their value.

Qualified Bidders and Delivery of Confidential Information Memorandum

9. Any party who wishes to participate in the SISP (a "**Potential Bidder**") must provide to the Monitor and counsel to the Aleafia Group, at the addresses specified in Appendix "B" hereto (including by email transmission), an NDA executed by it, acceptable to the Monitor, in consultation with the Aleafia Group, and written confirmation of the identity of the Potential Bidder, the contact information for such Potential Bidder and full disclosure of the direct and indirect principals of the Potential Bidder.

10. A Potential Bidder (who has delivered the executed NDA and letter as set out above) will be deemed a "**Qualified Bidder**" if the Monitor, in its reasonable judgment, and in consultation with the Aleafia Group, determines such person is likely, based on the availability of financing, experience and other considerations, to be able to consummate a sale or investment pursuant to the SISP. All Qualified Bidders will receive a Confidential Information Memorandum prepared by the Monitor and will be granted access to the VDR. For the avoidance of doubt, the Stalking Horse Bidder is, and will be deemed to be, a Qualified Bidder.

11. The Monitor will prepare and send to each Qualified Bidder a Teaser Letter and provide a copy of the Stalking Horse Agreement or the Grimsby APS, as applicable, and any material amendment thereto. The Aleafia Group, the Monitor and their respective advisors make no representation or warranty as to the information contained in the VDR, Teaser Letter, Confidential Information Memorandum or otherwise made available pursuant to the SISP.

12. At any time during the SISP, the Monitor may, in its reasonable judgment, and in consultation with the Aleafia Group, eliminate a Qualified Bidder from the SISP, in which case such bidder will be eliminated from the SISP and will no longer be a "Qualified Bidder" for the purposes of the SISP.

13. Potential Bidders must rely solely on their own independent review, diligence, investigation and/or inspection of all information and of the Property and Business in connection with their participation in the SISP and any transaction they enter into with one or more of the entities comprising the Aleafia Group.

Due Diligence

14. The Monitor and the Aleafia Group, shall, subject to competitive and other business considerations, afford each Qualified Bidder such access to due diligence materials and information relating to the Property and Business as the Monitor, in consultation with the Aleafia Group, may deem appropriate. Due diligence access may include management presentations, access to the VDR, on-site inspections, and other matters which a Qualified Bidder may reasonably request and as to which the Monitor, in its reasonable judgment, and in consultation with the Aleafia Group, may agree. Any access or interactions with the Aleafia Group's management and personnel shall be coordinated through, and involve a representative of, the Monitor.

15. The Monitor will designate one or more representatives of the Monitor to be solely responsible for coordinating and responding to all requests for information and due diligence access from Qualified Bidders and the manner in which such requests must be communicated. Neither the Monitor, nor the Aleafia Group through the Monitor, will be obligated to furnish any information relating to the Property or Business to any person other than to Qualified Bidders. Further, and for the avoidance of doubt, selected due diligence materials may be withheld from certain Qualified Bidders if the Monitor, in consultation with the Aleafia Group, determines such information to represent proprietary or sensitive competitive information.

Formal Binding Offers

16. Any Qualified Bidder (other than the Stalking Horse Bidder) that wishes to make a formal offer to (A) acquire all or substantially all of the Property or Business, whether through an asset purchase, a share purchase or a combination thereof (either one, a "**Sale Proposal**") or a portion of the Property or the Business (a "**Partial Sale Proposal**"); (B) make an investment in, restructure, recapitalize or refinance the Aleafia Group or the Business or a portion thereof (an "**Investment Proposal**"); or (C) acquire the Grimsby Property (a "**Grimsby Proposal**"), must submit a binding offer (a "**Binding Offer**"): (a) in the case of a Sale Proposal, in the form of a template purchase agreement provided in the VDR, along with a marked version showing edits to the original form of the template provided in the VDR and otherwise with a marked version compared to the Stalking Horse Agreement; or (b) in the case of an Investment Proposal, a plan or restructuring support agreement in form and substance satisfactory to the Monitor, in consultation with the Aleafia Group (the "**Binding Offer Bidder**"), in each case, to the Monitor, no later 5 p.m. EST on October 2, 2023 (the "**Binding Offer Deadline**"), which does not apply in respect of a Grimsby Proposal. Any Qualified Bidder who wishes to make a formal offer in respect of a Grimsby Proposal must submit a Binding Offer, in the form of the Grimsby APS, to the Monitor no later than 5 p.m. EST on September 6, 2023 (the "**Grimsby Offer Deadline**"). Due to the earlier submission of offers for the Grimsby Property contemplated herein, the Grimsby Property, if subject to a Successful Bid arising from a Binding Offer submitted by the Grimsby Offer Deadline, shall be excluded from the later stages of this SISP (such as the Auction, as detailed below).

17. Except in the case of a Grimsby Proposal, a Binding Offer will be considered if it:

(a) provides net cash proceeds on closing via provisions that meet the following requirements, that are not less than the aggregate total of: (A) the amount of cash payable under the Stalking Horse Agreement together with the amount of all secured indebtedness, liabilities and obligations owing by the Aleafia Group to the DIP Lender (both in respect of its outstanding pre-filing secured loans and advances under the DIP Facility), plus (B) the amount of cash payable to cover the Expense Reimbursement (as defined in the Stalking Horse Agreement), plus (C) a minimum overbid amount of $200,000, plus (D) the amount of cash payable to repay in full all of the secured indebtedness, liabilities and obligations owing by the Aleafia Group to 1260356 Ontario Limited (the amounts set forth in this paragraph 17(a), the "**Minimum Purchase Price**"); provided, however, that the Monitor may, in its reasonable judgment, and in consultation with the Aleafia Group, deem this criterion satisfied if the Sale Proposal, Partial Sale Proposal or the Investment Proposal, together with one or more other non-overlapping Sale Proposal, Partial Sale Proposal or Investment Proposal, in the aggregate, meet or exceed the Minimum Purchase Price and such Minimum Purchase Price is payable in full in cash on closing (such bids, "**Aggregated Bids**", and each an "**Aggregated Bid**") (the amount of the Minimum Purchase Price will be confirmed by the Monitor with Potential Bidders);

(b) is submitted on or before the Binding Offer Deadline by a Qualified Bidder;

(c) is made by way of binding, definitive transaction document(s) that is/are executed by the Binding Offer Bidder;

(d) is a Binding Offer: (i) to purchase all, substantially all, or a portion of the Property or the Business; and/or (ii) to make an investment in, restructure, recapitalize or refinance the Aleafia Group or the Business or a portion thereof, on terms and conditions reasonably acceptable to the Monitor and the Aleafia Group;

(e) identifies all executory contracts of the Aleafia Group that the Binding Offer Bidder will assume and clearly describes, for each contract or on an aggregate basis, how all monetary defaults and non-monetary defaults will be remedied, as applicable;

(f) is not subject to any financing condition, diligence condition or internal or board approval;

(g) is unconditional, other than upon the receipt of the Approval Order(s) (as defined below) and satisfaction of any other conditions expressly set forth in the Binding Offer;

(h) contains or identifies the key terms and provisions to be included in any Approval Order, including whether such order will be a "reverse vesting order";

(i) contains the Binding Offer Bidder's proposed treatment of employees of the applicable Aleafia Group entities (for example, anticipated employment offers and treatment of post-employment benefits);

(j) includes acknowledgments and representations of the Binding Offer Bidder that it: (i) has had an opportunity to conduct any and all due diligence regarding the Opportunity prior to making its Binding Offer; (ii) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Property and/or the Business in making its Binding Offer; (iii) did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever, whether express, implied, statutory or otherwise, regarding the Opportunity or the completeness of any information provided in connection therewith, other than as expressly set forth in the Binding Offer or other transaction document submitted with the Binding Offer; and (iv) promptly will commence any governmental or regulatory review of the proposed transaction by the applicable competition, antitrust or other applicable governmental authorities, including those regulating the cannabis sector;

(k) provides for (i) net cash proceeds on closing that are not less than the Minimum Purchase Price; unless it is a part of a bid that qualifies as an Aggregated Bid, as the case may be, in which case the total net cash proceeds of the Aggregated Bids will be not less than the Minimum Purchase Price; and (ii) evidence satisfactory to the Monitor of funds available to pay the Minimum Purchase Price on closing including written evidence of a firm, irrevocable commitment for financing or other evidence of ability to pay the Minimum Purchase Price on closing;

(l) is accompanied by a letter that confirms that the Binding Offer: (i) may be accepted by the Aleafia Group by countersigning the Binding Offer, and (ii) is irrevocable and capable of acceptance until the earlier of (A) two (2) Business Days after the date of closing of the applicable Successful Bid; and (B) the Outside Date (as defined below);

(m) provides for any anticipated corporate, licensing, securityholder, Health Canada, legal or other regulatory approvals required to close the transaction, and an estimate of the anticipated time frame and any anticipated impediments for obtaining such approvals;

(n) does not provide for any break or termination fee, expense reimbursement or similar type of payment, it being understood and agreed that no bidder will be entitled to any bid protections;

(o) in the case of a Sale Proposal or Partial Sale Proposal, includes:

(i) the specific purchase price in Canadian dollars and a description of any non-cash consideration;

(ii) a description of the Property that is expected to be subject to the transaction and any of the Property expected to be excluded;

(iii) a specific indication of the sources of capital for the Binding Offer Bidder and the structure and financing of the transaction; and

(iv) a description of those liabilities and obligations (including operating liabilities) which the Binding Offer Bidder intends to assume and which such liabilities and obligations it does not intend to assume and are to be excluded as part of the transaction;

(p) in the case of an Investment Proposal, includes:

(i) a description of how the Binding Offer Bidder proposes to structure the proposed investment, restructuring, recapitalization, refinancing or reorganization, and a description of any non-cash consideration;

(ii) the aggregate amount of the equity and/or debt investment to be made in the Business or the Applicants in Canadian dollars;

(iii) the underlying assumptions regarding the pro forma capital structure;

(iv) a specific indication of the sources of capital for the Binding Offer Bidder and the structure and financing of the transaction; and

(v) a description of those liabilities and obligations (including operating liabilities) which the Binding Offer Bidder intends to assume and which liabilities and obligations it does not intend to assume and are to be excluded as part of the transaction;

(q) prior to entering the Auction, the Binding Offer Bidder will be required to deliver to the Monitor a deposit in the amount of not less than 10% of the cash purchase price payable on closing or total new investment contemplated, as the case may be (the "**Deposit**");

(r) is accompanied by an acknowledgement that (i) if the Binding Offer Bidder is selected as a Successful Bidder, that the Deposit will be non-refundable subject to approval of such Successful Bid by the Court and the terms described in paragraph 27 below; and (ii) if the Binding Offer Bidder is selected as a Back-Up Bidder, that the Deposit will be held and dealt with as described in paragraph 27 below;

(s) contemplates and reasonably demonstrates a capacity to consummate a closing of the transaction set out therein on the date that is twenty-one (21) days from the date of the issuance of the Approval Order approving such bid, or such earlier date as is practical for the parties to close the contemplated transaction, following the satisfaction or waiver of the conditions to closing (the "**Target Closing Date**") and in any event no later than November 22, 2023 (the "**Outside Date**"); and

(t) includes such other information as reasonably requested or identified as being necessary or required by the Monitor, in consultation with the Aleafia Group.

17A. In the case of a Grimsby Proposal, a Binding Offer will be considered if it:

(a) provides net cash proceeds on closing that provide an acceptable value for the Grimsby Property, as determined by the Aleafia Group and the Monitor, with the consent of the DIP Lender, on a commercially reasonable basis;

(b) is submitted on or before the Grimsby Offer Deadline by a Qualified Bidder;

(c) is made by way of binding, definitive transaction document(s) that is/are executed by the Binding Offer Bidder, and includes a blackline to the Grimsby APS;

(d) is not subject to any financing condition, diligence condition or internal or board approval;

(e) is unconditional, other than upon the receipt of the Approval Order and satisfaction of any other conditions expressly set forth in the Binding Offer;

(f) includes acknowledgments and representations of the Binding Offer Bidder that it: (i) has had an opportunity to conduct any and all due diligence regarding the Opportunity prior to making its Binding Offer; (ii) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Grimsby Property in making its Binding Offer; (iii) did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever, whether express, implied, statutory or otherwise, regarding the Opportunity or the completeness of any information provided in connection therewith, other than as expressly set forth in the Binding Offer or other transaction document submitted with the Binding Offer; and (iv) promptly will commence any governmental or regulatory review of the proposed transaction by any applicable governmental authorities;

(g) is accompanied by a letter that confirms that the Binding Offer: (i) may be accepted by the Aleafia Group by countersigning the Binding Offer, and (ii) is irrevocable and capable of acceptance until the earlier of two (2) Business Days after the date of closing of the applicable Successful Bid; and (B) the Grimsby Outside Date (as defined below);

(h) does not provide for any break or termination fee, expense reimbursement or similar type of payment, it being understood and agreed that no bidder will be entitled to any bid protections;

(i) includes the specific purchase price in Canadian dollars;

(j) includes a specific indication of the sources of capital for the Binding Offer Bidder and the structure and financing of the transaction;

(k) is accompanied by the delivery to the Monitor of a deposit in the amount of not less than 10% of the cash purchase price payable on closing (the "**Grimsby Deposit**") and an acknowledgement that (i) if the Binding Offer Bidder is selected as a Successful Bidder, that the Grimsby Deposit will be non-refundable subject to approval of such Successful Bid by the Court and the terms described in paragraph

27 below; and (ii) if the Binding Offer Bidder is selected as a Back-Up Bidder, that the Grimsby Deposit will be held and dealt with as described in paragraph 27 below;

(l) demonstrates a capacity to consummate a closing of the transaction set out therein on the date that is twenty-one (21) days from the date of the issuance of the Approval Order approving such bid, or such earlier date as is practical for the parties to close the contemplated transaction, following the satisfaction or waiver of the conditions to closing (the "**Grimsby Target Closing Date**") and in any event no later than October 31, 2023 (the "**Grimsby Outside Date**"); and

(m) includes such other information as reasonably requested or identified as being necessary or required by the Monitor, in consultation with the Aleafia Group.

18. The Monitor, in its reasonable judgment, and in consultation with the Aleafia Group, may waive strict compliance with any one or more of the requirements specified above (with the exception of the requirements contained in paragraphs 17(a) and 17(k), which cannot be waived without the prior written consent of the DIP Lender) and consider such non-compliant Binding Offer. For the avoidance of doubt, the completion of any Binding Offer shall be subject to the approval of the Court.

19. In the circumstance that a Binding Offer, including one or more Binding Offers comprising an Aggregated Bid, does not provide for net cash proceeds on closing that are at least equal to the Minimum Purchase Price, the Monitor will consult with the DIP Lender and, with the consent of the DIP Lender, may elect that such Binding Offer nevertheless be considered as a potential Successful Bid and be entitled to participate in the Auction.

Selection of Successful Bid

20. The Monitor, in consultation with the Aleafia Group, may, following the receipt of any Binding Offer, including one or more Binding Offers comprising an Aggregated Bid, seek clarification with respect to any of the terms or conditions of such Binding Offer and/or request and negotiate one or more amendments to such Binding Offer prior to determining if the Binding Offer should be considered.

21. The Monitor and the Aleafia Group, will (i) review and evaluate each relevant Binding Offer, valued upon numerous factors as referenced above, including factors affecting the speed, certainty and value of the transaction (including any licensing, Health Canada, regulatory or legal approvals, assignments or third party contractual arrangements required to close the transactions); (ii) subject to paragraph 22(j) below, (A) identify the highest and otherwise best Binding Offer (the "**Successful Bid**", and the Binding Offer Bidder making such Successful Bid, the "**Successful Bidder**"), and (B) the next highest and otherwise second best Binding Offer (the "**Back-Up Bid**", and the Binding Offer Bidder making such Back-Up Bid, the "**Back-Up Bidder**"); provided that, with respect to the sale of the Grimsby Property pursuant to a Grimsby Proposal, the applicable Successful Bid, Successful Bidder, Back-Up Bid and Back-Up Bidder, if any, will be identified by the Monitor and the Aleafia Group, with the consent of the DIP Lender, following the Grimsby Offer Deadline by no later than September 8, 2023 in accordance with the terms hereof.

Provided that the Ad Hoc Committee of Convertible Debentureholders confirms in writing that (i) it has not submitted or participated in the submission of a Binding Offer, and (ii) it is not affiliated or communicating with any Binding Offer Bidder, the Ad Hoc Steering Committee and counsel to the Ad Hoc Committee of Convertible Debentureholders shall be entitled to receive copies of each Binding Offer submitted by the Grimsby Offer Deadline and the Binding Offer Deadline, as applicable, on a confidential basis pursuant to one or more NDAs satisfactory to the Monitor as soon as reasonably practicable following receipt thereof.

22. In the event that no Binding Offer is selected (other than the Stalking Horse Bid), the Aleafia Group will promptly seek Court approval of the Stalking Horse Agreement and the transactions contemplated therein. In the event there is at least one Binding Offer in addition to the Stalking Horse Bid, a Successful Bid will be identified through an auction in accordance with the procedure set out below; provided that, the Grimsby Property is intended to be marketed separately as part of this SISP as set forth herein and will only be marketed through the Auction if no Grimsby Proposal is received by the Grimsby Offer Deadline or if the Grimsby Proposals received provide insufficient value, as determined by the Aleafia Group and the Monitor, on a commercially reasonable basis.

23. In the event that an auction (the "**Auction**") is required in accordance with the terms of these Bidding Procedures, it will be conducted in accordance with the procedures set forth in this paragraph (provided that, for certainty, the Auction will not apply or take place in respect of the Grimsby Property unless the requirements set out in the paragraph above are met):

    (a) The Auction will commence at a time to be designated by the Monitor, on October 10, 2023, and may, in the discretion of the Monitor, be held virtually via videoconference, teleconference or such other reasonable means as the Monitor deems appropriate. The Monitor will consult with the parties permitted to attend the Auction to arrange for the Auction to be so held. Subject to the terms hereof, the Monitor, in consultation with the Aleafia Group, may postpone the Auction.

    (b) The identity of each Binding Offer Bidder participating in the Auction will be disclosed, on a confidential basis, to other Binding Offer Bidders participating in the Auction.

    (c) Except as otherwise permitted in the Monitor's discretion, only the Aleafia Group, the Monitor and the Binding Offer Bidders, and, in each case, their respective professionals and representatives, will be permitted to attend the Auction. Only Binding Offer Bidders (including, for greater certainty, the Stalking Horse Bidder) are eligible to participate in the Auction.

    (d) Binding Offer Bidders will participate in the Auction through a duly authorized representative.

    (e) Except as otherwise set forth herein, the Monitor may waive and/or employ and announce at the Auction additional rules, including rules to facilitate the

participation of parties participating in an Aggregated Bid, that are reasonable under the circumstances for conducting the Auction, provided that such rules are: (i) not inconsistent with the Initial Order, the SISP, the Bidding Procedures, the CCAA, or any order of the Court issued in connection with the CCAA Proceedings; (ii) disclosed to each Binding Offer Bidder; and (iii) designed, by the Monitor, in its reasonable judgment, and in consultation with the Aleafia Group, to result in the highest and otherwise best offer.

(f) The Monitor may arrange for the actual bidding at the Auction to be transcribed or recorded. Each Binding Offer Bidder participating in the Auction will designate a single individual to be its spokesperson during the Auction.

(g) Each Binding Offer Bidder participating in the Auction must confirm on the record, at the commencement of the Auction and again at the conclusion of the Auction, that it has not engaged in any collusion with the Aleafia Group or any other person, without the consent of the Monitor, regarding the SISP, that has not been disclosed to all other Binding Offer Bidders. For greater certainty, communications between the Stalking Horse Bidder and either the Aleafia Group or the Monitor with respect to and in preparation of the Stalking Horse Agreement, the SISP and the Bidding Procedures, prior to the issuance of the SISP Order and the commencement of the SISP will not represent collusion nor communications prohibited by this paragraph.

(h) Prior to the Auction, the Monitor will identify the highest and best of the Binding Offers received and such Binding Offers will constitute the opening bid for the purposes of the Auction (the "**Opening Bid**"). Subsequent bidding will continue in minimum increments valued at not less than $200,000 cash in excess of the Opening Bid. Each Binding Offer Bidder will provide evidence of its financial wherewithal and ability to consummate the transaction at the increased purchase price. Further, in the event that an Aggregated Bid qualifies to participate in the Auction, modifications to the bidding requirements may be made by the Monitor, in consultation with the Aleafia Group, to facilitate bidding by the participants in the Aggregated Bid.

(i) All Binding Offer Bidders will have the right, at any time, to request that the Monitor announce, subject to any potential new bids, the then-current highest and best bid and, to the extent requested by any Binding Offer Bidder, use reasonable efforts to clarify any and all questions such Binding Offer Bidder may have regarding the Monitor's announcement of the then-current highest and best bid.

(j) Each participating Binding Offer Bidder will be given reasonable opportunity to submit an overbid at the Auction to any then-existing overbids. The Auction will continue until the bidding has concluded and there is one remaining Binding Offer Bidder. The Monitor and the Aleafia Group shall determine which Binding Offer Bidders have submitted (i) the highest and otherwise best Binding Offer of the Auction, which shall be a Successful Bid, and (ii) the next highest and otherwise second best Binding Offer of the Auction, which shall be a Back-Up Bid. At such time and upon the conclusion of the bidding, the Auction will be closed, and the

Binding Offer Bidder with the highest and otherwise best Binding Offer of the Auction will be a Successful Bidder. The Binding Offer Bidder with the next highest and otherwise second best Binding Offer of the Auction will be a Back-Up Bidder.

(k) Upon selection of a Successful Bidder and a Back-Up Bidder, if any, the Successful Bidder and the Back-Up Bidder, if any, shall each deliver to the Monitor and the Aleafia Group, an amended and executed transaction document that reflects their final bid and any other modifications submitted and agreed to during the Auction, prior to the filing of the motion material for the hearing to consider the Approval Motion.

(l) Any bids submitted after the conclusion of the Auction will not be considered.

(m) The Monitor, in consultation with the Aleafia Group, shall be at liberty to modify or to set additional procedural rules for the Auction as it sees fit, including to conduct the Auction by way of written submissions.

24. Other than in the case of a Grimsby Proposal, a Successful Bid and Back-Up Bid, if any, will be selected by no later than 5:00 p.m. (Eastern Time) on October 10, 2023 (or such later date immediately thereafter if the Auction is conducted and not completed in one day) and the completion and execution of definitive documentation in respect of such Successful Bid and Back-Up Bid, as applicable, must be finalized and executed no later than October 10, 2023 (or such later date immediately thereafter if the Auction is conducted and not completed in one day) which definitive documentation will be conditional only upon the receipt of the Approval Order(s) and the express conditions set out therein and will provide that the Successful Bidder will use all reasonable efforts to close the proposed transaction by no later than the Target Closing Date, or such longer period as may be agreed to by the Monitor, in consultation with the Aleafia Group and the Successful Bidder, subject to the terms hereof. In any event, such Successful Bid must be closed by no later than the Outside Date. In the case of a Grimsby Proposal, a Successful Bid and Back-Up Bid, if any, will be selected following the Grimsby Offer Deadline by no later than September 8, 2023, and the completion and execution of definitive documentation in respect of such Successful Bid and Back-Up Bid, as applicable, must be finalized and executed within two (2) Business Days of selection, which definitive documentation will be conditional only upon the receipt of the Approval Order and the express conditions set out therein and will provide that the Successful Bidder will use all reasonable efforts to close the proposed transaction by no later than the Grimsby Target Closing Date, or such longer period as may be agreed to by the Monitor, in consultation with the Aleafia Group, the DIP Lender and the Successful Bidder, subject to the terms hereof. In any event, such Successful Bid must be closed by no later than the Grimsby Outside Date. If a Back-Up Bid is identified in accordance with the SISP, then such Back-Up Bid shall remain open until the date (the "**Back-Up Bid Outside Date**") on which the transaction contemplated by the applicable Successful Bid is consummated or such earlier date as the Monitor, in consultation with the Aleafia Group, determines. If the transactions contemplated by the applicable Successful Bid have not closed by the Outside Date or the Grimsby Outside Date, as applicable, or the applicable Successful Bid is terminated for any reason prior to the

Outside Date or the Grimsby Outside Date, as applicable, the Aleafia Group and the Monitor may elect to, or by further order of the Court, seek to complete the transactions contemplated by the applicable Back-Up Bid, and will promptly seek to close the transaction contemplated by such Back-Up Bid, which will be deemed to be a Successful Bid. The Aleafia Group will be deemed to have accepted such Back-Up Bid only when the Aleafia Group and the Monitor have made such election.

Approval of Successful Bid

25. The Aleafia Group will apply to the Court (the "**Approval Motion**") for one or more orders: (i) approving the Successful Bid(s) and authorizing the taking of such steps and actions and completing such transactions as are set out therein or required thereby (such order shall also approve the Back-Up Bid(s), if any, should the Successful Bid(s) not close for any reason); and (ii) granting a vesting order and/or reverse vesting order to the extent that such relief is contemplated by the Successful Bid(s) so as to vest title to any purchased assets and/or shares in the name of the applicable Successful Bidder(s) and/or vesting unwanted assets and liabilities out of one or more of the Aleafia Group (collectively, the "**Approval Order(s)**"). The Approval Motion will be held on a date to be scheduled by the Aleafia Group and confirmed by the Court upon application by the Aleafia Group. With the consent of the Monitor and the applicable Successful Bidder(s), the Approval Motion may be adjourned or rescheduled by the Aleafia Group without further notice, by an announcement of the adjourned date at the Approval Motion or in a notice to the service list maintained in the CCAA Proceedings prior to the Approval Motion. The Aleafia Group will consult with the Monitor and the applicable Successful Bidder regarding the motion material to be filed by the Aleafia Group for the Approval Motion.

26. All Binding Offers (other than the Successful Bid(s) but including the applicable Back-Up Bid(s)) will be deemed rejected on and as of the date of the closing of the applicable Successful Bid(s), with no further or continuing obligation of the Aleafia Group or the Monitor to any unsuccessful Binding Offer Bidders.

Deposits

27. The Deposit(s) and the Grimsby Deposit(s), as applicable:

    (a) will, upon receipt from the Binding Offer Bidder(s), be retained by the Monitor and deposited in a non-interest-bearing trust account;

    (b) received from the Successful Bidder(s) and the Back-Up Bidder(s), if any, will:

        (i) be applied to the purchase price to be paid by the applicable Successful Bidder or Back-Up Bidder whose Successful Bid or Back-Up Bid, as applicable, is the subject of the Approval Order(s), upon closing of the approved transaction; and

        (ii) otherwise be held and refunded in accordance with the terms of the definitive documentation in respect of the applicable Successful Bid or or Back-Up Bid, provided that (i) all such documentation will provide that the

Deposit or Grimsby Deposit, as applicable, will be fully refunded to the Back-Up Bidder on the Back-Up Bid Outside Date; and (ii) all such documentation will provide that the Deposit will be retained by the Aleafia Group and forfeited by the Successful Bidder, if its Successful Bid fails to close by the Outside Date or Grimsby Outside Date, as applicable, and such failure is attributable to any failure or omission of the Successful Bidder to fulfil its obligations under the terms of its Successful Bid; and

(c) received from the Binding Offer Bidder(s) that are not a Successful Bidder or a Back-Up Bidder will be fully refunded to the Binding Offer Bidder(s) that paid the Deposit(s) or the Grimsby Deposit(s), as applicable, as soon as practical following the closing of the applicable Successful Bid.

28. Notwithstanding anything to the contrary herein, the Stalking Horse Bidder will not be required to provide a Deposit.

"As is, Where is"

29. Any sale (or sales) of the Property or the Business or portions thereof will be on an "**as is, where is**" basis except for representations and warranties that are customarily provided in purchase agreements for a company subject to CCAA proceedings. Any such representations and warranties provided for in the definitive documents will not survive closing.

Free of Any and All Claims and Interests

30. In the event of a sale, to the extent permitted by law, all of the rights, title and interests of the Aleafia Group in and to the Property or the Business to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests thereon and there against (collectively, the "**Claims and Interests**") pursuant to section 36(6) of the CCAA, such Claims and Interests to attach to the net proceeds of the sale of such Property or Business and/or excluded assets, as applicable (without prejudice to any claims or causes of action regarding the priority, validity or enforceability thereof), except to the extent otherwise set forth in the relevant transaction documents with a Successful Bidder.

Credit Bidding

31. The Stalking Horse Bidder will be entitled pursuant to the Stalking Horse Agreement, including for greater certainty as part of the Auction, as the case may be, to credit bid or retain as Retained Liabilities all or part of the existing secured obligations owing to it, including all interest, costs and fees to which the Stalking Horse Bidder is entitled pursuant to its relevant loan, interim financing, debenture, promissory note and/or security agreements with the Aleafia Group.

32. Any other secured party of the Applicants may include as part of a Binding Offer under this SISP all or part of its existing secured obligations owing to it as a credit bid for the Business and the Property. For the avoidance of doubt, a secured party, including, without

limitation, the Stalking Horse Bidder, may only make a credit bid in relation to the Property subject to such secured party's valid and enforceable security (in each case, the "**Encumbered Assets**"). To the extent that a secured party wishes to submit a Binding Offer for Property that does not form part of the Encumbered Assets (the "**Unencumbered Assets**"), such secured party shall specify a cash purchase price allocated to the Unencumbered Assets while making a credit bid for the Encumbered Assets that are included in such Binding Offer.

Confidentiality

33. For greater certainty, other than as required in connection with any Auction or Approval Motion and subject to paragraph 21, neither the Aleafia Group nor the Monitor will disclose: (i) the identity of any Potential Bidder or Qualified Bidder (other than the Stalking Horse Bidder); or (ii) the terms of any bid, Sale Proposal, Investment Proposal, Grimsby Proposal or Binding Offer (other than the Stalking Horse Agreement), to any other bidder or any of its affiliates (provided that disclosure may be made to the DIP Lender when expressly contemplated by the SISP, such as in the event that no single Binding Offer provides for net cash proceeds that are at least equal to the Minimum Purchase Price), except to the extent the Monitor, with the consent of such applicable parties is seeking to combine separate bids into Aggregated Bids. Potential Bidders, Qualified Bidders (including the Stalking Horse Bidder) and each of their respective affiliates shall not communicate with, or contact, directly or indirectly, any other Potential Bidder, Qualified Bidder or their respective affiliates, or any secured creditors of members of the Aleafia Group, including the Ad Hoc Committee of Convertible Debentureholders, without the express written consent of the Monitor, and such communications or discussions are to take place under the supervision of the Monitor.

Further Orders

34. At any time during the SISP, the Aleafia Group or the Monitor may apply to the Court for advice and directions with respect to any aspect of this SISP including, but not limited to, the continuation of the SISP or with respect to the discharge of its powers and duties hereunder.

Additional Terms

35. In addition to any other requirement of the SISP:

    (a) The Aleafia Group and the Monitor, as applicable, will at all times prior to the selection of a Successful Bid use commercially reasonable efforts to facilitate a competitive bidding process in the SISP including, without limitation, by actively soliciting participation by all persons who would be customarily identified as potential bidders in a process of this kind or who may be reasonably proposed by any of the Aleafia Group' stakeholders as a potential bidder.

    (b) Any consent, approval or confirmation to be provided by the Stalking Horse Bidder, the DIP Lender, the Aleafia Group and/or the Monitor is ineffective unless provided in writing and any approval required pursuant to the terms hereof is in addition to,

and not in substitution for, any other approvals required by the CCAA or as otherwise required at law in order to implement a Successful Bid. For the avoidance of doubt, a consent, approval or confirmation provided by email will be deemed to have been provided in writing for the purposes of this paragraph.

(c) Prior to seeking Court approval for any transaction or bid contemplated by this SISP, the Monitor will provide a report to the Court on the SISP process, parts of which may be filed under seal, including in respect of any and all bids received.

36. This SISP does not, and will not be interpreted to create any contractual or legal relationship between the Aleafia Group and any other party, other than as specifically set forth in the NDA or any other definitive agreement executed.

37. Notwithstanding anything to the contrary herein, the Monitor shall have no liability whatsoever to any person or entity, including without limitation any Potential Bidder, Qualified Bidder, Binding Offer Bidder, Successful Bidder, Back-Up Bidder or any other creditor or stakeholder, or any Applicant, as a result of implementation or otherwise in connection with this SISP, except to the extent that any such liabilities result from the gross negligence or wilful misconduct of the Monitor, as determined by the Court, and all such persons or entities shall have no claim against the Monitor in respect of the SISP for any reason whatsoever.

38. Participants in the SISP are responsible for all costs, expenses and liabilities incurred by them in connection with the submission of any Binding Offer, due diligence activities, and any other negotiations or other actions whether or not they lead to the consummation of a transaction.

APPENDIX A

DEFINED TERMS

"**Ad Hoc Committee of Convertible Debentureholders**" means the ad hoc group of holders of Aleafia Health Inc.'s secured convertible debentures issued under the amended and restated debenture indenture providing for the issue of certain convertible debentures dated as of June 27, 2022 between Aleafia Health Inc. and Computershare Trust Company of Canada, as the trustee, as supplemented by: (i) the first supplemental indenture dated as of June 27, 2022 (providing for the issue of the 8.5% Series A Secured Convertible Debentures Due June 30, 2024); (ii) the second supplemental indenture dated as of June 27, 2022 (providing for the issue of the 8.5% Series B Secured Convertible Debentures Due June 30, 2026); and (iii) the third supplemental indenture dated as of June 27, 2022 (providing for the issue of 8.50% Series C Secured Debentures Due June 30, 2028).

"**Ad Hoc Steering Committee**" means the three member committee elected by the Ad Hoc Committee of Convertible Debentureholders to represent and advance the interests of the Ad Hoc Committee of Convertible Debentureholders.

"**Business Day**" means a day on which banks are open for business in Toronto but does not include a Saturday, Sunday or statutory holiday in the Province of Ontario.

"**DIP Lender**" means Red White & Bloom Brands Inc. and its successors and permitted assigns.

"**Grimsby Property**" means the lands and premises municipally known as 378 South Service Road, Grimsby, Ontario and legally described under PIN 46033-0368 (LT) as 1STLY: PT LT 1 CON 1 NORTH GRIMSBY DESIGNATED AS PT 2 30R13028 & PT 18 30R13499; 2NDLY PT LT A EAST GORE NORTH GRIMSBY DESIGNATED AS PTS 4, 5, 8, 9, 10 30R13028; S/T RO437966; SUBJECT TO AN EASEMENT IN GROSS OVER PART LOT A, EAST GORE, NORTH GRIMSBY, PART 4, 30R13028 AS IN NR529869; TOWN OF GRIMSBY and all personal property located on and therein other than inventory.

"**Retained Liabilities**" has the meaning given to it in the Stalking Horse Agreement.

APPENDIX "B"

The Monitor:

KSV Restructuring Inc.
150 King Street West, Suite 2308
Toronto, ON M5H 1J9

Attention: Noah Goldstein and Eli Brenner

Email: ngoldstein@ksvadvisory.com / ebrenner@ksvadvisory.com

with copies to:

Osler, Hoskin & Harcourt LLP
100 King Street West
1 First Canadian Place
Suite 6200, P.O. Box 50
Toronto, ON M5X 1B8

Attention: Marc Wasserman and Martino Calvaruso

Email: mwasserman@osler.com / mcalvaruso@osler.com

The Applicants

Aleafia Group
c/o Aird & Berlis LLP
Brookfield Place, 181 Bay St. #1800
Toronto, ON M5J 2T9

Attention: Kyle Plunkett and Mel Cole

Email: kplunkett@airdberlis.com / mcole@airdberslis.com

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 ALEAFIA HEALTH INC. et al.

Applicants

Court File No. CV-23-00703350-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

ORDER
(Re: SISP Approval)

AIRD & BERLIS LLP
Brookfield Place
181 Bay Street
Suite 1800
Toronto, ON M5J 2T9

Kyle Plunkett (LSO# 61044N)
Miranda Spence (LSO# 60621M)
Tamie Dolny (LSO# 77958U)
Samantha Hans (LSO# 84737H)

Tel: 416.863.1500
Fax: 416.863.1515

Lawyers for the Applicants

Order

Rule 9.1

Clerk's Stamp
CLERK OF THE COURT
FILED
NOV 18 2025
JUDICIAL CENTRE
OF CALGARY

COURT FILE NO.:	2501-18462
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, as amended

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANACOL ENERGY LTD., 2654044 ALBERTA LTD., CANACOL ENERGY ULC, 2498003 ALBERTA ULC, CANTANA ENERGY GMBH, CNE OIL & GAS S.R.L, CANACOL ENERGY COLOMBIA S.A.S., SHONA HOLDING GMBH, CNE ENERGY S.A.S., and CNE OIL & GAS S.A.S

I hereby certify this to be a true copy of the original Order
Dated this 18 day of Nov/25
for Clerk of the Court

APPLICANTS(S)	CANACOL ENERGY LTD., 2654044 ALBERTA LTD., CANACOL ENERGY ULC, 2498003 ALBERTA ULC, CANTANA ENERGY GMBH, CNE OIL & GAS S.R.L, CANACOL ENERGY COLOMBIA S.A.S., SHONA HOLDING GMBH, CNE ENERGY S.A.S., and CNE OIL & GAS S.A.S.
DOCUMENT	**CCAA INITIAL ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Gowling WLG (Canada) LLP 1600, 421 – 7th Avenue S.W. Calgary, AB T2P 4K9 Telephone (403) 298-1946 / (416) 862-3509 / (403) 298-1976 Facsimile (403) 263-9193 **Attention: Clifton Prophet / Sam Gabor / Katherine Yurkovich** Email: clifton.prophet@gowlingwlg.com / sam.gabor@gowlingwlg.com / kate.yurkovich@gowlingwlg.com File No. G10088627

DATE ON WHICH ORDER WAS PRONOUNCED:	November 18, 2025
LOCATION AT WHICH ORDER WAS MADE:	Calgary Courts Centre
NAME OF JUSTICE WHO MADE THIS ORDER:	The Honourable Justice B. B. Johnston

UPON the application of Canacol Energy Ltd., 2654044 Alberta Ltd., Canacol Energy ULC, 2498003 Alberta ULC, Cantana Energy GMBH, CNE Oil & Gas S.R.L, Canacol Energy Colombia S.A.S., Shona Holding GMBH, CNE Energy S.A.S., and CNE Oil & Gas S.A.S. (collectively, the "**Applicants**"); **AND UPON** having read the Originating Application, the Affidavit of Jason Bednar sworn November 16, 2025 (the "**Bednar Affidavit**"); **AND UPON** reading the consent of KPMG Inc. ("**KPMG**") to act as Monitor; **AND UPON** being advised that this application is brought on without notice; **AND UPON** hearing counsel for the Applicants; **AND UPON** reading the Pre-Filling Report of KPMG dated November 17, 2025; **IT IS HEREBY ORDERED AND DECLARED THAT**:

SERVICE

1. Service of the Originating Application and the Bednar Affidavit in respect of this order is hereby abridged and deemed good and sufficient and otherwise dispensed with such that this application is properly returnable today.

REFERENCES TO DOLLARS

2. Unless otherwise stated, all references to dollars or $ herein are to Canadian dollars.

APPLICATION

3. Each of the Applicants is a company to which the *Companies' Creditors Arrangement Act* of Canada (the "**CCAA**") applies.

PLAN OF ARRANGEMENT

4. The Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

5. The Applicants shall:

(a) remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof and all assets, undertakings and rights that are owned, held, controlled, administered, registered, or recorded in the name of any branch/sucursal of an Applicant in Colombia (the "**Property**");

(b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property;

(c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order; and

(d) be entitled to continue to utilize the central cash management system currently in place as described in the Bednar Affidavit or replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicants of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicants, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

6. To the extent permitted by law, the Applicants shall be entitled but not required to make the following advances or payments of the following expenses, incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the

ordinary course of business and consistent with existing compensation policies and arrangements;

(b) the reasonable fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges, including for periods prior to the date of this Order;

(c) obligations and expenses owing for goods and services supplied to the Applicants prior to the date of this Order by vendors, suppliers and governmental authorities, deemed by the Applicants to be critical to the extent required to ensure ongoing supply of critical goods and services, as permitted by the Initial Order, subject to prior approval by the Monitor, up to a maximum amount of the Canadian dollar equivalent of USD$2,000,000;

(d) payments required to be made for royalties arising prior to the date of this Order to the Agencia Nacional de Hidrocarburos ("**ANH**") (the National Hydrocarbon Agency) or other governmental and/or regulatory authorities in Colombia to preserve and maintain exploration and production contracts and exploration and exploitation contracts of the Applicants, including, without limitation, royalties and work commitments required to be paid thereunder in the amount of US$1,657,000; and

~~(e) payments to or required by Promigas S.A. E.S.P. ("**Promigas**") in respect of arrangements between Promigas and the Applicants (as applicable) related to the transportation and delivery of natural gas;~~

7. Except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after this Order and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and

(b) payment for goods or services actually supplied to the Applicants following the date of this Order.

8. The Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority that are required to be deducted from employees' wages, including, without limitation, amounts in respect of:

(i) employment insurance,

(ii) Canada Pension Plan,

(iii) Quebec Pension Plan, and

(iv) income taxes,

but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after the date of this Order, unless otherwise ordered by the Court;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

(c) any amount payable to the Crown in Right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and that are attributable to or in respect of the carrying on of the Business by the Applicants.

9. Until such time as a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicants may pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the Applicants from time to time for the period commencing from and including the date of this Order ("**Rent**"), but shall not pay any rent in arrears.

10. Except as specifically permitted in this Order, the Applicants are hereby directed, until further order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of its creditors as of the date of this Order;

(b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and

(c) not to grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

11. The Applicants shall, subject to such requirements as are imposed by the CCAA have the right to:

(a) permanently or temporarily cease, downsize or shut down any portion of its business or operations and to dispose of redundant or non-material assets not exceeding the Canadian dollar equivalent of USD$250,000 in any one transaction or the Canadian dollar equivalent of USD$1,000,000 in the aggregate, provided that any sale that is either (i) in excess of the above thresholds, or (ii) in favour of a person related to the Applicants (within the meaning of section 36(5) of the CCAA), shall require authorization by this Court in accordance with section 36 of the CCAA;

(b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate on such terms as may be agreed upon between the Applicants and such employee, or failing such agreement, to deal with the consequences thereof in the Plan;

(c) disclaim or resiliate, in whole or in part, with the prior consent of the Monitor (as defined below) or further Order of the Court, their arrangements or agreements of any nature whatsoever with whomsoever, whether oral or written, as the Applicants deems appropriate, in accordance with section 32 of the CCAA; and

(d) pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "**Restructuring**").

12. The Applicants shall provide each of the relevant landlords with notice of the Applicants' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the

intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal. If the landlord disputes the Applicants' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicants, or by further order of this Court upon application by the Applicants on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicants disclaims or resiliates the lease governing such leased premises in accordance with section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute other than Rent payable for the notice period provided for in section 32(5) of the CCAA, and the disclaimer or resiliation of the lease shall be without prejudice to the Applicants' claim to the fixtures in dispute.

13. If a notice of disclaimer or resiliation is delivered pursuant to section 32 of the CCAA, then:

(a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice; and

(b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicants of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

14. Until and including November 28, 2025, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the applicable Applicant and Monitor or leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

15. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**"), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with the written consent of the applicable Applicant and the Monitor or leave of this Court, provided that nothing in this Order shall:

    (a) empower the Applicants to carry on any business that the Applicants are not lawfully entitled to carry on;

    (b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA;

    (c) prevent the filing of any registration to preserve or perfect a security interest;

    (d) prevent the registration of a claim for lien; or

    (e) exempt the Applicants from compliance with statutory or regulatory provisions relating to health, safety or the environment.

16. Nothing in this Order shall prevent any party from taking an action against the Applicants where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Applicants and Monitor at the first available opportunity.

NO INTERFERENCE WITH RIGHTS

17. During the Stay Period, no person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the applicable Applicant and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

18. During the Stay Period, all persons having:

(a) statutory or regulatory mandates for the supply of goods and/or services; or

(b) oral or written agreements or arrangements with the Applicants, including without limitation all computer software, communication and other data services, centralized banking services, cash management services, payroll and benefit services, insurance, transportation, services, utility or other services to the Business or the Applicants

are hereby restrained until further order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Applicants or exercising any other remedy provided under such agreements or arrangements. The Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with the payment practices of the Applicants, or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

19. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

20. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph 16 of this Order, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date of this Order and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

~~DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE~~

~~21. The Applicants shall indemnify its directors and officers against obligations and liabilities that they may incur as directors and or officers of the Applicants after the commencement of the within proceedings except to the extent that, with respect to any officer or director, the obligation was incurred as a result of the director's or officer's gross negligence or wilful misconduct.~~

~~22. The directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "Directors' Charge") on the Property, which charge shall not exceed an aggregate amount to the Canadian dollar equivalent of USD$1,000,000, as security for the indemnity provided in paragraph 21 of this Order. The Directors' Charge shall have the priority set out in paragraphs 32 and 34 herein.~~

~~23. Notwithstanding any language in any applicable insurance policy to the contrary:~~

~~(a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge; and~~

~~(b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 21 of this Order.~~

APPOINTMENT OF MONITOR

21. 24. KPMG Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property, Business, and financial affairs and the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

22. 25. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements, Business and dealings with the Property;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein and immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the Applicants;

(c) advise the Applicants in its preparation of the Applicants' cash flow statements;

(d) advise the Applicants in its development of the Plan and any amendments to the Plan;

(e) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(f) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form and other financial documents of the Applicants to the extent that is necessary to adequately assess the Property, Business, and financial affairs of the Applicants or to perform its duties arising under this Order;

(g) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(h) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the Applicants and any other Person; and

(i) perform such other duties as are required by this Order or by this Court from time to time.

23. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintain possession or control of the Business or Property, or any part thereof. Nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management of any of the Property that might be environmentally contaminated, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal or waste or other contamination, provided however that this Order does not exempt the Monitor from any duty to report or make disclosure imposed by applicable environmental legislation or regulation. The Monitor shall not, as a result of this Order or anything done in

pursuance of the Monitor's duties and powers under this Order be deemed to be in possession of any of the Property within the meaning of any federal or provincial environmental legislation.

24. The Monitor shall provide any creditor of the Applicants with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants are confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

25. In addition to the rights and protections afforded the Monitor under the CCAA or as an Officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

26. The Monitor, counsel to the Monitor, and counsel to the Applicants shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements related to these CCAA proceedings), in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants on a weekly basis and, in addition, the Applicants are hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Applicants, retainers in the amounts set out in their respective engagement letters or arrangements, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

27. The Monitor and its legal counsel shall pass their accounts from time to time.

28. The Monitor, counsel to the Monitor, if any, and the Applicants' counsel, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "~~**Administration**~~ **Charge**") on the Property, which charge shall not exceed an aggregate amount of the Canadian dollar equivalent of USD$1,000,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor and such counsel, both before and after the making of this Order

in respect of these proceedings. The ~~Administration~~ Charge shall have the priority set out in paragraphs ~~32~~ 29 and ~~34~~ 31 hereof.

VALIDITY AND PRIORITY OF CHARGES

~~32.~~ 29. The priorities of ~~the Directors' Charge and~~ the ~~Administration~~ Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of USD$1,000,000);

~~Second – Directors' Charge (to the maximum amount of USD$1,000,000).~~

~~33.~~ 30. The filing, registration or perfection of ~~the Directors' Charge or~~ the ~~Administration~~ Charge ~~(collectively, the "Charges")~~ shall not be required, and the Charge~~s~~ shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charge~~s~~ coming into existence, notwithstanding any such failure to file, register, record or perfect.

~~34.~~ 31. ~~Each of the Directors' Charge and~~ The ~~Administration~~ Charge (all as constituted and defined herein) shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charge~~s~~ shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, *save and except* (until further order of this Court) for the secured claims of Macquarie Bank Ltd. ("**Macquarie**") in respect only of and limited to the Property over which Macquarie has valid and enforceable secured claims.

~~35.~~ 32. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, ~~any of~~ the Charge~~s~~, unless the Applicants also obtains the prior written consent of the Monitor, and the beneficiaries of ~~the Directors' Charge and/or~~ the ~~Administration~~ Charge (as applicable), or further order of this Court.

~~36.~~ 33. ~~The Directors' Charge and~~ The ~~Administration~~ Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charge~~s~~ (~~collectively~~, the "**Chargees**") thereunder shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made in this Order;

(b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") that binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof shall create or be deemed to constitute a new breach by the Applicants of any Agreement to which it is a party;

(ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and

(iii) the payments made by the Applicants pursuant to this Order, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

ALLOCATION

34. 37. Any interested Person may apply to this Court on notice to any other party likely to be affected for an order to allocate the Charges amongst the various assets comprising the Property.

SERVICE AND NOTICE

35. 38. The Monitor shall (i) without delay, publish in the Globe and Mail (National Edition) a notice containing the information prescribed under the CCAA; (ii) within five (5) days after the date of this Order (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than $1,000 and (C) prepare a list showing the names and addresses of those

creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with section 23(1)(a) of the CCAA and the regulations made thereunder.

36. ~~39.~~ The Monitor shall establish a case website in respect of the within proceedings at the following URL 'https://kpmg.com/ca/canacol' (the "**Case Website**").

37. ~~40.~~ The Applicants and the Monitor are at liberty to serve this Order, any other materials and orders in these proceedings, and any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing. Any person that wishes to be served with any application and other materials in these proceedings must deliver to the Applicant and the Monitor by way of ordinary mail, courier, or electronic transmission, a request to be added to the service list (the "**Service List**") to be maintained by the Monitor.

38. ~~41.~~ Any party to these proceedings may serve any court materials in these proceedings by emailing a PDF or other electronic copy of such materials to counsel's email addresses as recorded on the Service List from time to time, and the Monitor shall post a copy of all prescribed materials on the Case Website.

39. ~~42.~~ An application in these proceedings is hereby scheduled to be heard before this Court on November 26, 2025 at 2:00 pm MST (the "**Comeback Hearing**"). The Applicants are entitled to serve any Court materials in connection with the Comeback Hearing on the Service List by courier, personal delivery, or electronic transmission in accordance with this Order.

FOREIGN REPRESENTATIVE

40. ~~43.~~ The Monitor, or any officer, employee or representative of the Monitor, is hereby authorized and empowered to act as the foreign representative (in such capacity the "**Foreign Representative**") in respect of these proceedings for the purpose of having these proceedings recognized and approved in a foreign jurisdiction. The Foreign Representative is hereby authorized to apply for foreign recognition and approval of these proceedings, as necessary, in any jurisdiction outside Canada, including, without limitation, the United States of America, the Republic of Colombia, the Republic of Panama and/or Switzerland.

GENERAL

41. ~~44.~~ The Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

42. ~~45.~~ Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Monitor will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence. The Monitor's reports shall be filed by the Court Clerk notwithstanding that they do not include an original signature.

43. ~~46.~~ Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager or a trustee in bankruptcy of the Applicants, the Business or the Property.

44. ~~47.~~ This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

45. ~~48.~~ Each of the Applicants and the Monitor be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Monitor is authorized and empowered to act as foreign representative in respect of the within proceeding for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

46. ~~49.~~ Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

47. 50. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Standard Time on the date of this Order.

Justice of the Court of King's Bench of Alberta

SUPERIOR COURT OF JUSTICE

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-23-00703350-00CL

DATE: **22-AUG-2023**

NO. ON LIST: 6

TITLE OF PROCEEDING: ALEAFIA HEALTH INC. et al.

BEFORE: JUSTICE CONWAY

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
Miranda Spence	Applicants	mspence@airdberlis.com
Samantha Hans	Applicants	shans@airdberlis.com

For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Sean Zweig & Josh Foster	Ad Hoc Committee of the Convertible Debentureholders	zweigs@bennettjones.com fosterj@bennettjones.com
Martino Calvaruso	Monitor	mcalvaruso@osler.com
Virginie Gauthier	Red White & Bloom Brands Inc.	virginie.gauthier@gowlingwlg.com
Saneea Tanvir	1260356 Ontario Limited and Royal Group Resources Ltd.	stanvir@mccarthy.ca

Noah Goldstein Murtaza Tallat	Observer, KSV Restructuring Inc. as Monitor	ngoldstein@ksvadvisory.com mtallat@ksvadvisory.com
Chris Burr	Board of Directors	chris.burr@blakes.com

ENDORSEMENT OF JUSTICE CONWAY:

[1] All defined terms used in this Endorsement shall, unless otherwise defined, have the meanings ascribed to them in the Factum of the Applicants dated August 17, 2023.

[2] The Applicants bring this motion for an order approving a SISP, approving the Stalking Horse Agreement, preserving the Licenses during the extended Stay of Proceedings, and extending the Stay Period to October 31, 2023. The Monitor supports all of the relief sought.

[3] As a result of negotiations between stakeholders – in particular the Ad Hoc Committee of Debentureholders – the motion is now proceeding on an unopposed basis. Counsel for the Applicants advised the court that changes have been made to how the SISP will be conducted to ensure that it proceeds in an independent manner, which has addressed the concerns of the Ad Hoc Committee, as confirmed by its counsel in court. Counsel for the board of directors and the secured creditor 1260356 Ontario Limited also voiced their support for the relief sought.

[4] I reviewed the terms of the Stalking Horse Agreement and the timelines in the SISP. I am satisfied that the SISP process, accompanied by the Stalking Horse Agreement, is warranted to adequately canvass the market for the benefit of all stakeholders and should be approved.

[5] With respect to the *status quo* order for the Licenses, the Monitor's counsel advised that CRA has expressly told the Monitor that it does not oppose the order. It did not attend or file any opposing materials. While Health Canada did not expressly advise the Monitor, it has been served and did not oppose. The *status quo* order is consistent with those granted in *Just Energy, Abbey Resources, Original Traders* and *Tantalus* and will mitigate the risk of destruction of value that revoking the Licenses would have on the business. I am granting the *status quo* order.

[6] The stay extension to October 31, 2023 is granted. The Applicants have acted and are continuing to act in good faith and with due diligence. The Updated Cash Flow Forecast indicates that the Applicants will have sufficient liquidity to fund their business during the extended period. The Monitor confirms that no creditor will be materially prejudiced by the extension.

[7] Order to go as signed by me and attached to this Endorsement. This order is effective from today's date and is enforceable without the need for entry and filing.



REINVENTING BANKRUPTCY LAW

A History of the *Companies' Creditors Arrangement Act*

REINVENTING BANKRUPTCY LAW

A History of the *Companies' Creditors Arrangement Act*

VIRGINIA TORRIE

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2
Corporate Restructuring as a Bondholder Remedy

Fortunately we have long followed the practice of the English conveyancers of including in trust deeds the so-called majority clauses, which permit bondholders' meetings to pass resolutions binding on all the bondholders, and both before and since the passing by Parliament of the Companies' Creditors Arrangement Act, important reorganizations have been satisfactorily brought about in our country in this way.[1]

Fred R. MacKelcan, K.C., *Canadian Bar Review*

1 Receivership Reorganizations

English Practices

Corporate restructuring initially evolved outside bankruptcy and insolvency law because legislators were suspicious of the potential abuses and frauds that could be perpetrated by debtors if business restructuring were permitted.[2] In nineteenth-century England, trust deeds were commonly used to facilitate the reorganization of large, important companies.[3] A "trust deed" is a financing instrument used by bondholders to secure bonds against assets of the company, and the business itself, through fixed and floating charges.[4] In 1887, Baron Bowen, a legal scholar and a Lord Justice in the Court of Appeal in England, wrote:

> The important insolvencies which had been brought about by pure mercantile misfortune were administered to a large extent under private trust deeds and voluntary compositions, which, since they might be disturbed by the caprice or malice of a single outstanding creditor, were always liable to be made the instruments of extortion.[5]

Even after adding reorganization provisions to English bankruptcy legislation in 1825, legislators made restructuring so difficult to complete that these statutes were little used.[6] So trust deeds were well-established instruments of restructuring in company law before effective reorganization provisions were added to English bankruptcy or insolvency statutes.

Measures for compromises between debtor companies and their creditors were added to English legislation as early as 1862. The *Companies Act, 1862* allowed businesses undergoing voluntary winding-up proceedings to make binding arrangements with their creditors, subject to three-fourths majority creditor approval and sanction by an extraordinary resolution of the company.[7] An "extraordinary" or "special" resolution is a decision that is passed by a high-threshold majority of shareholders (usually two-thirds or three-fourths).[8]

A few years later, the English parliament enacted the *Joint Stock Companies Arrangements Act, 1870* specifically "to facilitate compromises and arrangements between creditors and shareholders of Joint Stock and other Companies in Liquidation."[9] The 1870 act expanded the possibility of creditor-debtor arrangements set out in the *Companies Act, 1862* to include compromises between companies and their shareholders, and companies undergoing court-supervised winding-up, allowing the substitution of "a living company for a receivership and a liquidation."[10] These English statutes were early iterations of what is known as a "scheme of arrangement" or "scheme."

Six decades later, the CCAA continued the English approach of restructuring companies through a stand-alone statute. The substance and framing of the CCAA resembles that of the 1870 act, including its use of the clunky appellation "companies arrangement act."[11] In Canada, these restructuring plans were usually referred to as "arrangements," rather than "schemes," although both short forms are derived from the long form: "scheme of arrangement." Common law tests used in CCAAs – such as compliance with all statutory requirements and the fairness and reasonableness of the plan – were originally developed by English courts overseeing restructuring proceedings under the 1870 act.[12]

The addition of reorganization provisions to English companies legislation extended the application of trust-deed-like reorganization practices to all companies and their creditors. This avoided drafting inadequacies that could thwart restructuring attempts under a trust deed and helped standardize English reorganization practice. These provisions were passed down through companies legislation and were eventually enumerated in section 153 of the English *Companies Act,*

1929.[13] By the time the CCAA was before parliament, in the 1930s, reorganization under the *Companies Act, 1929* was the preferred means of restructuring in England.[14]

Canadian Approaches

The CCAA bill, enacted in 1933, imported the substance of section 153 of the English *Companies Act, 1929* to Canada. Charles H. Cahan (MP, Conservative) characterized the CCAA as basically an amendment to the federal *Companies Act*,[15] linking it to English reorganization practice[16]. Thus, company restructuring in the Anglo-Canadian context has a long history and was not initially an aspect of bankruptcy or insolvency law.[17]

In Canada, the division of legislative powers between the provinces and the federal government posed challenges to wholesale adoption of the English approach to company reorganization. Nevertheless, before the enactment of the CCAA, legal practices existed to effect company restructurings outside of insolvency law, borrowing from English techniques.[18]

Bondholder reorganizations, conducted through the provisions of a governing trust deed, were the most prevalent and important form of restructuring in the early twentieth century.[19] Modeled on English trust deeds, the Canadian versions usually provided that a stated majority of bondholders could compel the minority to accept a modification of their rights as bondholders, thereby avoiding the problem of holdout creditors.[20] From this early date bondholders used the private architecture of trust deeds to solve collective action problems concerning their rights and remedies as creditors.

The contemporary English academic Jennifer Payne notes that the statutory majority provisions of the *Joint Stock Companies Arrangement Act, 1870* were enacted in part as a response to problems with small creditors derailing compromises and arrangements.[21] Majority provisions were also useful where it was not practicable to track down all creditors for the purposes of voting on a restructuring plan. This could occur when, for instance, the bondholders were widely dispersed or because the company had an outstanding issue of bearer bonds.[22] "Bearer bonds" are unregistered debt instruments in respect of which no records are kept concerning ownership or transactions involving ownership. Although bearer bonds are largely of historical significance, these debt instruments sometimes formed part of the capital structure of Canadian companies, for example with Dome Petroleum, into the 1980s.[23]

Majority clauses gave rise to some concern that they could be used to the detriment of minority bondholders. In Canada and England, however, practitioners regarded these provisions as necessary to prevent obstructive tactics by minority bondholders and to facilitate action by bondholders as a class.[24] Where the majority of bondholders exercised its power unfairly or oppressively, the court could, at least theoretically, grant relief to the minority.[25]

Floating Charges

In England and Canada, the floating charge gave rise to bondholder reorganizations.[26] In late nineteenth- and early twentieth-century Canada, bond issues were the main form of long-term commercial financing,[27] and bondholder reorganizations were the primary method of business restructuring. As historian Michael Bliss notes, it was easier for Canadian corporations to obtain capital through bond issues as opposed to commercial bank loans.[28] The key elements of bondholder floating charges under Canadian trust deeds were the long-term nature of the credit arrangement and the charge on the business undertaking as part of the security for the loan. These features gave bondholders an interest in the long-term success of the company, which somewhat resembled that of shareholders. As a result, the presumptive response to debtor failure by bondholders during this period was to restructure the enterprise.

The origins of the English floating charge shed light on the restructuring incentive it created for Canadian and English bondholders. According to Robert Pennington, an English solicitor and Reader at the Law Society's School of Law, nineteenth-century English courts recognized that the floating charge was a means of obtaining capital for companies, which faced a scarcity of *equity* investment.[29] By their long-term nature and charge on the business undertaking of the company, bondholders' floating charges contemplated a situation in which there were inadequate assets to secure the loan – intrinsically a situation of under-security. The floating charge holder whose security included future profitability of the business undertaking took security, in part, against the anticipated success of the company – likely because this was the only security that the company had left to offer.

Since a significant portion of the security for long-term credit issued under a floating charge included the earning power of the business, the ongoing operation of the enterprise was the ultimate creditor remedy. In 1952, Canadian lawyer Fred MacKelcan wrote that the only cases in which bondholders would *not* attempt to restructure the debtor were

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Enshrining a Bondholder Remedy in Federal Legislation

It was never the intention under the Act, I am convinced, to … permit the holders of junior securities to put through a scheme … amounting to confiscation of the vested interest of the bondholders.[1]

Kingstone J., *In re Wellington Building Corporation Limited, 1934*

On 20 April 1933, Conservative Member of Parliament Charles H. Cahan introduced Bill No. 77 – an act to facilitate compromises and arrangements between companies and their creditors – in the House of Commons by stating:

> At the present time some legal method of making arrangements and compromises between creditors and companies is perhaps more necessary because of the prevailing commercial and industrial depression …[2]

In the Senate the Right Honourable Arthur Meighen (Conservative) stated that the Depression prompted the CCAA bill:

> The depression has brought almost innumerable companies to the pass where some such arrangement is necessary in the interest of the company itself, in the interest of its employees … and in the interest of the security holders …[3]

Since the CCAA bill was based on the single provision of the English *Companies Act* concerning reorganizations, it was quite brief.[4] It even lacked a preamble. The CCAA provided that an insolvent company or one of its creditors could make an application under the act to restructure both the unsecured and secured debt of the firm.[5] This initial application was made in the relevant court in the province or territory in

question.[6] The act could be conjointly applied with the relevant companies legislation to restructure equity holdings in the debtor company.[7] Upon the application by an interested party in respect of a company that had filed under the CCAA, the court could stay all claims and proceedings against the debtor, including those under the *Bankruptcy Act* and the WUA.[8] It is not clear to what extent parties relied on a broad or general stay of proceedings, which became the common practice in the 1980s and 1990s. Historical documents suggest that court involvement was minimal and served as judicial rubber stamp for essentially private arrangements worked out under the statute.[9] The CCAA required the support of a majority of a company's secured and unsecured creditors, which were divided into classes based on the similarity of their claims. The act required the support of three-fourths of each class of creditors, present and voting, before a plan could be put before the court for consideration.[10] If the plan was "fair and reasonable," the court would sanction the plan for implementation.

Debate on the new bill was limited, taking up roughly six pages of Hansard, and the bill had the support of both the Conservative and Liberal parties.[11] No figures or statistics on bankruptcy or business failure were cited. Rather, it appears there was a tacit understanding of the seriousness of the Depression as well as circumstances in struggling industries, such as pulp and paper. Bankruptcy and liquidation statistics for Dominion companies compiled by the Secretary of State indicate that business failure rates were very high in this period, as illustrated in appendices 1 and 2 – a fact which parliamentarians were likely aware of, and which came out in debates on other bills from that period. The lack of discussion in parliament can also be explained by the fact that the CCAA essentially harmonized existing practices and legislation to the extent possible under the Canadian constitution.

1 Interest Groups

Politicians

The personal interests of parliamentarians may have helped prompt the reform of business reorganization practices and thus garner support for the CCAA bill. For instance, Senator Meighen (Conservative) personally held a considerable number of bonds in Ontario Power Service (OPC), a subsidiary of Abitibi.[12] When Abitibi and OPC defaulted in 1932, Meighen and other financiers successfully appealed for government intervention when their bonds lost over two-thirds of their face value, without disclosing their interests in the distressed companies – information that

only came out later.[13] Additionally, Prime Minister Richard B. Bennett (Conservative) had already established a reputation as a "millionaire businessman" when he was elected Prime Minister in 1930, so he too may have held some of the affected bonds.[14] The personal interests of parliamentarians might help explain the multi-partisan support for the CCAA bill and might account for the limited discussion recorded in the debates in the House of Commons and Senate.

Prime Minister Bennett's experiences and ideology also help shed light on the policy behind the CCAA as an insolvency statute that promoted financial interests. He possessed a driving ambition for success, and as a partner in a Calgary law firm in 1897 he represented many corporate clients, including railroads, retail businesses, banks, loan and insurance companies, as well as farmers and ranchers.[15] This law partnership was dissolved after twenty-five years, and then Bennett became a founding partner in a new firm, now known as Bennett Jones LLP.[16] He also served as president of the Canadian Bar Association from 1929 to 1930, the years immediately preceding his election as prime minister of Canada.[17] As a lawyer, businessman, and politician, Bennett was a strong advocate for large corporations and financial firms, and he possessed a vision of promoting capital expansion and development in Canada.[18] This experience and ideology fit well with the underlying purposes of the CCAA.

Bondholders

The major beneficiaries of the CCAA were large bondholding interests – namely, life insurance companies and trust and loan companies.[19] These were essentially the same financial interests that benefitted from the *Farmers' Creditors Arrangement Act* (FCAA), which provided a similar insolvency law mechanism for restructuring secured farm debt.[20] Yet, significantly, this same interest group derided the provincial debt adjustment legislation, enacted by Alberta's Social Credit government, as fundamentally anti-capitalist.[21]

The fact that large financial interests supported the CCAA and FCAA indicates that the federal legislation was different: It advanced the interests of this group in ways that the Social Credit legislation did not. The provincial legislation concerning debt adjustment contemplated downward adjustments on capital owed to creditors as part of a fundamental shift in debtor-creditor relations, which would curtail the rights of creditors.[22] Large secured creditors did not support legislative efforts to diminish their rights as secured creditors; however, they were not altogether opposed to debt adjustment since moderate legislative

intervention could serve their long-term interests.[23] For example, in the 1930s, farming operations in the Prairies had been hit hard by the deep financial crisis, along with a long-lasting drought that came to be known as the "Dust Bowl."[24] To work through these challenging conditions, mortgage loan companies favoured adjustments to interest payments or time frames for repayments, which could be negotiated on a farmer-by-farmer basis.[25] These kinds of arrangements preserved the creditors' bargaining power and prevented the need to seize and sell illiquid assets, such as farmland, on a mass scale. Mortgage loan companies and other secured creditor interests, such as the Dominion Mortgage and Investment Association (DMIA), also supported "emergency" legislation like the FCAA, which was temporary in nature and allowed for case-by-case negotiation of debt.[26] Public funding of the administration of the FCAA also reduced adjustment costs for creditors and farmers alike.[27]

Interest groups representing secured creditors did not make submissions to parliament about the CCAA bill. Indeed, DMIA and other trade groups were not even directly consulted about the original bill. DMIA learned about the draft legislation through one of its members, and then circulated the details to other trade groups, including the Canadian Life Insurance Officers Association, the Canadian Manufacturers Association, and the Canadian Bankers Association.[28] However, parliament passed the CCAA bill so quickly that these trade groups did not have time to study the bill and make submissions.[29]

DMIA, which supported the new legislation, reported to its members that it thought it "inadvisable to make representations to the Government respecting the unconstitutionality of the [CCAA] Bill."[30] This group, representing life insurance companies, supported the objectives of the CCAA bill but thought it raised serious federal-provincial jurisdictional issues. DMIA expressed concern that defeat of the CCAA bill on jurisdictional grounds might close the door to further attempts to pass effective legislation, but welcomed the idea of consultations about the proposed legislation with the federal Department of Justice and the provinces, especially Ontario and Quebec.[31] For members of this interest group, the stakes were high – the fate of some life insurance companies depended on getting new creditors' arrangement legislation of this kind.

The CCAA extended, rather than limited, bondholder rights by facilitating company reorganization where bondholders' interests were better served by restructuring than by liquidation. In describing the bill to its members, DMIA highlighted language in the bill that stated its provisions were "in extension" to existing provisions, demonstrating to its members that the CCAA bill was intended to be a creditor remedy.[32]

In effect, the CCAA strengthened bondholder rights in certain ways by diminishing the already weak rights of unsecured creditors. CCAA applications could formally stay all proceedings against the debtor, including those under the *Bankruptcy Act.* Unsecured creditors, who already had very weak rights vis-à-vis bondholders, had no method of enforcing their claims once the CCAA was invoked. Even then, the extent of remedies for unsecured creditors under the CCAA was limited to the right to vote on a plan – if a plan was proposed with respect to unsecured claims.

The CCAA did not provide for the appointment of an official such as a bankruptcy trustee to oversee the process.[33] In its brevity, the act provided almost no guidance on the administration of proceedings under the statute, aside from a few requirements concerning meetings and creditor voting.[34] This contrasted with the more rules-based restructuring procedures in the US *Bankruptcy Act*, which similarly was enacted during the Great Depression and adopted the practice of American equity receivership reorganizations into bankruptcy law.[35] In Canada, the lack of guidance can be explained by the act's function as an extension of bondholder remedies; a CCAA restructuring would be worked out under the legal architecture of receivership under a trust deed – something which was expressly allowed for by the fact that the act was "in extension, and not in limitation, of the provisions of any instrument now or hereafter governing the rights of creditors."[36] This was apparently so obvious at the time that it required no explanation.

The FCAA, by contrast, spelled out an administrative framework for farmer-creditor compromises,[37] suggesting that that act did something more novel in the Canadian context. Prior to 1935, there was no federal administrative regime for facilitating compromises on farm debt,[38] and thus it was necessary for parliament to establish procedures for debt adjustment under the FCAA. This was not necessary under the CCAA, since company reorganization was already the subject of a long body of English and Canadian case law by the 1930s. The CCAA merely added supplemental, harmonizing provisions to overcome specific difficulties encountered by bondholders in conducting company reorganizations.

The fact that the CCAA was justified as federal insolvency legislation is significant, although it led to confusion about the essential character of the statute, including the act's original purposes. The majority decision of the SCC in the 2010 *Century Services* case captures the conventional thinking on the CCAA:

> 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.[39]

> 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. 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. Insolvency could be so widely felt as to impact stakeholders other than creditors and employees.[40]

Contemporary scholars have inferred that the mention of employees when the CCAA bill was introduced in parliament demonstrates that parliamentarians had a broader public interest in mind when enacting the CCAA.[41] This is unlikely in view of the broader context of the act. Other than this sole remark in parliament, employees and public interest considerations are not mentioned in any of the CCAA materials from the 1930s located in the course of this study. The earliest mention of the public interest value of CCAA reorganizations appears to be in 1947, when Winslow Benson suggested that a bondholder reorganization may be "in the interest of the community, for the continuance of the enterprise concerns employees, suppliers, and the whole economy."[42] But he offers no evidence to support this view, which instead appears to be a throwaway line. In a *Canadian Bar Review* article published the same year, Stanley Edwards advocated that judges should proactively reshape CCAA law along these lines.[43] By contrast, the FCAA, which extended debt relief to distressed farmers, entailed extensive discussions – in parliament and the press – concerning public policy rationales for keeping farmers on their land.[44]

It is also difficult to reconcile the CCAA's purported policy goal of advancing the public interest through restructuring large, important firms with the fact that the act excluded from its scope the institutions that were arguably of the greatest national and public interest in the 1930s. Subsection 2(b) of the CCAA excluded banks, railway companies, telegraph companies, insurance companies, trust companies, and loan companies from the definition of "debtor company" for the purposes of the act.[45] Writing in 1932, bankruptcy lawyer Lewis Duncan noted that these were institutions that provided "essential services," and hence supervision of such private concerns was necessarily a "feature of the modern State."[46] Rather than leave the fate of these firms to receivership or business insolvency legislation,[47] their national and public importance warranted more direct government assistance in the face of insolvency.

4
Constitutional References and Changing Conceptions of Federalism, 1934–1937

It is believed that Parliament under the head of bankruptcy and insolvency has no power to legislate so as to enable secured creditors to be bound by the will of a majority in respect of the administration of their security.[1]

Harold E. Manning, *Fortnightly Law Journal*

In 1933, there was widespread doubt about whether the federal power to legislate on bankruptcy and insolvency could validly interfere with secured creditor rights.[2] This led to much uncertainty concerning the vires of the federal CCAA. In parliament, no objections were raised about the bill, and it passed into law with unanimous support. But this fact disguised the concern that existed about the act. While a few commentators spoke out against the constitutional validity of the CCAA, others who shared their views kept quiet. Over time, this silence obscured the constitutional controversy that the CCAA sparked in the legal community, as well as the way in which this statute shifted the boundaries between provincial and federal jurisdiction. The impetus to make changes to bankruptcy law is explained by the desperate need for restructuring legislation, the expediency of a federal approach, and the perceived risk that federal failure would jeopardize any future restructuring legislation – whether enacted by the provinces or parliament.

Parliamentarians knew that compulsorily binding secured claims under federal bankruptcy and insolvency law would likely provoke constitutional challenges, so they drafted the CCAA bill as tightly as possible to try to fit it within the federal lawmaking power. An early draft of the bill would have omitted any substantive provision affecting secured claims in favour of a section that would have harmonized the operation of the act with provincial legislation for adjusting secured

debts, such as the Ontario *Judicature Act*. Writing about this draft bill, one lawyer stated:

> In so far as property rights of secured creditors were concerned, the draft [CCAA] bill was prepared upon the view that such rights, being property of creditors duly conveyed to them and established under Provincial law, no *ex post facto* event … could deprive such property owners of their vested rights and those rights were not property of the debtor divisible amongst his creditors and were not subject to the legislative interference of Parliament under the head of Bankruptcy and Insolvency.[3]

The final version of the CCAA, however, provided for federal adjustment of both secured and unsecured claims.

In Canada, due to corporate law federalism, it was not possible for parliament to provide general restructuring legislation simply by adding a provision to corporate law, as England had done with the English *Companies Act, 1929*. This approach would only allow parliament to provide restructuring legislation for federal companies, leaving the restructurings of provincially incorporated companies, such as Abitibi Power and Paper, outside of federal jurisdiction. As a fallback position, however, the Attorney General for Canada argued that, at minimum, the CCAA was valid in respect of Dominion companies under parliament's company law jurisdiction.[4]

In the Depression years, several provinces enacted laws relating to debt adjustment for farmers or individuals, including Ontario, Alberta, Saskatchewan, and Manitoba.[5] Such piece-meal solutions were considered inadequate to address the widespread economic crisis. Furthermore, much of the provincial legislation favoured debtors at the expense of large, secured creditors, which concerned members of DMIA and similar associations.[6]

The Bennett government proceeded alone with its CCAA bill, just as it did with its social reform legislation.[7] The CCAA did not fully address the need for effective business restructuring law; it did not apply to technically solvent companies, and this attracted criticism.[8] But the act did provide a national law for restructuring both federally and provincially incorporated companies, provided the debtor company was insolvent. The coordinating provisions of the CCAA provided a solution to the problem of complete company reorganization by incorporating the relevant companies legislation governing shareholder restructurings, and allowing all restructurings to proceed in a single forum.

1 The Great Depression and Legislative Experiments

Developments in the 1920s and early 1930s provided commercial and economic impetus for a coordinated statutory framework that would overcome inadequate provisions in trust deeds and establish a mechanism for adjusting both secured and unsecured debt. Rising federalism alongside deteriorating economic conditions and the inadequacy of existing reorganization practices played important roles in mustering the political will to pass the CCAA and other Canadian New Deal legislation.

This section situates the CCAA within this broader economic and political context, and illustrates the novelty and boldness of this new federal approach to corporate reorganization. Contrasting the outcome of the CCAA reference with those of the other New Deal references demonstrates the marked shift in the constitutional dividing line between federal and provincial jurisdiction over secured creditor rights. This expansion of the federal power would have significant ramifications for Canadian insolvency law over time, and helped prepare the way for the corporate restructuring developments of the 1980s and 1990s.

Canadian bankruptcy reform has tended to follow periods of recession or depression, and the 1930s reforms fit this pattern. An important difference, however, is that two of the significant bankruptcy and insolvency reforms of the 1930s were designed for the benefit of secured creditors – a first in Canadian history. The severity of the Great Depression prompted federal attempts to justify secured creditor remedies under insolvency law. In this context, the interests of bondholder interest groups, including life insurance companies and trust and loan companies, held particular sway with the Bennett government, leading to the proclamation of both the CCAA and FCAA.

For certain significant industries in Canada, economic conditions began to deteriorate before the Great Depression. The pulp and paper industry was in serious financial difficulty by the late 1920s, as epitomized by the Abitibi receivership. In the Canadian Dust Bowl, drought and falling prices for staple crops such as wheat led to the insolvencies of many farmers.[9] In the shipping industry, Canada Steamship Company faced severe financial difficulties, and eventually restructured under the CCAA.[10] The Depression also hit the Canadian steel industry particularly badly. By the 1930s, the two leading iron and steel firms – Algoma and Besco – were in receivership.[11] Stelco, the third leading iron and steel firm, fared relatively well through the Depression and did not reorganize.[12]

In an era where the term restructuring amounted to job losses in public parlance, the Bennett government intervened directly in such

notable insolvencies as Algoma Steel and the Canadian National Railroad (CNR).[13] Algoma was too important an employer in Northern Ontario, and the CNR too large an employer, to leave the fate of these firms up to their creditors to decide.[14] For instance, the large number of layoffs associated with the private restructuring efforts of the CNR led the Bennett government to subsidize and then nationalize that railroad, essentially as part of its public works program.[15]

The depth and length of the Depression drained municipal and provincial resources through relief payments, and underscored the inability of these governments to deal with a crisis of such magnitude without federal assistance.[16] Many Canadian municipalities defaulted on their debts, which caused further financial difficulties for trust, loan, and insurance companies, which were large investors in bonds issued by all levels of government.[17] British Columbia, Alberta, Saskatchewan, and Manitoba were all in danger of default by the mid-1930s.[18] This prompted a significant shift toward greater federalism in Canada, essentially because the Dominion was the only level of government that could keep up relief payments as the Depression dragged on.

Prime Minister Mackenzie King (Liberal) was in office at the time of the 1929 stock market crash, but he lost the 1930 election to R.B. Bennett (Conservative), largely due to a widespread popular perception that he did not do enough to respond to the deepening Depression.[19] King saw the early stages of the economic downturn as a natural swing in business cycles, which helps explain his inaction in the first months of the crisis.[20] In contrast, the incoming Bennett government intervened to assist the struggling provinces by enacting social legislation and channelling relief funds to the Prairie provinces in particular.[21]

Initially federal relief efforts were not a straightforward matter. JCPC decisions, construing the division of powers as "watertight" compartments, left little room for direct federal involvement.[22] Leading up to the 1930s, JCPC decisions also provided wide interpretations of "property and civil rights in the province," which expanded provincial legislative powers at the expense of federal jurisdiction.[23] With few exceptions the JCPC adhered to a narrow interpretation of the federal legislative power, holding that the Dominion could only legislate on those subjects specifically enumerated under section 91.[24] However, the Depression, New Deal legislation, and Canadian constitutional references striking down relief efforts prompted renewed interest in the interpretation of the division of powers and Canadian federalism.[25]

The prospect of political alternatives further contributed to rising federalism. The Social Credit government in Alberta, elected in 1935, enacted a series of laws aimed at regulating banking, finance, and currency, but the measures overstepped the province's legislative

powers. These statutes were either refused royal assent, disallowed, or struck down as unconstitutional.[26] In Saskatchewan, discontent with mounting farm debts leading up to the 1934 provincial election helped prompt the Bennett government to enact a federal farm debt adjustment statute – the FCAA – in order to stave off more radical provincial legislation.[27] The governments of both Bennett and King saw increased centralization as the best means of preventing the spread of anti-capitalist threats, which were generally regional in their base and focus.[28] Even more moderate political alternatives, such as the CCF and United Farmers, provided impetus for the Liberal and Conservative parties to find ways to address the deepening Depression in order to prevent electoral defeat.

Against this backdrop Bennett enacted a series of statutes, which were dubbed the Canadian "New Deal," to help address the growing crisis.[29] In his radio speeches introducing the legislation, Bennett asserted that the era of individualism was past and now government regulation and cooperation would carry the day.[30] Tellingly, his efforts attracted two main criticisms from the Liberal and CCF parties, as well as individual politicians, lawyers, and scholars: They overstepped the federal legislative power,[31] and their practical benefit as social legislation was minimal because they changed little about the status quo – in effect, they failed to live up to the promise of a New Deal.[32] The fact that commentators saw the New Deal legislation as both beyond the powers of the Dominion and ineffectual underscores the difficult constitutional balance Bennett tried to strike in order to provide Depression relief at the federal level.

The Liberal and CCF parties criticized the New Deal legislation for essentially supporting big business.[33] For example, it was in part the prospect of the financial failures of loan companies that prompted parliament to introduce the FCAA bill in 1934.[34] Although the preamble to the FCAA framed the act as a temporary Depression measure and emphasized its social policy purpose of helping farmers, these outcomes were ancillary to its purposes of staving off a more radical provincial alternative, and giving mortgagees a means of restructuring secured debt – something that was not possible under other federal legislation.[35] Concern for lenders was further reflected by the fact that the bill made no provision for "hopelessly insolvent farmers" – who could neither make a reasonable proposal under the act, nor discharge their debts in bankruptcy – despite the concerns raised about these farmers in the House of Commons.[36] When the FCAA was later upheld on constitutional reference, it made the more farmer-friendly provincial debt adjustment regimes ultra vires insofar as they applied to insolvent farmers.[37]

The CCAA was not officially part of the New Deal legislation and had little in the way of window dressing to support a view that it