

COURT FILE NUMBER	2501 – 06120
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
MATTER	IN THE MATTER OF THE <i>COMPANIES' CREDITORS ARRANGEMENT ACT</i> , RSC 1985, c C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SUNTERRA FOOD CORPORATION, TROCHU MEAT PROCESSORS LTD., SUNTERRA QUALITY FOOD MARKETS INC., SUNTERRA FARMS LTD., SUNWOLD FARMS LIMITED, SUNTERRA BEEF LTD., LARIAGRA FARMS LTD., SUNTERRA FARM ENTERPRISES LTD., SUNTERRA ENTERPRISES INC.
DOCUMENT	BOOK OF AUTHORITIES OF CERTUS DEVELOPMENTS INC.
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McLENNAN ROSS LLP #1900 Eau Claire Tower 600 – 3 rd Avenue SW Calgary, AB T2P 0G5 Lawyer: James P. Flanagan T: 403) 303-9102 F: (403) 303-1659 E: jamie.flanagan@mross.com File No.: 20261341

TAB 1

2012 ONCA 795
Ontario Court of Appeal

Aim Health Group Inc. v. 40 Finchgate Ltd. Partnership

2012 CarswellOnt 14463, 2012 ONCA 795, [2012] O.J. No. 5429, 113 O.R. (3d) 187, 223
A.C.W.S. (3d) 875, 26 R.P.R. (5th) 169, 300 O.A.C. 130

**AIM Health Group Inc. (formerly known as CPM Health Centre Inc.),
Applicant (Respondent) and 40 Finchgate Limited Partnership,
Respondent (Appellant)**

K. Feldman, E.E. Gillese, Gloria Epstein JJ.A.

Heard: June 22, 2012
Judgment: November 20, 2012
Docket: CA C54997

Proceedings: reversing *Aim Health Group Inc. v. 40 Finchgate Ltd. Partnership*  (2012),
2012 ONSC 169, 2012 CarswellOnt 65 (Ont. S.C.J.)

Counsel: V. Ross Morrison, Natalie Schernitzki, for Appellant
John Russo, Marc D. Whiteley, for Respondent

Headnote

Real property --- Landlord and tenant — Overholding — Right to recovery of possession

Tenant operated health clinic from landlord's premises pursuant to five-year lease expiring December 31, 2011 — Lease's overholding clause provided that if, at expiration of term, tenant remained in premises without further written agreement, there was no tacit renewal of lease, and tenancy became month to month and could be terminated by either party on one month's notice — Tenant told landlord it planned to relocate but later advised it would likely require lease extension due to delays associated with inspection of clinic — In December, tenant advised it likely needed further extension — On December 19, landlord told tenant it was terminating lease and was entering into lease with new tenant — Tenant did not tender increased rent on January 1, 2012 as specifically required by overholding clause — On January 1, landlord changed locks and removed tenant's property — Application judge granted tenant declaration that, among other things, lease became month to month tenancy after tenant remained in premises after lease term ended, so tenant was overholding tenant entitled to re-entry —

Landlord appealed — Appeal allowed — Tenant was in breach of obligation to deliver vacant possession at end of term of lease — Although overholding clause in lease did not say that month to month tenancy was created only on payment and acceptance of rent or on landlord's consent, clause did not give tenant unilateral option to remain in premises at end of lease — Overholding clauses were often put into commercial leases to avoid common-law rule that lease for more than one year became yearly tenancy where tenant holds over and landlord accepts rent — Both leading texts and longstanding judicial authority made it clear that, for overholding tenancy to arise, landlord had to agree to tenant remaining in premises, normally by accepting rent from tenant — Courts consistently read term requiring landlord's acceptance of rent into commercial overholding clauses, and it made commercial sense to give same interpretation to clauses that were well-understood to have particular legal meaning and consequence — There was no benefit for landlord to draft clause limiting and creating uncertainty as to whether it could exercise its right to obtain vacant possession at end of lease term — Properly interpreted, if tenant overholds with consent of landlord, landlord has effectively waived tenant's obligation to vacate — Without waiver, tenant had to comply with surrender clause — Landlord made it clear by notice to quit that it required premises at end of term — Having remained in possession without consent of landlord and having refused to deliver vacant possession at end of term, tenant became trespasser.

Real property --- Landlord and tenant — Term of lease — Termination — Miscellaneous

Tenant operated health clinic from landlord's premises pursuant to five-year lease expiring December 31, 2011 — Lease's overholding clause provided that if, at expiration of term, tenant remained in premises without further written agreement, there was no tacit renewal of lease, and tenancy became month to month and could be terminated by either party on one month's notice — Tenant told landlord it planned to relocate but later advised it would likely require lease extension due to delays associated with inspection of clinic — In December, tenant advised it likely needed further extension — On December 19, landlord told tenant it was terminating lease and was entering into lease with new tenant — Tenant did not tender increased rent on January 1, 2012 as specifically required by overholding clause — On January 1, landlord changed locks and removed tenant's property — Application judge granted tenant declaration that, among other things, lease became month to month tenancy after tenant remained in premises after lease term ended, so tenant was overholding tenant entitled to re-entry — Landlord appealed — Appeal allowed — Tenant was in breach of obligation to deliver vacant possession at end of term of lease — Although overholding clause in lease did not say that month to month tenancy was created only on payment and acceptance of rent or on landlord's consent, clause did not give tenant unilateral option to remain in premises at end of lease — Overholding clauses were often put into commercial leases to avoid common-law rule that lease for more than one year became yearly tenancy where tenant holds over and landlord accepts rent — Both leading texts and longstanding judicial authority made it clear that, for overholding tenancy to arise, landlord had to agree to tenant remaining in premises, normally by accepting rent from tenant — Courts consistently read term requiring landlord's acceptance of rent into commercial overholding clauses, and it made commercial sense to give same interpretation to

clauses that were well-understood to have particular legal meaning and consequence — There was no benefit for landlord to draft clause limiting and creating uncertainty as to whether it could exercise its right to obtain vacant possession at end of lease term — Properly interpreted, if tenant overholds with consent of landlord, landlord has effectively waived tenant's obligation to vacate — Without waiver, tenant had to comply with surrender clause — Landlord made it clear by notice to quit that it required premises at end of term — Having remained in possession without consent of landlord and having refused to deliver vacant possession at end of term, tenant became trespasser.

The tenant operated a pain management clinic on premises leased from the landlord pursuant to a five-year commercial lease commencing on January 1, 2007 and ending on December 31, 2011. The lease contained an overholding clause which provided that if, at the expiration of the lease's term, the tenant continued to occupy the premises without further written agreement, there was no tacit renewal of the lease, and the tenancy became a month to month lease which could be terminated by either party on one month's notice.

Prior to the lease's expiration, the tenant advised the landlord of its intention to relocate the clinic after the clinic passed a mandatory inspection process. In October 2011, the tenant advised the landlord that it would likely require an extension of the lease until mid or late February 2012 as a result of delays associated with the inspection. In December 2011, the tenant communicated that it would likely require a further extension. On December 19, 2011, the landlord purported to terminate the lease and advised the tenant that it was entering into a lease with a new tenant. The tenant did not tender increased rent to the landlord on January 1, 2012 as specifically required by the overholding clause. At the beginning of January, the landlord changed the locks and removed the tenant's possessions from the premises.

The tenant brought a successful application for a declaration that, among other things, the tenant was an overholding tenant pursuant to the overholding clause in the lease and therefore entitled to re-entry and the return of the tenant's property to the leased premises. The application judge found that the landlord was clearly aware that the tenant's relocation plans were delayed, that the tenant had set out reasons for the delay and the need for an extension, and that it was clear that the tenant would not be able to re-locate before December 2011. The application judge found that the lease became a month to month tenancy after the tenant remained in the premises after the lease term ended, that the landlord's correspondence requiring vacant premises was not proper notice under the lease, and that the landlord breached the lease by changing the locks and removing the tenant's property. The landlord appealed.

Held: The appeal was allowed.

Per Feldman J.A. (Epstein J.A. concurring): The tenant was in breach of its obligation to deliver vacant possession at the end of the lease term. The proper interpretation of the overholding clause was that the tenant could not unilaterally remain in the premises absent evidence of the landlord's consent. At common law, the tenant remaining in possession following the expiry of the lease gave rise to either tenancy at sufferance, tenancy at will, a deemed new periodic

tenancy (holdover tenancy), or trespass. To avoid the deemed creation of a yearly tenancy where a tenant under a lease for more than one year holds over and the landlord accepts rent, parties to commercial leases frequently inserted overholding clauses which provided that the tenancy created was month to month instead of yearly. If the tenant remained without paying rent, though, at common law, the tenant was there at the sufferance of the landlord and was subject to ejectment. Both leading texts and longstanding judicial authority made it clear that, for the overholding tenancy to arise, the landlord had to agree that the tenant could stay in the premises, which agreement was normally evidenced by the landlord's acceptance of rent. The courts' long-standing practice was to consistently read a term requiring the landlord's acceptance of rent into commercial overholding clauses, and it made commercial sense to interpret this clause the same way. There was no benefit for the landlord to draft a clause limiting its right to obtain vacant possession at the end of the lease term and to create uncertainty for itself as to whether or not it was going to receive vacant possession as required by the lease. Clauses that were well-understood to have a particular legal meaning and consequence should be interpreted consistently so as to foster certainty and predictability in the law and give full effect to the clause in the lease requiring the tenant to deliver vacant possession at the expiration of the lease. This overholding clause did not extend the lease but gave rise to a new month to month tenancy. A landlord who consents to the tenant overholding effectively waives the tenant's obligation to vacate but, without such waiver, the tenant must comply with surrender clause. The landlord made it clear by its notice to quit that it required the premises at the end of term. By remaining in possession without the landlord's consent, the tenant became a trespasser.

Per Gillese J.A. (dissenting): I would dismiss the landlord's appeal. The application judge correctly concluded that the overholding clause of the lease governed the situation when, on January 1, 2012, the tenant remained in occupation of the leased premises. Having found that the overholding clause applied, its terms governed. The tenant was in lawful occupation on January 1 on the basis of a month to month tenancy. When the parties entered into the lease, they agreed, through the overholding clause, on their respective rights and obligations in the event that the tenant remained in occupation after the expiration of the initial term and without the benefit of a further written agreement. They agreed that the tenant's occupation would be a month to month tenancy, that the tenancy might be terminated by either party on one month's notice, and that the tenant would pay rent at an increased rate. There was no reason not to enforce the terms of the parties' agreement. If the landlord's consent was to be a necessary precondition to the tenant's remaining in occupation, it should have been included, but it was not. This interpretation of the overholding clause did not render two other clauses in the lease meaningless. Giving effect to the overholding clause according to its terms did not bring about a commercially unrealistic result or give the tenant the power to unilaterally convert the lease into a month to month tenancy on the expiration of the initial term. The overholding clause was not only to the tenant's benefit as it gave the landlord increased rent. Finally, the overholding clause did not expose the landlord to a lengthy month to month tenancy as the tenancy could be brought to an end by either party on one month's notice. The overholding clause "pre-authorized" the tenant's continued occupation after the expiration of initial term and constituted the landlord's

permission that the tenant remain in occupation.

Table of Authorities

Cases considered by *E.E. Gillese J.A.* (dissenting):

BG Checo International Ltd. v. British Columbia Hydro p; Power Authority  (1993), 1993 CarswellBC 1254, [1993] 2 W.W.R. 321, [1993] 1 S.C.R. 12, 147 N.R. 81, 75 B.C.L.R. (2d) 145, 99 D.L.R. (4th) 577, 20 B.C.A.C. 241, 35 W.A.C. 241, 14 C.C.L.T. (2d) 233, 5 C.L.R. (2d) 173, 1993 CarswellBC 10 (S.C.C.) — referred to

Consolidated-Bathurst Export Ltd. c. Mutual Boiler p; Machinery Insurance Co.  (1979), (sub nom. *Exportations Consolidated-Bathurst Ltée c. Mutual Boiler p; Machinery Insurance Co.*) [1980] 1 S.C.R. 888, 112 D.L.R. (3d) 49, 1979 CarswellQue 157, 1979 CarswellQue 157F, 32 N.R. 488, [1980] I.L.R. 1-1176 (S.C.C.) — referred to

Imperial Oil Ltd. v. Robertson  (1959), 21 D.L.R. (2d) 535, [1959] O.R. 655, 1959 CarswellOnt 156 (Ont. C.A.) — distinguished

Medalist Holdings Ltd. v. General Electric Capital Equipment Finance Inc.  (1997), 1997 CarswellOnt 1696, 28 O.T.C. 210, 10 R.P.R. (3d) 111 (Ont. Gen. Div.) — referred to

Cases considered by *K. Feldman J.A.*:

Doe Dem. Burritt v. Dunham (1847), 4 U.C.Q.B. 99, 1847 CarswellOnt 62 (U.C. Q.B.) — referred to

Gasner v. Bellak Brothers Ltd.  (1945), [1945] O.R. 499, [1945] 3 D.L.R. 365, 1945 CarswellOnt 41 (Ont. C.A.) — referred to

Gibbens v. Co-operators Life Insurance Co.  (2009), (sub nom. *Co-operators Life Insurance Co. v. Gibbens*) [2009] 3 S.C.R. 605, 2009 CarswellBC 3402, 2009 CarswellBC 3403, 2009 SCC 59, 278 B.C.A.C. 283, 471 W.A.C. 283, 79 C.C.L.I. (4th) 1, [2010] 1 W.W.R. 575, 99 B.C.L.R. (4th) 1, (sub nom. *Co-operators Life Insurance Co. v. Gibbens*) [2010] I.L.R. I-4928, (sub nom. *Co-operators Life Insurance Company v. Gibbens*) 2009 C.E.B. p; P.G.R. 8370, 313 D.L.R. (4th) 513, 396 N.R. 165 (S.C.C.) — referred to

Imperial Oil Ltd. v. Robertson  (1959), 21 D.L.R. (2d) 535, [1959] O.R. 655, 1959 CarswellOnt 156 (Ont. C.A.) — considered

Lyons v. McVeity (1919), 46 O.L.R. 148, 49 D.L.R. 635, 1919 CarswellOnt 143 (Ont. C.A.) — referred to

Rafael v. Crystal  (1966), 58 D.L.R. (2d) 325, [1966] 2 O.R. 733, 1966 CarswellOnt 135 (Ont. H.C.) — considered

Statutes considered by *E.E. Gillese J.A.* (dissenting):

Limited Partnerships Act, R.S.O. 1990, c. L.16

Generally — referred to

***E.E. Gillese J.A.* (dissenting):**

1 This appeal raises interesting questions about the interpretation of a lease. In particular, the court must decide whether a lease gave the tenant the right to stay in occupation on the expiration of the initial term of the lease.

2 At first instance, the judge found in favour of the tenant and held that the landlord acted wrongfully when it locked out the tenant from the leased premises.

3 In my view, the decision below is correct. As a result, I would dismiss the landlord’s appeal.

Background

4 AIM Health Group Inc. (the “Tenant” or “AIM Health”) operated a chronic pain management facility (the “Clinic”) from leased premises located at unit 224A, 40 Finchgate Blvd. in Brampton, Ontario (the “Property”). William J. Danis was AIM Health’s Senior Vice President of Operations and Finance at the relevant times.

5 40 Finchgate Limited Partnership (the “Landlord”) is a limited partnership registered in the province of Ontario under the *Limited Partnerships Act*, R.S.O. 1990 c. L.16, as amended. It owns the Property and is the landlord. Susanne Gilbert represented the property manager that the Landlord had engaged to manage the Property.

6 The Landlord and AIM Health entered into a commercial lease agreement in February of 2007 (the “Lease”). The term of the Lease was for 5 years, beginning on January 1, 2007. The term was to expire on December 31, 2011, but there was an option to renew for an additional 5 years.

7 The Clinic was staffed with four physicians and seven full and part-time staff and technicians. It facilitated approximately 700 patient care visits per month.

8 In the spring of 2010, the Ontario government enacted legislation requiring certain medical facilities to comply with premise inspection standards published by the College of Physicians and Surgeons of Ontario (the “College”).

9 In February of 2011, the College’s inspection team attended at the leased premises to

conduct an inspection.

10 In the spring of 2011, Mr. Danis told Ms. Gilbert that AIM Health would not renew the Lease because the Clinic was going to relocate. However, he let her know that it was likely that the Clinic would need to stay in the leased premises for a few weeks or months after the term expired at the end of 2011. He was unable to be more definite about how long the Clinic would need to stay after the term ended because it was not clear when the College's inspection process would be completed. Before the Clinic could be relocated, it had to pass the College's inspection regime. By law, it could not operate from another location prior to receiving a passing designation.

11 In light of AIM Health's decision that it would not exercise the option to renew, the Landlord took steps to locate a new tenant.

12 Ms. Gilbert and Mr. Danis had a number of conversations in the spring, summer and fall of 2011 about the delays involved in relocating the Clinic and AIM Health's need for an extension at the end of the term.

13 In October of 2011, AIM Health advised the Landlord, through Ms. Gilbert, that it would likely need an extension of the Lease until mid or late February of 2012 because of delays with the inspection. AIM Health was given no indication that such an extension would be problematic.

14 In mid-December of 2011, Mr. Danis communicated again with Ms. Gilbert, making it clear that AIM Health had been further delayed in relocating due to the inspection process, and that it would require a longer extension of the Lease.

15 By letter dated December 19, 2011, the Landlord advised AIM Health that it required vacant possession of the leased premises by December 31, 2011, because it had secured a new tenant for January 1, 2012.

16 On December 21, 2011, the Landlord entered into a new lease agreement with a new tenant. The new lease was to begin on January 1, 2012, and run for a term of four years.

17 Also on December 21, 2011, AIM Health made a written request for a three-month extension of the Lease. The Landlord refused because it had secured the new tenant. While the Landlord offered AIM Health alternative space in the Property from which to run the Clinic, this was not a viable alternative due to the inspection regime.

18 The term of the Lease expired on December 31, 2011. AIM Health continued to occupy the leased premises.

19 On January 1, 2012, the Landlord changed the locks on the leased premises. On January 3 and 4, 2012, it removed the Tenant's property from them.

20 AIM Health brought an emergency application in which it sought, among other things, a declaration that it was entitled to re-enter the leased premises. It claimed to be an overholding tenant pursuant to s. 3.05 of the Lease. As such, it maintained that the Lease had become a month to month tenancy, which the Landlord had not given notice to terminate.

21 Section 3.05 is the overholding provision in the Lease. It sets out the conditions that apply when the Tenant stays in occupation after the expiration of the term of the Lease. It reads as follows:

3.05 Overholding

If, at the expiration of the initial Term or any subsequent Term or any subsequent renewal or extension thereof, the Tenant shall continue to occupy the Leased Premises without further written agreement, there shall be no tacit renewal of this Lease, and **the tenancy of the Tenant thereafter shall be from month to month only and may be terminated by either party on one month's notice.** Rent shall be payable in advance on the first day of each month equal to the sum of 150% of the monthly instalment of Basic Rent payable during the last year of the Term and one twelfth (1/12) of all Additional Rent charges herein provided for, determined in the same manner as if the Lease had been renewed and all terms and conditions of this Lease shall, so far as applicable, apply to such monthly tenancy.

[Emphasis added.]

22 AIM Health contended that in light of s. 3.05, the Landlord's entry into the premises and removal of its property was a breach of the terms of the Lease.

23 Section 7.08 of the Lease provides that the Tenant must surrender the leased premises at the expiration or sooner termination of the Lease. It reads as follows:

7.08 Surrender of Leased Premises

At the expiration or sooner termination of this Lease, the Tenant shall peaceably surrender and give up unto the Landlord vacant possession of the Leased Premises in the same condition and state of repair as the Tenant is required to maintain the Leased Premises throughout the Term and in accordance with its obligations in Section 7.07 hereof.

24 The Landlord argued that pursuant to s. 7.08 of the Lease, the Tenant was required to surrender the leased premises on December 31, 2011, when the term expired. As AIM Health

had not delivered up vacant possession by January 1, 2012, the Landlord said that it had no alternative but to retake possession so that it could comply with its obligation to the new tenant.

25 The application judge found in favour of the Tenant. He held, among other things, that the Tenant was validly overholding pursuant to s. 3.05 of the Lease. Consequently, he declared, the Tenant was entitled to re-enter the leased premises.

26 The Landlord appeals. The essence of its position is that s. 7.08 of the Lease applies, rather than s. 3.05, and accordingly, at the expiration of the term of the Lease, AIM Health was required to give up vacant possession of the leased premises.

27 By the time the appeal was heard, the live dispute between the parties had disappeared. The Landlord had given AIM Health one month's notice to vacate and AIM Health had done so. As well, AIM Health had tendered, and the Landlord had accepted, payment on account of AIM Health's overholding. The Tenant submitted that as the dispute between the parties was moot, the court should decline to hear the appeal.

28 The issues decided by this appeal are significant to many more than just these parties. Moreover, they are likely to arise again. For those reasons, the court acceded to the Landlord's request and exercised its discretion to hear and decide the appeal.

The Relevant Lease Provisions

29 The relevant Lease provisions are set out below.

1.01 Summary of Basic Terms

(g)	(i)	Term:	Five (5) Years, subject to Section 3.04.
	(ii)	Commencement Date:	January 1, 2007, subject to Section 3.04.
	(iii)	End of Term:	December 31, 2011, subject to Sections 3.03 and 3.04.

...

(m)	Special Provisions:	Set out in Schedule "D".
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...

2.01 Definitions

...

(q) "**Term**" means the period specified in Subsection 1.01(g)(i) and any additional period during which the Landlord shall accept rent as provided in this Lease.

...

3.03 Term

The Term shall commence on the Commencement Date, run for the period set out in Subsection 1.01(g)(i) and end on the date set out in Subsection 1.01(g)(iii) unless terminated earlier pursuant to this Lease.

...

3.05 Overholding

If, at the expiration of the initial Term or any subsequent Term or any subsequent renewal or extension thereof, the Tenant shall continue to occupy the Leased Premises without further written agreement, there shall be no tacit renewal of this Lease, and the tenancy of the Tenant thereafter shall be from month to month only and may be terminated by either party on one month's notice. Rent shall be payable in advance on the first day of each month equal to the sum of 150% of the monthly instalment of Basic Rent payable during the last year of the Term and one twelfth (1/12) of all Additional Rent charges herein provided for, determined in the same manner as if the Lease had been renewed and all terms and conditions of this Lease shall, so far as applicable, apply to such monthly tenancy.

...

7.08 Surrender of Leased Premises

At the expiration or sooner termination of this Lease, the Tenant shall peaceably surrender and give up unto the Landlord vacant possession of the Leased Premises in the same condition and state of repair as the Tenant is required to maintain the Leased Premises throughout the Term and in accordance with its obligations in Section 7.07 hereof.

...

13.04 Notices

Any notice, delivery, payment, or tender of money or documents to the Landlord hereunder may be delivered personally or sent by prepaid registered or certified mail to it addressed at the address set out in Section 1.01(a)(i) hereof, with copy to the Property Manager as the address set out in Section 1.01(a)(ii) hereof, or to such other address as the Landlord may in writing direct, and any such notice, delivery or payment so delivered or sent shall be deemed to have been well and sufficiently given or made and received upon delivery of the same or on the next business day following such mailing of same as the case may be.

Any notice, delivery, payment, or tender of money or documents to the Tenant hereunder may be delivered personally or sent by prepaid registered or certified mail to the Tenant at

the Leased Premises, or to such other address as the Tenant may in writing direct, and any such notice, delivery or payment so delivered or sent shall be deemed to have been well and sufficiently given, made and received upon delivery of the same on the second business day following such mailing of same, as the case may be.

...

Schedule “D”: Special Provisions

4. Option to Extend

Provided the Tenant is then in good standing under the terms and conditions of this Lease, the Tenant shall have the option to extend the Term of the lease for one (1) additional five (5) year period on the same terms and conditions except for the amount of Basic Rent, any rent-free period, leasehold improvements, allowance or other tenant inducements and except that there shall be no further option to extend. The Tenant may exercise this option to extend by giving the Landlord notice in writing at least six (6) months prior to the expiry of the Term herein. If the Tenant exercises this option to extend, the basic rent payable on a per square foot per annum basis during such extension period shall be negotiated between the Landlord and the Tenant....

The Issues

30 The Landlord submits that the application judge erred in:

1. finding that the Lease did not contain a renewal term;
2. concluding that the Landlord had to give notice in accordance with s. 13.04 of the Lease; and,
3. concluding that the Tenant was overholding pursuant to s. 3.05 of the Lease.

Analysis

Did the Lease contain a renewal term?

31 At para. 12 of his reasons, the application judge states that the Lease “does not contain a renewal term”. This is not correct. Section 4 of Schedule “D” to the Lease, set out above, is a renewal option pursuant to which the Tenant had the right to extend the term of the Lease for one additional five year period on the same terms and conditions (except for the amount of basic rent) by giving the Landlord notice in writing at least six months prior to the expiry of the term of the lease.

32 Despite para. 12, however, at para. 2(c) of the reasons the application judge recites that the Lease contained an option to renew for an additional five years.

33 In any event, if the application judge did erroneously find that there was no renewal option, the error is of no significance to the decision below. The presence or absence of the renewal clause does not materially bear on the interpretation of ss. 3.05 and 7.08 of the Lease, the provisions upon which the application was decided.

Did the Landlord have to give notice in accordance with s. 13.04 of the Lease?

34 In para. 17 of his reasons, the application judge states:

In the case at bar there was no further written agreement as set out in s. 3.05. Further, **the correspondence sent to Danis indicating that AIM must vacate the premises by December 31, 2011 is not proper notice in accordance with 13.04.**

[Emphasis added.]

35 The second sentence in para. 17, which has been emphasized (the “impugned statement”), is the basis for this ground of appeal.

36 The Landlord submits that the impugned statement is wrong in law. It says that the Tenant was obliged to comply with s. 7.08 without notice. Therefore, contrary to the impugned statement, it was not required to give notice to the Tenant, in accordance with s. 13.04, that it had to vacate the leased premises.

37 I agree with the Landlord that — absent a provision in the Lease to contrary — when the tenancy by the terms of the lease comes to an end, no notice to quit is necessary to terminate it: see, for example, *Imperial Oil Ltd. v. Robertson* , [1959] O.R. 655 (Ont. C.A.), at para. 4, a case considered more fully below.

38 However, while the impugned statement is somewhat ambiguous, I do not share the Landlord’s view as to its meaning. I do not understand the impugned statement as saying that the Landlord had to give notice, in accordance with s. 13.04, for the purposes of s. 7.08. Rather, I understand it to say that the Landlord had not given notice pursuant to s. 3.05, a notice that would have had to have complied with the requirements of s. 13.04 to be valid.

39 My view of the impugned sentence flows from a reading of the reasons as a whole, particularly paras. 13 to 17.

40 In para. 13 of his reasons, the application judge states that ss. 3.05 and 7.08 are the Lease provisions that dealt with what was to happen at the expiration of the initial term.

41 In para. 14, the application judge holds that s. 3.05 — the overholding provision — governs. He notes that although the Lease term had ended, AIM Health continued to occupy the leased premises and the Lease became a month to month tenancy that “[might] be terminated by either party on one month’s notice”.

42 In paras. 15 and 16, the application judge considers jurisprudence dealing with overholding clauses in lease agreements.

43 Paragraph 17 consists of two sentences. The first sentence expressly refers to s. 3.05, noting that there was no further written agreement between the parties. The second sentence is the impugned statement.

44 In short, after recognizing that either s. 3. 05 or s. 7.08 governed, the application judge held that s. 3. 05 applied. Thereafter, until the impugned statement, he deals either with the specific overholding provision in the Lease or the caselaw on overholding. In the first sentence of para. 17 (i.e. immediately before the impugned statement), the application judge again refers to s. 3. 05. Accordingly, when the application judge makes the impugned statement, I do not understand him to be referring to s. 7.08. Rather, it appears that he is referring to the notice required by s. 3.05. It will be recalled that s. 3.05 provides for termination of the month to month tenancy by one month’s notice by either party.

45 On this view of the impugned statement, the application judge was correct. At the time of the application, the Landlord had not given the notice required by s. 3.05. By its terms, s. 13.04 applies to any notice that the Landlord is to give to the Tenant. Therefore, for a notice given pursuant to s. 3.05 to be proper, it would have to comply with the requirements of s. 13.04.

46 However, even if I have misunderstood the impugned statement, given my interpretation of the lease provisions below, the result on appeal remains.

Was the Tenant overholding pursuant to s. 3.05 of the Lease?

47 The Landlord submits that the application judge wrongly interpreted the Lease when he concluded that AIM Health was lawfully overholding pursuant to s. 3.05 of the Lease. Its many arguments in support of this submission can be summarised as follows.

48 First, interpreting s. 3.05 as giving the Tenant the option to occupy after the end of the term is inconsistent with the renewal option provision and renders meaningless s. 7.08, which required the Tenant to give up vacant possession of the premises. A proper interpretation should give effect to all of the relevant Lease provisions.

49 Second, the application judge's interpretation is not commercially reasonable because it gave the Tenant the unilateral option to convert the Lease into a month to month tenancy on the expiration of the term, thereby frustrating the Landlord's efforts to move a new tenant into the lease premises. In order to interpret the Lease provisions in a way that avoids commercial absurdity, s. 3.05 must be interpreted as requiring the consent of the Landlord. Because the Landlord did not expressly or impliedly permit the Tenant to continue to occupy the leased premises after December 31, 2011, s. 3.05 does not apply. Therefore, s. 7.08 dictates that the Tenant was obliged to give up possession at the end of the term on December 31, 2011.

50 Third, overholding arises when a landlord accepts rent, after the termination of the lease, in circumstances that permit the inference to be drawn that a new tenancy has been created. Here, the Landlord gave two notices in December 2011 that the Tenant was required to deliver up vacant possession on the expiry of the term. As the Tenant remained in occupation after permission had been revoked and the Landlord had not accepted payment of rent, there could be no inference that a new tenancy had been created. Therefore, the Tenant's occupation amounted to trespass, not justified by s. 3.05.

51 Fourth, in  *Imperial Oil Ltd.*, there was no requirement for landlord consent in the overholding clause but this court held the clause was of no effect because the parties had not agreed to a new tenancy. Based on  *Imperial Oil Ltd.*, s. 3.05 should be of no effect as the Landlord had not agreed to a new tenancy.

52 As I will explain, I do not accept these arguments. In my view the application judge correctly concluded that s. 3.05 of the Lease governed the situation when, on January 1, 2012, the Tenant remained in occupation of the leased premises. Having found that s. 3.05 applied, its terms governed: the Tenant was in lawful occupation on January 1, 2012, on the basis of a month to month tenancy.

The Governing Principles

53 There is no dispute over the principles to be followed when interpreting the Lease provisions. Each provision is to be read in the context of the Lease as a whole and with regard to the surrounding circumstances. Where there are apparent inconsistencies between different provisions, the court should attempt to find an interpretation that can reasonably give meaning to each of the provisions in question. See *BG Checo International Ltd. v. British Columbia Hydro p; Power Authority* , [1993] 1 S.C.R. 12 (S.C.C.), at para. 9.

54 Moreover, as the Supreme Court has cautioned, the court should not interpret a contract so as to bring about an unrealistic result or one that would not be contemplated in the commercial atmosphere in which it was contracted: see *Consolidated-Bathurst Export Ltd. c. Mutual Boiler p; Machinery Insurance Co.*  (1979), 112 D.L.R. (3d) 49 (S.C.C.), at p. 901.

Interpreting the Relevant Lease Provisions

55 For ease of reference, ss. 3.05 and 7.08 of the Lease are set out again now.

3.05 Overholding

If, at the expiration of the initial Term or any subsequent Term or any subsequent renewal or extension thereof, the Tenant shall continue to occupy the Leased Premises without further written agreement, there shall be no tacit renewal of this Lease, and **the tenancy of the Tenant thereafter shall be from month to month only and may be terminated by either party on one month's notice.** Rent shall be payable in advance on the first day of each month equal to the sum of 150% of the monthly instalment of Basic Rent payable during the last year of the Term and one twelfth (1/12) of all Additional Rent charges herein provided for, determined in the same manner as if the Lease had been renewed and all terms and conditions of this Lease shall, so far as applicable, apply to such monthly tenancy.

[Emphasis added.]

7.08 Surrender of Leased Premises

At the expiration or sooner termination of this Lease, the Tenant shall peaceably surrender and give up unto the Landlord vacant possession of the Leased Premises in the same condition and state of repair as the Tenant is required to maintain the Leased Premises throughout the Term and in accordance with its obligations in Section 7.07 hereof.

56 By its terms, s. 3.05 applies if (i) at the expiration of the initial term, (ii) the Tenant continues to occupy the leased premises, (iii) without further written agreement.

57 That is precisely what occurred. The initial term expired on December 31, 2011, and the Tenant continued to occupy the leased premises without further written agreement.

58 At the time the parties entered into the Lease, by means of s. 3.05 they agreed on their respective rights and obligations in the event that the Tenant remained in occupation, after the expiration of the initial term and without the benefit of a further written agreement. They agreed that the Tenant's occupation would be a month to month tenancy, that the tenancy might be terminated by either party on one month's notice, and that the Tenant would pay rent at the increased sum of 150% of the monthly Basic Rent payable during the last year on the term, as well as one twelfth of all additional rent charges.

59 There is no reason not to enforce the terms of their agreement.

60 If the Landlord's consent was to be a necessary precondition to the Tenant's remaining

in occupation, it would have been a simple matter to have included that requirement. It was not.

61 Contrary to the Landlord's assertion, this interpretation of s. 3.05 does not render either s. 7.08 or the renewal option provision meaningless. These three provisions can be read harmoniously and with effect. They each apply in different circumstances. Had the Tenant wished to renew the Lease, s. 4 of Schedule "D" governed. Had the Tenant given up occupation at the end of the initial term, s. 7.08 governed. By its terms, the Tenant would have had to deliver up vacant possession of the leased premises in the same condition and state of repair as was required throughout the term. If, however, as was the case, the Tenant remained in occupation after the expiration of the initial term, s. 3.05 governed, unless the parties entered into a further written agreement in which case that further agreement would have governed.

62 This interpretation of the Lease provisions is reinforced by a close consideration of the wording of s. 7.08. Section 7.08 does not require AIM Health to give up occupation at the expiration of the initial term. Section 7.08 provides that "at the expiration or sooner termination of this Lease", the Tenant shall give up vacant possession. If the drafters of the lease had intended that s. 7.08 should apply at the expiration of the initial term they could easily have said so. Instead, by its terms, s. 7.08 applies to the expiration *of the Lease*. The Lease did not expire on December 31, 2011. Because the Tenant stayed in occupation pursuant to s. 3.05, the Lease remained operative. Thus, the Lease did not expire on December 31, 2011, although the initial term did.

63 Moreover, giving effect to s. 3.05 according to its terms does not bring about a commercially unrealistic result. Section 3.05 does give the Tenant the power to convert the Lease into a month to month tenancy on the expiration of the initial term, absent the parties coming to a further written agreement. However, three points need to be made in relation to this. First, given that the Landlord agreed to this provision at the time the parties entered into the Lease, it ought not now to complain about it. Second, s. 3.05 benefits both parties, not just the Tenant. The Landlord receives a benefit in the form of increased rent of 150% of the base rent. Third, s. 3.05 did not expose the Landlord to a lengthy month to month tenancy as it could be brought to an end by either party on one month's notice.

64 Thus, s. 3.05 appears to be a commercially realistic bargain for both parties. Under its terms, the Landlord would receive a significantly enhanced rent, and it faced exposure to only one additional month's occupation by the Tenant. The Tenant had the peace of mind of knowing it could stay in occupation at the end of the initial term, albeit at a significantly enhanced rent.

65 On a related point, the Landlord argued that once Aim Health advised that it would not exercise the renewal option, it had to find a new tenant to take up the leased premises at the end of the initial term. The findings of the application judge meet this point.

66 The application judge recognized that the Landlord relied on AIM Health's

representation that it would not exercise the renewal option. However, he found that the Landlord was aware that AIM Health was delayed in its plans to relocate and that at the time it entered into the new tenancy agreement, the Landlord knew that AIM Health could not relocate by December 31, 2011. Despite that, the Landlord went ahead and entered into a new lease which required occupancy on January 1, 2012.

67 While the Landlord was free to look for a new tenant, it had to honour its obligations under the Lease. Those obligations constrained the Landlord's ability when choosing the start date for the new tenancy. Given the findings of the application judge, it could have come as no surprise to the Landlord that the Tenant intended to stay in occupation past December 31, 2011.

68 The Landlord's third argument, it will be recalled, is that historically the purpose of an overholding clause was to protect the landlord in the event that a tenant continued to occupy the leased premises after the lease expired without a further written agreement. It is inserted for the benefit of the landlord. See *Medalist Holdings Ltd. v. General Electric Capital Equipment Finance Inc.* , [1997] O.J. No. 1995 (Ont. Gen. Div.), at para. 58. Consequently the Landlord argued, it was for the Tenant to prove that it remained in occupation only with the permission of the Landlord.

69 The answer to this argument is simple: s. 3.05. By its terms, s. 3.05 "preauthorized" the Tenant's continued occupation after the expiration of the initial term. That is, s. 3.05 amounts to the Landlord's permission that the Tenant could remain in occupation. There is nothing in the purpose of an overholding clause that would inhibit the parties from crafting their own terms of any continued occupation.

Imperial Oil Considered

70 The Landlord's fourth argument, it will be recalled, is based on  *Imperial Oil Ltd.*

71 In  *Imperial Oil Ltd.*, the parties entered into a lease dated July 1, 1958, for a term of 12 months to expire on June 30, 1959. The lease contained an overholding clause, which read as follows:

If the lessee shall hold over after the term hereby demised, the resulting tenancy shall be a tenancy from month to month and not a tenancy from year to year, subject to all the terms, conditions and agreements herein contained insofar as the same may be applicable to a tenancy from month to month.

72 In a notice dated May 28, 1959, the landlord advised the tenant that he was required to deliver up vacant possession on the expiry of the lease.

73 On June 28 and 30, 1959, representatives of the landlord attended at the leased premises and asked the tenant what he intended to do on the expiration of the lease. On the first occasion, the tenant would not disclose his position. On the second, he said that he would not be leaving the premises “peacefully”. At around that time, the tenant sent a cheque dated July 1, 1959, to the landlord, for the usual amount of the rent. On the face of the cheque were the words “July rent”.

74 Although instructions had been given that personnel of the landlord company were not to accept rent for the month of July from the tenant, the cheque was endorsed and deposited in the landlord’s bank. Shortly thereafter the landlord wrote to the tenant, advising him that a clerk had accepted the cheque through inadvertence and contrary to the landlord’s instructions. Included with the letter was a cheque for the amount of the July rent.

75 The tenant brought proceedings under the then-prevailing landlord and tenant legislation.

76 At first instance, the court found in favour of the landlord on the basis that it intended neither to accept rent for July nor create a new tenancy.

77 The tenant appealed to this court.

78 The question for the court was whether a new tenancy had been created by virtue of the landlord’s receipt of the July rent cheque.

79 Justice Morden, writing for the court, observed that by the terms of the lease, the tenancy came to an end on June 30, 1959, and that no notice to quit was required to terminate it. At para. 8, he explains that because the tenancy had ended, the burden was on the tenant to demonstrate that a new tenancy had been created. Acceptance of rent was “an important factor” in meeting that burden. However, as the landlord had made it “very plain” to the tenant that he was to vacate at the expiry of the lease, the court held that the tenant had failed to show that the July rent cheque had been accepted with the mutual intention that a new tenancy should be created at the expiration of the old tenancy. That is, the tenant had failed to discharge his burden of showing that a new tenancy had been created.

80 Accordingly, the court dismissed the tenant’s appeal.

81  *Imperial Oil Ltd.*, it can be seen, is very different from the present case.

82 In  *Imperial Oil Ltd.*, the question for the court was whether the landlord had agreed to a new tenancy by the inadvertent acceptance of a rent cheque after the expiration of the initial term of the lease. The focus in  *Imperial Oil Ltd.* was on the actions and conduct of the parties — questions of fact. The case turned on whether the tenant had, on the facts, met his

burden of demonstrating that a new tenancy was created. The result in *Imperial Oil Ltd.* was not based on the overholding provision in the lease, or any other provision for that matter. It was based on the conduct of the parties.

83 Unlike *Imperial Oil Ltd.*, this is not a case about whether a new tenancy had been created based on the conduct of the parties. This case turns on the proper interpretation of the Lease provisions, particularly ss. 3.05 and 7.08.

84 Accordingly, *Imperial Oil Ltd.* does not assist the Landlord. There is nothing in *Imperial Oil Ltd.* that speaks to the interpretation of s. 3.05 of the Lease, which is the central issue in this case.

Disposition

85 For these reasons, I would dismiss the appeal with costs to the respondent fixed at \$5,000, inclusive of disbursements and all applicable taxes.

K. Feldman J.A.:

86 Having had the benefit of reading the reasons of my colleague, Gillese J.A., I respectfully disagree with her on the legal issue of the meaning and effect of the overholding clause, and therefore, on the proper outcome of this appeal.

87 The factual circumstances are fully set out in the reasons of my colleague. The issue before the court is a question of law: the proper interpretation of the provisions of a lease. Neither party seeks to rely on extrinsic evidence.

88 The parties entered into a written lease of commercial premises, the appellant as landlord and the respondent as tenant. The term of the Lease was five years commencing on January 1, 2007 and ending on December 31, 2011: ss. 1.01(g)(i)-(iii). Section 3.03 of the Lease provides that the term runs for the five-year period from January 1, 2007 to December 31, 2011, unless terminated earlier under the Lease.

89 Section 7.08 is the “Surrender” clause. I quote it here for ease of reference:

7.08 Surrender of Leased Premises

At the expiration or sooner termination of this Lease, the Tenant shall peaceably surrender and give up unto the Landlord vacant possession of the Leased Premises in the same condition and state of repair as the Tenant is required to maintain the Leased Premises throughout the Term and in accordance with its obligations in Section 7.07 hereof.

90 Although this type of surrender clause is often found in leases, the coauthors of *Williams p; Rhodes Canadian Law of Landlord and Tenant*, loose-leaf (2012-Rel. 1), 6th ed., (Toronto: Carswell 1988), at para. 13:1:1, explain that this covenant is not necessary because there is an implied obligation on the tenant to deliver up the premises to the landlord upon the expiration or earlier termination of the tenancy:

The covenant often found in leases binding the lessee to yield up possession at the end of the term is not strictly necessary, since there is an implied obligation on the tenant not only to give up possession, but also to restore the absolute possession to the landlord: *Henderson v. Squire* (1869), L.R. 4 Q.B. 170; *Doe d. Miller v. Tiffany* (1848), 5 U.C.Q.B. 79 (C.A.); *Harrison v. Pinkney* (1881), 6 O.A.R. 225; *Hyatt v. Griffiths* (1851), 17 Q.B. 505, 117 E.R. 1375; *Toronto v. Ward* (1909), 18 O.L.R. 214 (C.A.).

91 The landlord gave the tenant written notice that it required the premises on January 1, 2012. The question that arises in this case is, what are the obligations of the parties when the tenant does not leave at the end of the lease term?

92 At common law, if a tenant remains in possession following the expiry of the term of the lease, there are four possible legal relationships that can then be created between the tenant and the landlord: 1) a tenancy at sufferance; 2) a tenancy at will; 3) a deemed new periodic tenancy, referred to as a holdover tenancy; and 4) a trespass.

93 A tenancy at sufferance arises when a person remains without consent after the person's right to be in possession has ended but where no demand for possession has been made: *Lyons v. McVeity* (1919), 46 O.L.R. 148 (Ont. C.A.), at pp. 150-51; *Gasner v. Bellak Brothers Ltd.*, [1945] O.R. 499 (Ont. C.A.), at p. 516. Once the former landlord demands possession, the former tenant is no longer there at sufferance and becomes a trespasser: see Richard Olson, *A Commercial Tenancy Handbook*, loose-leaf (2012-Rel. 1), (Toronto: Carswell, 2004), at pp. 12-1, 12-5.

94 In a tenancy at will, the tenant remains in possession with the consent of the landlord after the lease has expired, most often when they are negotiating a new lease. The tenancy at will lasts "until some other interest is created, either by express grant or by implication by the payment and acceptance of rent": *Halsbury's Laws of England*, vol. 27(1), 4th ed. (Reissue) (London, U.K.: Butterworths, 2006), at para. 201. A tenancy at will is determinable by either party indicating that it wishes the tenancy at will to end: see Olson, at p. 12-2.

95 Where a tenant remains in possession following the termination of a lease, or holds over, and where the landlord accepts rent from the tenant or otherwise consents, a new periodic tenancy arises at common law by implication on the same terms as the expired lease, subject to any evidence that the parties reached a different arrangement or understanding. If the original

lease term was less than one year, the new tenancy is deemed to be month to month, whereas if the original lease term was for more than one year, the new tenancy is deemed to be year to year. The payment and acceptance of rent is considered evidence of the parties' intent to enter into a new tenancy arrangement. Without agreeing on other terms, it would be on the same terms as the old lease: see Olson, at pp. 3-72.1, 12-3; *Halsbury's*, at para. 212.

96 In order to avoid the deemed creation of a yearly tenancy when the tenant holds over and the landlord accepts rent, the overholding clause is frequently inserted into commercial leases, providing that the tenancy that is created is a month to month tenancy: see Olson, at p. 3-72.2; Harvey M. Haber, *The Commercial Lease: A Practical Guide*, 4th ed. (Aurora: Canada Law Book, 2004), at p. 329. Such clauses often provide for higher rent than was paid during the original term of the lease.

97 But if the tenant remains without paying rent, then at common law, the tenant is there at the sufferance of the landlord and is subject to ejectment: see *Doe Dem. Burritt v. Dunham* (1847), 4 U.C.Q.B. 99 (U.C. Q.B.).

98 In this case, s. 3.05 of the Lease, titled the "Overholding" clause, reads as follows:

3.05 Overholding

If, at the expiration of the initial Term or any subsequent renewal or extension thereof, the Tenant shall continue to occupy the Leased Premises without further written agreement, there shall be no tacit renewal of this Lease, and the tenancy of the Tenant thereafter shall be from month to month only and may be terminated by either party on one month's notice. Rent shall be payable in advance on the first day of each month equal to the sum of 150% of the monthly instalment of Basic Rent payable during the last year of the Term and one twelfth (1/12) of all Additional Rent charges herein provided for, determined in the same manner as if the Lease had been renewed and all terms and conditions of this Lease shall, so far as applicable, apply to such monthly tenancy.

99 The tenant's position is that the overholding clause in this lease has a different meaning and effect than the common law meaning and effect of overholding, because it does not say that a month to month tenancy is created only on the payment and acceptance of rent or on the consent of the landlord. Because those words are not there, the tenant says that the meaning and effect of the clause is to give the tenant the unilateral option not to vacate the premises at the end of the lease, as required by the surrender clause, but to remain in possession, creating a new month to month tenancy without the landlord having accepted rent or otherwise given consent.

100 Two Ontario decisions have considered the operation and meaning of similarly-worded overholding clauses in two commercial leases, one a decision of the Court of Appeal and the other a decision of Gale C.J.H.C. when he was Chief Justice of the High Court

and before he became Chief Justice of Ontario. As in the present case, the overholding clause in these cases did not refer to the landlord's acceptance of rent. Nonetheless, the courts required the landlord to have accepted rent after the term of the lease had expired as a precondition for finding that a new tenancy had arisen.

101 In *Imperial Oil Ltd. v. Robertson* , [1959] O.R. 655 (Ont. C.A.), the overholding clause was quoted in the reasons for judgment as follows:

[I]f the lessee shall hold over after the term hereby demised, the resulting tenancy shall be a tenancy from month to month and not a tenancy from year to year, subject to all terms, conditions and agreements herein contained insofar as the same may be applicable to a tenancy from month to month.

102 The lease term was for one year, ending June 30, 1959. The landlord sent the tenant a notice dated May 28, 1959 advising that it required the tenant to deliver vacant possession upon expiry of the lease. Then on June 28th and June 30th, representatives of the landlord attended the premises to ask what the tenant intended to do on expiry of the lease. On the 30th, the tenant said that he would not be leaving peacefully on that date. The tenant also sent the landlord a rent cheque for \$275, which was the monthly rent under the lease. Although the landlord had instructed its personnel not to accept a rent cheque for July from the tenant, someone mistakenly accepted and deposited it. On July 2nd, the landlord served a demand for possession on the tenant. On July 8th, the landlord advised the tenant that the acceptance of the cheque was inadvertent and contrary to instructions and returned the cheque. The tenant responded in kind by returning the cheque. On July 10th, the landlord instituted the proceedings for possession of the premises.

103 The court referred to the service of the notice to quit and held that, the term having come to an end, no notice to quit was necessary to terminate the tenancy (at p. 658). The issue in the case, as described by both the County Court judge and the Court of Appeal, was whether the landlord had intended to accept the rent cheque from the tenant following the termination of the written lease, and whether the landlord intended to create a new tenancy. The payment and intentional acceptance of rent would be very strong evidence of an agreement to create a new tenancy. The Court of Appeal set out the law as follows, at p. 662:

[W]hen a lease has terminated either by its terms or by the operation of a valid notice to quit, the tenancy is at an end and if the tenant is thereafter to retain possession he must show that there was a new tenancy: *McIntyre v. Bird*, [1946] O.W.N. 905 (C.A.). The payment by him and the receipt by the landlord of the money equivalent of rent is a very important factor in determining whether there was, in fact, a new tenancy. If this were the only evidence on the issue, a Court or jury would be entitled to find a new tenancy. The evidence in the case at bar goes beyond that. By notices before and after the expiration of

the lease, by personal interviews prior to its expiration, the landlord, by its representatives, made it very plain to the tenant that he was to vacate at the expiry of the lease. The only contrary factor was the receipt and deposit of the tenant's cheque for the July rent. In the circumstances, which I will now review, the appellant in my view has failed to show that this money was received with the mutual intention that a new tenancy should be created upon the expiration of the old tenancy.

104 The overholding clause in  *Imperial Oil Ltd.*, like that in the present case, did not include language requiring the consent of the landlord or the acceptance of rent as a condition precedent to the creation of a month to month tenancy. However, the court did not suggest that that wording of the overholding clause gave the tenant the unilateral right to remain in possession after the termination of the lease without consent. Rather, the month to month tenancy would only arise if the landlord intentionally accepted rent. The only issue in the case was whether, in fact, that had occurred.

105  *Imperial Oil Ltd.* was a case that involved a similarly-worded overholding clause. The entire analysis of the Court of Appeal focused on whether there was evidence of the landlord's consent to the overholding.

106 In *Rafael v. Crystal* , [1966] 2 O.R. 733 (Ont. H.C.), the lease was for 28 months from August 1, 1961. Gale C.J.H.C. observed that the lease was on a standard printed form and contained what he described as "the usual term" which read:

AND it is hereby agreed between the parties hereto that should the Lessee remain in possession of the said premises after the determination of the term hereby granted, without other special agreement, it shall be as a monthly tenant only, at a rental of \$400 per month, payable in advance on the first day of every month, and subject in other respects to the terms of this lease.

107 Toward the end of the term, the parties were negotiating a renewal of the lease but had not reached any agreement by the end of the lease term. Gale C.J.H.C. stated: "when the plaintiff (tenant) *was allowed* to remain in possession following the expiration of the 28 months granted by the lease, he became an overholding monthly tenant pursuant to the printed clause which I have already quoted." [Emphasis added.]

108 Both  *Rafael* and  *Imperial Oil Ltd.* demonstrate an important point. An overholding clause that does not refer to the consent of the landlord has nevertheless been interpreted and applied to mean that it is only with the consent of the landlord that a month to month tenancy is created when the tenant overholds by remaining in possession following the termination of the lease.

109 Thus, both the leading texts on commercial leasing and longstanding judicial authority make it clear that for an overholding tenancy to arise, the landlord must agree that the tenant may stay in the premises, which agreement is normally evidenced by the landlord's acceptance of rent. The judicial authority consistently interprets the overholding clause in a commercial lease that does not refer to the landlord's acceptance of rent as effectively implying that term.

110 In my view, to interpret the overholding clause at issue in the present case in the same way that such a clause has always been interpreted and understood makes commercial sense for two reasons.

111 First, there is no benefit for the landlord to draft a clause that limits its right to obtain vacant possession at the end of the lease term and to create uncertainty for itself as to whether or not it is going to receive vacant possession as required by the lease.

112 Interpreting the overholding clause as giving the tenant the unilateral option to remain in the leased premises would make the clause commercially unreasonable. The landlord would then be in the position where it could not safely re-let the premises commencing on the day following the end of the lease term because it would not know whether the tenant would, in fact, vacate the premises at that time. Interpreted as my colleague suggests, the tenant need not tell the landlord whether it intends to stay or not. Therefore, at best, the landlord could only re-let the premises beginning one month following the end of the lease term. And if the tenant were to vacate at the end of the lease term, the landlord would be burdened with unrented premises for at least one month because of the uncertainty created by the tenant's unilateral right to stay on a month to month basis.

113 Moreover, the competing interpretation of the overholding clause affords little benefit or certainty to the tenant. If the tenant stays against the will of the landlord, then the landlord is entitled to immediately give the tenant one month's notice to terminate and the tenant must vacate the premises thereafter.

114 Second, as a matter of contractual interpretation of the intention of the parties, clauses that are well-understood to have a particular legal meaning and consequence, such as those found in standard form contracts including insurance contracts, should be consistently interpreted in order to foster certainty and predictability in the law: see for example, *Gibbens v. Co-operators Life Insurance Co.*, 2009 SCC 59, [2009] 3 S.C.R. 605 (S.C.C.), at para. 27; Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2d ed. (Markham: LexisNexis, 2012), at p. 111.

115 In addition to being an interpretation that accords with principles of commercial efficacy and good business sense, interpreting the overholding clause in s. 3.05 of the Lease in the same way that such a clause has always been interpreted and understood by courts and commentators gives full effect to the surrender clause in s. 7.08 of the Lease. The surrender

clause requires the tenant to deliver vacant possession at the expiration of the Lease. I disagree with my colleague's view that the Lease did not end on December 31, 2011 (the expiration of the lease term) and the tenant was not required to vacate the premises on that date because the tenant chose to remain under the overholding clause.

116 The overholding clause in s. 3.05 does not extend the Lease; it specifically provides not that the Lease continues, but that a new month to month tenancy arises. Properly interpreted, if the tenant overholds with the consent of the landlord, the landlord has effectively waived the tenant's obligation to vacate. Without such a waiver, the tenant is obliged to comply with the surrender clause.

Conclusion

117 In this case, the landlord made it clear by notice to quit that it required the premises at the end of the term. The tenant remained in possession without the consent of the landlord. The landlord did not create a new tenancy with the respondent tenant. Rather, it signed a new lease with another tenant. The tenant, having refused to deliver vacant possession at the end of the term, therefore became a trespasser.

118 I note that although the tenant refused to deliver vacant possession after the lease term ended, it did not tender the increased rent to the landlord on January 1, 2012 as specifically required by the clause that it subsequently purported to rely on.

119 In my view, the tenant was in breach of its obligation to deliver vacant possession of the premises at the end of the term of its lease. On a proper interpretation of the overholding clause, the tenant was not entitled to unilaterally remain in the premises under that clause absent evidence that the landlord consented.

120 I would therefore allow the appeal, set aside the order of the application judge, and dismiss the application with costs of the appeal to the landlord fixed at \$9,500 inclusive of disbursements and H.S.T.

Gloria Epstein J.A.:
I agree

Appeal allowed.

TAB 2

Given the express wording on point, the continued occupation and use of premises is rarely at issue in CCAA proceedings. However, there may be issues surrounding the terms of occupation (e.g., compliance versus non-compliance with the tenant's obligations under the lease or the activities conducted on the premises such as liquidation sales), which is considered in Chapter 5: The Binding Nature of Contracts.

A tenant's continued occupancy should always be founded on a legal basis to occupy, grounded in its rights under the lease and with consideration of any express statutory rights of occupation (of which there are none in the CCAA). A tenant's right of occupation is restricted by the term of the lease, and the granting of a right of occupation and sweeping prohibitions against interference with the debtor do not permit a tenant to remain in occupation beyond the expiration of the lease. Where an insolvent tenant has rights of renewal under a lease, there is no basis at law for suspending or extending by court order the time in which the tenant may exercise such rights of renewal. Some CCAA orders contain broad provisions tolling or extending time periods and limitations periods, but such provisions ought not to be interpreted as granting a right of occupation beyond the term of the lease or to create, suspend or extend the exercise of renewal rights under leases.

Paragraph 16 of the Ontario Model CCAA Order provides that no person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any renewal right. This language does not confer on an insolvent tenant a right to renew a lease where such renewal right has not been granted contractually by the landlord. There is no legal basis for compelling by court order an extension or renewal of a lease in the absence of a contractual entitlement to the same. A leasehold interest is more than a matter of contractual rights or entitlements; it is a tenure, an interest in land, and the court cannot order a new lease or an extension of an existing lease bestowed on a debtor simply because the debtor wishes it. Doing so would be to order the owner of land to part involuntarily with an interest in its property. Where a lease expires in accordance with its terms during CCAA proceedings, the landlord will be entitled to possession of the premises and the debtor will have no right to continue in occupation or use of the premises absent a consensual agreement with its landlord.

However, in one case in which the leases were about to expire due to a failure by the tenant to provide notice of renewal, and where the court found the leases to be essential to the insolvent tenant in CCAA, the court (i) permitted the landlord to pursue proceedings under provincial commercial tenancies legislation to recover possession, but (ii) stayed any order of possession granted to the landlord under such legislation for so long as the CCAA stay of proceedings continued.²²⁹

²²⁹ *Re Philip's Manufacturing Ltd.*, [1991] B.C.J. No. 2932, 9 C.B.R. (3d) 1 (B.C.S.C.).

Where a tenant in CCAA proceedings overholds and refuses to surrender possession of the premises upon the expiry of the lease, a landlord should be mindful, before exercising any remedies or taking any steps to evict the tenant, of the Initial CCAA Order's broad stay of proceedings and enforcement rights; it may be prudent to seek to lift the stay to permit such actions to be taken to avoid an allegation of being in breach of the Initial CCAA Order. In such circumstances, there is no basis for the courts to continue to restrain a landlord from recovering possession of the premises and ousting an overholding tenant whose interest in the leased premises has expired.

b. Rent Obligations During CCAA Proceedings

As with BIA proposal proceedings, it is rare for a tenant to assert a right of occupation without paying any rent, and the principal issues in contention are not the payment of rent but rather disputes as to the quantum, timing and other terms surrounding payment of rent.

The generic wording of paragraph 17 of the Ontario Model CCAA Order leaves open wiggle room for tenants to argue about what, in the context of rent, is a "normal price or charge" and further that payment is only required "in accordance with the normal payment practices of the Applicant". This ambiguity would be avoided with more careful wording that expressly requires that payment with respect to contractual obligations be made as and when required pursuant to such contracts unless and until such time as contracts are disclaimed or resiliated by the tenant. In any event, there is a foundational *quid pro quo* confirmed in CCAA proceedings: occupancy and use of premises post-CCAA commencement is preserved but is conditional upon payment for same. There is further confirmation of this *quid pro quo* in section 11.03 of the CCAA and in a provision of most CCAA orders, each of which mirrors section 65.1(5) of the BIA for proposal proceedings.

Section 11.01 of the CCAA provides:

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

- (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
- (b) requiring the further advance of money or credit.²³⁰

²³⁰ CCAA, s. 11.01. There is a limited exception for suppliers determined to be "critical suppliers", whereby they can be compelled to provide credit to the insolvent person subject to the protections and rights under the CCAA (see CCAA s. 11.4). To date, landlords in commercial tenancies cases have not been declared "critical suppliers" and an attempt to do

TAB 3

2011 ONSC 2215
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2011 CarswellOnt 2392, 2011 ONSC 2215, [2011] O.J. No. 1590, 200 A.C.W.S. (3d)
1023, 75 C.B.R. (5th) 156

**In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985,
C-36, as Amended**

And In the Matter of a Plan of Compromise or Arrangement of Canwest Global
Communications Corp. and Other Applicants

Pepall J.

Judgment: April 7, 2011
Docket: CV-09-8396-00CL

Counsel: Douglas J. Wray, Jesse B. Kugler for Applicant, Communications, Energy and
Paperworkers Union of Canada
David Byers, Maria Konyukhova for Monitor

Headnote

**Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial
application — Lifting of stay**

C Entities obtained initial order under Companies' Creditors Arrangement Act (CCAA) staying all proceedings against them — As part of CCAA proceedings, claims procedure order was granted which established procedure for identification and quantification of claims against C Entities — B was dismissed after having been employed by division of one of C Entities for 20 years — Union filed claims pursuant to claims procedure order in respect of certain outstanding grievances — Claim with respect to B's grievances was not resolved — Plan was implemented, at which time all operating assets of C Entities were transferred and C Entities ceased operations — Stay with respect to employer was terminated — Stay with respect to remaining C Entities was extended — Union brought motion for order lifting stay of proceedings in respect of B's grievances and directing that they be adjudicated in accordance with collective agreement — Motion granted — Generally speaking, grievances should be adjudicated along with other claims pursuant to provisions of claims procedure order within context of CCAA proceedings — Present case was unique — Employer emerged from CCAA protection and was currently

operating under different name — B was 20 year employee — Given stage of CCAA proceedings, fact that stay relating to employer had been lifted, and B's employment tenure, B ought to be given opportunity to pursue his claim for reinstatement rather than being compelled to have that entitlement monetized by claims officer if so ordered — No meaningful prejudice would ensue to any stakeholder — Balance of convenience and interests of justice favoured lifting stay to permit grievances to proceed through arbitration rather than before claims procedure officer.

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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

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

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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

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

Generally — referred to

s. 11 — considered

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

s. 33 [en. 2005, c. 47, s. 131] — referred to

s. 33(1) [en. 2005, c. 47, s. 131] — referred to

s. 33(8) [en. 2005, c. 47, s. 131] — referred to

Pepall J.:

Introduction

1 The Communications, Energy and Paperworkers Union of Canada ("CEP") requests an order lifting the stay of proceedings in respect of certain grievances and directing that they be adjudicated in accordance with the provisions of the applicable collective agreement. In the alternative, CEP requests an order amending the claims procedure order so as to permit the subject claim to be adjudicated in accordance with the provisions of the collective agreement.

Background Facts

2 On October 6, 2009, the CMI Entities obtained an initial order pursuant to the *CCAA* staying all proceedings and claims against them. Specifically, paragraphs 15 and 16 of that order stated:

NO PROCEEDINGS AGAINST THE CMI ENTITIES OR THE CMI PROPERTY

15. **THIS COURT ORDERS** that until and including November 5, 2009, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or

the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.

NO EXERCISE OF RIGHTS OR REMEDIES

16. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being “Persons” and each being a “Person”) against or in respect of the CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of claim for lien.

3 On October 14, 2009, as part of the CCAA proceedings, I granted a claims procedure order which established a claims procedure for the identification and quantification of claims against the CMI Entities. In that order, “Claim” is defined as any right or claim of any Person against one or more of the CMI Entities in existence on the Filing Date¹ (a “Prefiling Claim”) and any right or claim of any Person against one or more of the CMI Entities arising out of the restructuring on or after the Filing Date (a “Restructuring Claim”). Claims arising prior to certain dates had to be asserted within the claims procedure failing which they were forever extinguished and barred. Pursuant to the claims procedure order, subject to the discretion of the Court, claims of any person against one or more of the CMI Entities were to be determined by a claims officer who would determine the validity and amount of the disputed claim in accordance with the claims procedure order. The Honourable Ed Saunders, The Honourable Jack Ground and The Honourable Coulter Osborne were appointed as claims officers. Other persons could also be appointed by court order or on consent of the CMI Entities and the Monitor. This order was unopposed. It was amended on November 30, 2009 and again the motion was unopposed. As at October 29, 2010, over 1,800 claims asserted against the CMI Entities had been finally resolved in accordance with and pursuant to the claims procedure order.

4 On October 27, 2010, CEP was authorized to represent its current and former union members including pensioners employed or formerly employed by the CMI Entities to the extent, if any, that it was necessary to do so.

5 On the date of the initial order, CEP had a number of outstanding grievances. CEP filed claims pursuant to the claims procedure order in respect of those grievances. The claim that is the subject matter of this motion is the only claim filed by CEP that has not been resolved and therefore is the only claim filed by CEP that requires adjudication. There is at least one other claim in Western Canada that may require adjudication.

6 John Bradley had been employed for 20 years by Global Television, a division of Canwest Television Limited Partnership ("CTLTP"), one of the CMI Entities. Mr. Bradley is a member of CEP. On February 24, 2010, CTLTP suspended Mr. Bradley for alleged misconduct. On March 8, 2010, CEP filed a grievance relating to his suspension under the applicable collective agreement. On March 25, 2010, CTLTP terminated his employment. On March 26, 2010, CEP filed a grievance requesting full redress for Mr. Bradley's termination. This would include reinstatement to his employment. On June 23, 2010 a restructuring period claim was filed with respect to the Bradley grievances on the following basis:

The Union has filed this claim in order to preserve its rights. Filing this claim is without prejudice to the Union's ability to pursue all other remedies at its disposal to enforce its rights, including any other statutory remedies available. Notwithstanding that the Union has filed the present claim, the Union does not agree that this claim is subject to compromise pursuant [to the CCAA]². The Union reserves its right to make further submissions in this regard.

7 In spite of the parties' good faith attempts to resolve the Bradley grievances and the Bradley claim, no resolution was achieved.

8 The Plan was sanctioned on July 28, 2010 and implemented on October 27, 2010. At that time, all of the operating assets of the CMI Entities were transferred to the Plan Sponsor and the CMI Entities ceased operations. The CTLTP stay was also terminated. The stay with respect to the Remaining CMI Entities (as that term is defined in the Plan) was extended until May 5, 2011. Pursuant to an order dated September 27, 2010, following the Plan implementation date the Monitor shall be:

(a) empowered and authorized to exercise all of the rights and powers of the CMI Entities under the Claims Procedure Order, including, without limitation, revise, reject, accept, settle and/or refer for adjudication Claims (as defined in the Claims Procedure Order) all without (i) seeking or obtaining the consent of the CMI Entities, the Chief Restructuring Advisor or any other person, and (ii) consulting with the Chief

Restructuring Advisor in the CMI Entities; and

(b) take such further steps and seek such amendments to the Claims Procedure Order or additional orders as the Monitor considers necessary or appropriate in order to fully determine, resolve or deal with any Claims.

9 The Monitor has taken the position that if the Bradley matter is not resolved, the claim should be referred to a claims officer for determination. It is conceded that a claims officer would have no jurisdiction to reinstate Mr. Bradley to his employment.

10 CEP now requests an order lifting the stay of proceedings in respect of the Bradley grievances and directing that they be adjudicated in accordance with the provisions of the collective agreement. In the alternative, CEP requests an order amending the claims procedure order so as to permit the Bradley claim to be adjudicated in accordance with the provisions of the collective agreement.

11 For the purposes of this motion and as is obvious from the motion seeking to lift the stay, both CEP and the Monitor agree that the stay did catch the Bradley claim and that it is encompassed by the definition of claim found in the claims procedure order.

12 Since the commencement of the *CCAA* proceedings, CEP has only sought to lift the stay in respect of one other claim, that being a claim relating to a grievance filed by CEP on behalf of Vicky Anderson. The CMI Entities consented to lifting the stay in respect of Ms. Anderson's claim because at the date of the initial order, there had already been eight days of hearing before an arbitrator, all evidence had already been called, and only one further date was scheduled for final argument. Ultimately, the arbitrator ordered that Ms. Anderson be reinstated but made no order for compensation.

13 Pursuant to Article 12.3 of the applicable collective agreement, discharge grievances are to be heard by a single arbitrator. All other grievances are to be heard by a three person Board of Arbitration unless the parties consent to submit the grievance to a single arbitrator. The single arbitrator is to be selected within 10 days of the notice of referral to arbitration from a list of 5 people drawn by lot. An award is to be given within 30 days of the conclusion of the hearing. The list of arbitrators was negotiated and included in the collective agreement. The arbitrator has the power to reinstate with or without compensation.

14 The evidence before me suggests that adjudications of grievances under collective agreements are typically much more costly and time consuming than adjudications before a claims officer as the latter may determine claims in a summary manner and there is more control over scheduling. The Monitor takes the position that additional cost and delay would arise if the claims were adjudicated pursuant to the terms of the collective agreement rather than pursuant to

the terms of the claims procedure order.

Issues

15 Both parties agree that the following two issues are to be considered:

(a) Should this court lift the stay of proceedings in respect of the Bradley grievances and direct that the Bradley grievances be adjudicated in accordance with the provisions of the collective agreement?

(b) Should this court amend the claims procedure order so as to permit the Bradley claim to be adjudicated in accordance with the provisions of the collective agreement?

Positions of the Parties

16 In brief, dealing firstly with the stay, CEP submits that the balance of convenience favours pursuit of the grievances through arbitration. CEP is seeking to compel the employer to comply with fundamental obligations that flow from the collective agreement. This includes the appointment of an arbitrator on consent who has jurisdiction to award reinstatement if he or she determines that there was no just cause to terminate Mr. Bradley's employment. Requiring that the claim and the grievances be adjudicated in a manner that is inconsistent with the collective agreement would have the effect of depriving the grievor of some of the most fundamental rights under a collective agreement. Furthermore, permitting the grievances to proceed to arbitration would prejudice no one.

17 Alternatively, CEP submits that the claims procedure order ought to be amended. It is in conflict with the terms of the collective agreement. Pursuant to section 33 of the *CCAA*, the collective agreement remains in force during the *CCAA* proceedings. The claims procedure order must comply with the express requirements of the *CCAA*. Lastly, orders issued under the *CCAA* should not infringe upon the right to engage in associational activities which are protected by the *Charter of Rights and Freedoms*.

18 The Monitor opposes the relief requested. On the issue of the lifting of the stay, it submits that the *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. The stay of proceedings permits the *CCAA* to accomplish its legislative purpose and in particular enables continuance of the company seeking *CCAA* protection.

19 The lifting of a stay is discretionary. Mr. Bradley is no more prejudiced than any other creditor and the claims procedure established under the order has been uniformly applied. The claims officer has the power to recognize Mr. Bradley's right to reinstatement and monetize that

right. The efficacy of *CCAA* proceedings would be undermined if a debtor company was forced to participate in an arbitration outside the *CCAA* proceedings. This would place the resources of an insolvent *CCAA* debtor under strain. The Monitor submits that CEP has not satisfied the onus to demonstrate that the lifting of the stay is appropriate in this case.

20 As for the second issue, the Monitor submits that the claims procedure order should not be amended. Courts regularly affect employee rights arising from collective agreements during *CCAA* proceedings and recent amendments to the *CCAA* do not change the existing case law in this regard. Furthermore, amending the claims procedure order would undermine the purpose of the *CCAA*. Lastly, relying on the Supreme Court of Canada's statements in  *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*³, the claims procedure order does not interfere with freedom of association.

21 Following argument, I requested additional brief written submissions on certain issues and in particular, to what employment Mr. Bradley would be reinstated if so ordered. I have now received those submissions from both parties.

Discussion

1. Stay of Proceedings

22 The purpose of the *CCAA* has frequently been described but bears repetition. In  *Lehndorff General Partner Ltd., Re*⁴, Farley J. stated:

The *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both.

23 The stay provisions in the *CCAA* are discretionary and very broad. Section 11.02 provides that:

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

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding Up and Restructuring Act;

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

(c) prohibiting, until otherwise ordered by the court, the commencement of any

action, suit or proceeding against the company.

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

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

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

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

24 As the Court of Appeal noted in *Nortel Networks Corp., Re*⁵, the discretion provided in section 11 is the engine that drives this broad and flexible statutory scheme. The stay of proceedings in section 11 should be broadly construed to accomplish the legislative purpose of the *CCAA* and in particular to enable continuance of the company seeking *CCAA* protection:  *Lehndorff General Partner Ltd.*⁶.

25 Section 11 provides an insolvent company with breathing room and by doing so, preserves the status quo to assist the company in its restructuring or arrangement and prevents any particular stakeholder from obtaining an advantage over other stakeholders during the restructuring process. It is anticipated that one or more creditors may be prejudiced in favour of the collective whole. As stated in  *Lehndorff General Partner Ltd.*⁷:

The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the *CCAA* because this effect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the *CCAA* must be for the debtor and all of the creditors.

26 In *Canwest Global Communications Corp., Re*⁸, I had occasion to address the issue of lifting a stay in a *CCAA* proceeding. I referred to situations in which a court had lifted a stay as described by Paperny J. (as she then was) in *Canadian Airlines Corp., Re*.⁹ and by Professor McLaren in his book, "*Canadian Commercial Reorganization: Preventing Bankruptcy*"¹⁰. They included where:

a) a plan is likely to fail;

- b) the applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
- c) the applicant shows necessity for payment;
- d) the applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;
- e) it is necessary to permit the applicant to take steps to protect a right that could be lost by the passage of time;
- f) after the lapse of a significant period, the insolvent debtor is no closer to a proposal than at the commencement of the stay period;
- g) there is a real risk that a creditor's loan will become unsecured during the stay period;
- h) it is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period;
- i) it is in the interests of justice to do so.

27 The lifting of a stay is discretionary. As I wrote in *Canwest Global Communications Corp., Re*¹¹:

There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy", an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.

28 There appears to be no real issue that the grievances are caught by the stay of proceedings. In *Smoky River Coal Ltd., Re*¹², the issue was whether a judge had the discretion under the CCAA to establish a procedure for resolving a dispute between parties who had previously agreed by contract to arbitrate their disputes. The question before the court was whether the dispute should be resolved as part of the supervised reorganization of the company under the CCAA or whether the court should stay the proceedings while the dispute was resolved

by an arbitrator. The presiding judge was of the view that the dispute should be resolved as expeditiously as possible under the *CCAA* proceedings. The Alberta Court of Appeal upheld the decision stating:

The above jurisprudence persuades me that “proceedings” in section 11 includes the proposed arbitration under the B.C. *Arbitration Act*. The Appellants assert that arbitration is expeditious. That is often, but not always, the case. Arbitration awards can be appealed. Indeed, this is contemplated by section 15(5) of the *Rules*. Arbitration awards, moreover, can be subject to judicial review, further lengthening and complicating the decision making process. Thus, the efficacy of *CCAA* proceedings (many of which are time sensitive) could be seriously undermined if a debtor company was forced to participate in an extra-*CCAA* arbitration. For these reasons, having taken into account the nature and purpose of the *CCAA*, I conclude that, in appropriate cases, arbitration is a “proceeding” that can be stayed under section 11 of the *CCAA*.¹³

29 I do recognize that the *Smoky River* decision did not involve a collective agreement but an agreement to arbitrate. That said, the principles described also apply to an arbitration pursuant to the terms of a collective agreement.

30 In considering balance of convenience, CEP’s primary concerns are that the claims procedure order does not accord with the rights and obligations contained in the collective agreement. Firstly, a claims officer is the adjudicator rather than an arbitrator chosen pursuant to the terms of the collective agreement and secondly, reinstatement is not an available remedy before a claims officer. Thirdly, an arbitration imports rules of natural justice and procedural fairness whereas the claims procedure is summary in nature.

31 The claims officers who were identified in the claims procedure order are all former respected and experienced judges who are well suited and capable of addressing the issues arising from the Bradley claim. Furthermore, had this been a real issue, CEP could have raised it earlier and identified another claims officer for inclusion in the claims procedure order. Indeed, an additional claims officer still could be appointed but no such request was ever advanced by CEP.

32 Should the claims officer find that CTLP did not have just cause to terminate Mr. Bradley’s employment, he can recognize Mr. Bradley’s right to reinstatement by monetizing that right. This was done for a multitude of other claims in the *CCAA* proceedings including claims filed by CEP on behalf of other members. I note that Mr. Bradley would not be receiving treatment different from that of any other creditor participating in the claims process.

33 The claims process is summary in nature for a reason. It reduces delay, streamlines the process, and reduces expense and in so doing promotes the objectives of *CCAA*. Indeed, if grievances were to customarily proceed to arbitration, potential exists to significantly undermine the *CCAA* proceedings. Arbitration of all claims arising from collective agreements would place

the already stretched resources of insolvent CCAA debtors under significant additional strain and could divert resources away from the restructuring. It is my view that generally speaking, grievances should be adjudicated along with other claims pursuant to the provisions of a claims procedure order within the context of the CCAA proceedings.

34 That said, it seems to me that this case is unique. While the claims procedure order and the meeting order of June 23, 2010 provide that all claims against CTLP and others arising prior to certain dates must be asserted within the claims procedure failing which they are forever extinguished and barred, the stay relating to CTPL was terminated on October 27, 2010. CTLP has emerged from CCAA protection and is currently operating in the normal course having changed its name to Shaw Television Limited Partnership ("STLP"). If the grievance relating to Mr. Bradley's termination is successful, he could be reinstated to his employment at STLP. The position of CEP, Mr. Bradley and the Monitor is that reinstatement, if ordered, would be to STLP. Counsel for CEP advised the court that notice of the motion was given to STLP and that a representative was present in court for the argument of the motion although did not appear on the record. The Monitor has also confirmed that Shaw Communications Inc., the parent of STLP, was aware of the motion and its counsel has confirmed its understanding that any reinstatement of Mr. Bradley, if ordered, would be to STLP.

35 As mentioned, Mr. Bradley was a 20 year employee. While I do not consider the identity of the arbitrator and the natural justice arguments of CEP to be persuasive, given the stage of the CCAA proceedings, the fact that the stay relating to CTLP has been lifted, and Mr. Bradley's employment tenure, I am persuaded that he ought to be given the opportunity to pursue his claim for reinstatement rather than being compelled to have that entitlement monetized by a claims officer if so ordered. Counsel for the Monitor has confirmed that the timing of the distributions would not appear to be affected by the outcome of this motion. No meaningful prejudice would ensue to any stakeholder. It seems to me that the balance of convenience and the interests of justice favour lifting the stay to permit the grievances to proceed through arbitration rather than before the claims procedure officer. Therefore, CEP's motion to lift the stay is granted and the Bradley grievances may be adjudicated in accordance with the terms of the collective agreement.

2. Amendment of the Claims Procedure Order

36 In light of my decision on the stay, it is not strictly necessary to consider whether the claims procedure order should be amended as requested by CEP as alternative relief. As this issue was argued, however, I will address it.

37 Section 33 of CCAA was added to the statute in September, 2009. The relevant sub-sections now provide:

33(1) If proceedings under this Act have been commenced in respect of a debtor company,

any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.

33(8) For greater certainty, any collective agreement that the company and the bargaining agent have not agreed to revise remains in force, and the court shall not alter its terms.

38 Justice Mongeon of the Québec Superior Court had occasion to address the effect of section 33 of the *CCAA* in *White Birch Paper Holding Co., Re*¹⁴. He stated that the fact that a collective agreement remains in force under a *CCAA* proceeding does not have the effect of “excluding the entire collective labour relations process from the application of the *CCAA*.”¹⁵ He went on to write that:

It would be tantamount to paralyzing the employer with respect to reducing its costs by any means at all, and to providing the union with a veto with regard to the restructuring process.¹⁶

39 In *Canwest Global Communications Corp., Re*.¹⁷, I wrote that section 33 of the *CCAA* “maintains the terms and obligations contained in the collective agreement but does not alter priorities or status.”¹⁸ In that case when dealing with the issue of immediate payment of severance payments, I wrote:

There are certain provisions in the amendments that expressly mandate certain employee related payments. In those instances, section 6(5) dealing with a sanction of a plan and section 36 dealing with a sale outside the ordinary course of business being two such examples, Parliament specifically dealt with certain employee claims. If Parliament had intended to make such a significant amendment whereby severance and termination payments (and all other payments under a collective agreement) would take priority over secured creditors, it would have done so expressly.¹⁹

40 I agree with the Monitor’s position that if Parliament had intended to carve grievances out of the claims process, it would have done so expressly. To do so, however, would have undermined the purpose of the *CCAA* and in particular, the claims process which is designed to streamline the resolution of the multitude of claims against an insolvent debtor in the most time sensitive and cost efficient manner. It is hard to imagine that it was Parliament’s intention that grievances under collective agreements be excluded from the reach of the stay provisions of section 11 of the *CCAA* or the ancillary claims process. In my view, such a result would seriously undermine the objectives of the *Act*.

41 Furthermore, I note that over 1,800 claims have been processed and dealt with by way of the claims procedure order, many of them involving claims filed by CEP on behalf of its members. CEP was provided with notice of the motion wherein the claims procedure order and the claims officers were approved. CEP did not raise any objection to the claims procedure

order, the claims officers or the inclusion of grievances in the claims procedure at the time that the order was granted. The claims procedure order was not an order made without notice and none of the prerequisites to variation of an order has been met. Had I not lifted the stay, I would not have amended the claims procedure order as requested by CEP.

42 CEP's last argument is that the claims procedure order interferes with Mr. Bradley's freedoms under the Canadian *Charter of Rights and Freedoms*. In this regard I make the following observations. Firstly, this argument was not advanced when the claims procedure order was granted. Secondly, CEP is not challenging the validity of any section of the *CCAA*. Thirdly, nothing in the statute or the claims procedure inhibits the ability to collectively bargain. In  *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*²⁰, the Supreme Court of Canada stated:

We conclude that section 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute or guarantee access to any particularly statutory regime. ...

In our view, it is entirely possible to protect the "procedure" known as collective bargaining without mandating constitutional protection for the fruits of that bargaining process.²¹

43 In my view, nothing in the claims procedure or the *CCAA* impacts the procedure known as collective bargaining.

Conclusion

44 Under the circumstances, the request to lift the stay as requested by CEP is granted. Had it been necessary to do so, I would have dismissed the alternative relief requested.

Motion granted.

Footnotes

1 The Filing Date was October 6, 2009, the date of the initial order.

2 The words in brackets were omitted but presumably this was the intention.

3 (S.C.C.).

4  (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at para. 6.

5 (Ont. C.A.) at para. 33.

6 *Supra*, note 4 at para. 10.

7 *Ibid*, at para. 6.

8 (Ont. S.C.J. [Commercial List]).

9 (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.)

10 (Aurora: Canada Law Book, looseleaf) at para. 3.3400.

11 *Supra*, note 8 at para. 32.

12 (Alta. C.A.)

13 *Ibid*, at para. 33.

14 2010 QCCS 2590 (C.S. Que.)

15 *Ibid*, at para. 31.

16 *Ibid*, at para. 35.

17 (Ont. S.C.J. [Commercial List])

18 *Ibid*, at para. 32.

19 *Ibid*, at para. 33.

20 *Supra*, note 3.

21 *Ibid*, at at paras. 19 and 29.

TAB 4

2025 ABKB 750
Alberta Court of King's Bench

Wallace & Carey Inc. (Re)

2025 CarswellAlta 3093, 2025 ABKB 750, [2026] A.W.L.D. 515

**In the Matter of the Companies' Creditors Arrangement Act, RSC 1985, c
C-36, as Amended**

In the Matter of the Compromise or Arrangement of Wallace & Carey Inc., Loudon
Bros. Limited and Carey Management Inc.

M.A. Marion J.

Heard: November 27, 2025
Judgment: December 15, 2025
Docket: Calgary 2301-08305

Counsel: Jeffrey Oliver, for Monitor
Chelsea Nimmo, Bruna Kalinsoki, for Digiflex Information Systems Inc.
Carole J. Hunter, Edmond F.B. Lamek, for 7-Eleven Canada, Inc. and 7-Eleven Distribution
Canada Corporation

Headnote

**Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial
application — Lifting of stay**

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M.A. Marion J.:

Reasons for Decision

I. Introduction

1 Wallace & Carey Inc. (**W&C**), Loudon Bros Limited (**Loudon**), and Carey Management Inc. (**CMI**) (collectively, **Companies**) are subject to protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA*). The monitor is KSV Restructuring Inc. (**Monitor**).

2 I have before me two applications:

(a) an application (**Digiflex Application**) by Digiflex Information Systems Inc. (**Digiflex**) to:

(i) lift the stay of proceedings vis a vis Digiflex; and

(ii) declare that Digiflex has no obligations:

(A) to provide 7-Eleven, Inc. (**7-Eleven**), 7-Eleven Canada, Inc. (**SEC**) or 7-11 Distribution Canada Corporation (**SEDCC**) access to Digiflex's enterprise resource planning (**ERP**) software (**Digiflex Software**), whether directly or indirectly through W&C/Loudon; and

(B) to provide any associated software services to 7-Eleven, SEC, SEDCC, W&C or Loudon;

(b) an application by the Monitor (**Monitor Application**), on behalf of W&C/Loudon and at the request of SEC/SEDCC, to dismiss the Digiflex Application and approve the assignment (**Proposed Assignments**) of the interests of W&C and Loudon in and to certain software licence agreements between them and Digiflex (**Licence Agreements**)¹ to SEC or SEDCC, pursuant to section 11.3 of the *CCAA*.

3 For the reasons set out below, Digiflex's Application is not granted as requested. However, the Court lifts the stay *vis a vis* Digiflex effective on February 15, 2026, to allow Digiflex to pursue whatever rights and remedies it may have as against W&C/Loudon at that time.

4 The portion of the Monitor Application seeking the Proposed Assignments is adjourned to

allow the parties to attempt to reach a commercial resolution for continued limited use and access to the Digiflex Software post-February 15, 2026, for the purposes of records retention, audit and tax purposes.

II. Background

5 The Companies operated one of Canada's largest independent wholesale distribution and logistics businesses servicing more than 7,000 customers across Canada. The Companies' largest customer, by far, was SEC. The W&C distribution and logistics business for SEC was complex and ran on an almost just-in-time basis. The work for SEC involved over 450 employees involved in the daily picking, packing and delivery of over 5,000 products from approximately 240 suppliers to SEC's over 500 7-Eleven stores across Ontario and western Canada.

6 In 2023, W&C and Loudon were facing a liquidity crisis caused by the COVID-19 global pandemic, supply chain disruptions and lockdowns, inflationary pressures, increasing interest rates, and the decline of tobacco sales, all of which put their business and continued employment of hundreds of employees at risk.

7 On June 22, 2023, the Court granted an initial order under the *CCAA* with respect to the Companies. On June 30, 2023, the Court granted an Amended and Restated Initial Order (**ARIO**).

8 Given the importance of W&C to SEC's retail business, SEC quickly became directly involved in the *CCAA* proceedings. It negotiated an agreement with the Companies and their secured creditor to provide cash collateral to increase W&C's liquidity, to provide a limited recourse guarantee of W&C's credit obligations to its secured creditor, and to provide SEC the right to be a stalking horse purchaser of W&C's assets when they were sold.

9 On August 23, 2023, the Court granted an order approving a sale and investment and sales process (**SISP**) for the Companies' assets or business.

10 Following the **SISP**, on November 17, 2023, the Court granted an Approval and Vesting Order (**AVO**) approving a transaction with SEC (**Transaction**), including among other things:

- (a) approving an asset purchase agreement (**APA**) by which SEC purchased certain specific assets (**Purchased Assets**) of W&C and Loudon (**Vendors**);
- (b) vesting the Purchased Assets, which included certain assigned contracts (**Assigned Contracts**), in or with SEC;
- (c) approving the assignment of the Assigned Contracts; and

(d) approving a Transition Services Agreement (**TSA**) between W&C, CMI, SEC and the Monitor.

11 One of the commercial purposes of the TSA was to maintain W&C's services to SEC to facilitate the transition of the Purchased Assets and the SEC-related logistics operations from W&C to SEC. It also provided SEC time to decide whether there were additional assets it wanted to purchase, and how it was going to structure its Canadian distribution and logistics needs.

12 Under the TSA, among other things:

(a) W&C and CMI (**Debtors**) were obligated to SEC to continue to provide certain services (**Services**), which included certain "**Ongoing Services**" and "**Transition Services**", and to maintain and preserve certain contracts (**Transition Contracts**) required for the operation of the Debtor's business that were not part of the Purchased Assets;

(b) the Debtors would use certain employees to perform the Services, but SEC would have the right to offer employment to those employees as SEC may deem appropriate;

(c) SEC would fund W&C's operations and would be entitled to W&C's revenue during the term of the TSA;

(d) the Debtors and the Monitor would use best efforts to wind-down all business activities of the Debtors for its non-SEC customers within 60 days, subject to any extensions SEC may agree to for some non-SEC customers in its sole discretion; and

(e) the TSA's term was to end by August 2024 for business east of Alberta (**Eastern Business**) and by February 2025 for business in Alberta and British Columbia (**Western Business**), subject to SEC's right to extend those dates twice by 90 days each time (that is, until approximately February 2025 for the Eastern Business and August 2025 for the Western Business).

13 The AVO authorized and approved any amendments to the TSA agreed to between the Companies and SEC with the consent of the Monitor, and authorized and approved the Companies' performance of the obligations under the TSA.

14 Under a long-standing business relationship with Digiflex, W&C and Loudon used the Digiflex Software, including a number of modules and software programs, which handled (among other things), purchasing, inbound control and receiving, warehouse management and inventory control, order processing and billing, logistics, shipping control, and consolidated reporting.

15 For that purpose, W&C and Loudon had several agreements with Digiflex related to the Digiflex Software, including the Licence Agreements and associated maintenance agreements (**Maintenance Agreements**). The Licence Agreements are non-exclusive and perpetual licences to use the Software - the licence fees were paid when the Licence Agreements were first entered into. The Maintenance Agreements are automatically renewed annually unless a written notice of termination was given at least 30 days before the end of the term; they contemplated the provision of “**Maintenance Services**” including the provision of software updates and a 7 day by 24 hour “hotline service” for the software. In 2021, the Companies had decided to wind-down their use of the Digiflex Software and to transition to a new ERP software with another provider. However, at the time the Companies entered *CCAA* protection, W&C/Loudon continued to use the Digiflex Software under the Licence Agreements and continued to receive Maintenance Services under the Maintenance Agreements.

16 It is acknowledged by all parties that the Licence Agreements were not purported to be part of, and were not part of, the Purchased Assets or Assigned Contracts acquired by SEC in the Transaction, and that they are not expressly referenced in the TSA.

17 The Transaction closed in November 2023. For much of the first post-closing year, SEC worked on integrating financial information into SEC’s database management system. During this process, it became apparent to SEC that the Digiflex Software used by W&C was outdated. SEC began exploring long term and short term ERP software options.

18 Eventually, SEC also decided that it would incorporate a new company, SEDCC, to provide SEC with distribution and logistics services.

19 In July 2024, W&C sought a quote from Digiflex for the development, test and go-live support, together with ongoing maintenance and support, for a separate ERP system to operate temporarily from January 1, 2025, to March 31, 2025 (with a possible extension until June 30, 2025). After receiving Digiflex’s quote information, which included licence fees ranging from about \$485,000 to \$3,875,000 and with annual maintenance fees from \$169,400 to \$968,750, W&C advised Digiflex that it intended to continue using its existing Digiflex Software system with only a name change. Digiflex advised that a new company would require a new software licence.

20 By September 2024, Digiflex was aware of SEC’s plans to set up SEDCC for SEC’s distribution and logistics needs. It had discussions with W&C and reiterated the need for a new licence if SEDCC intended to use the Digiflex Software.

21 In October 2024, a senior manager of 7-Eleven in Ohio contacted Digiflex about renewing the Maintenance Agreements. She confirmed that only W&C transactions would be carried on the Digiflex Software. Digiflex advised a new licence agreement may be required to renew the Maintenance Agreement, but Digiflex could renew its annual general helpdesk²

services (**General Helpdesk Services**) because that agreement was not directly related to the Software Licence Agreement. It provided an invoice for General Helpdesk Services, that was significantly more than the previous year.

22 On October 15, 2024, 7-Eleven confirmed that it did not intend to buy a new licence agreement with Digiflex, there was no immediate intent or capacity to move to Digiflex's new ERP system, and that the W&C contracts (including the Licence Agreements) "will be in full force and effect" on their current terms. Later, 7-Eleven confirmed that the Digiflex Software was being used by W&C and that until W&C winds down Digiflex invoices should continue being issued to W&C.

23 A dispute then arose. Digiflex took the position that SEC/SEDCC had been using Digiflex's Software since November 2023 (upon closing of the Transaction). It sent a new licence agreement to SEDCC, which SEDCC did not sign. Digiflex issued invoices to SEDCC, which SEC/SEDCC refused to pay until they were re-issued in the name of W&C.

24 On December 3, 2024, Digiflex wrote to 7-Eleven, noted the lack of payment of the invoices or response, stated that "we can only assume that your Epicor implementation project has finally been completed and you no longer need our system or services". It asked 7-Eleven to inform W&C of this change and to initiate destruction of the Digiflex Software and documentation.

25 That day, the Monitor's counsel wrote to Digiflex. It confirmed that, while SEC is funding W&C's business, W&C has not assigned (and remained party to) its agreements with Digiflex, that the agreements with Digiflex were not assigned to SEC, and that W&C was a separate legal entity from SEC. The Monitor informed Digiflex of the stay and stay period (**Stay Period**) under the ARIO, and that Digiflex's attempt to terminate agreements and increase prices was in breach of the ARIO.

26 Digiflex's position was that "all indications are 7-Eleven has effectively taken over operations for more than a year now" that "7-Eleven decided to hide behind CCAA and [W&C], and now they seem to be trying to set up the 7-Eleven Distribution Canada business inside the existing [W&C] ERP databases", and that "they now want to pretend they are [W&C] to avoid paying licensing and maintenance fees". Digiflex confirmed it would not provide services beyond January 1, 2025.

27 The Monitor immediately filed and scheduled an urgent court application. In Digiflex's December 11, 2024 response, it provided "formal notice that we will stop our support, maintenance and helpdesk services on January 1, 2025 . . . regardless of the court outcome". Further correspondence and negotiations ensued.

28 The parties reached a resolution. On December 17, 2024, Digiflex, W&C and the Monitor

agreed to the terms of a consent order (**Digiflex Consent Order**), which (paraphrased) provided (among other things):

- (a) Digiflex shall continue to provide Maintenance Services to W&C until the later of (1) the expiration of the Stay Period (as may be extended by court order) and (2) the expiration of the term for the Western Business under the TSA (subject to further extensions as permitted under the TSA or court order);
- (b) Digiflex shall continue to provide General Helpdesk Services to W&C until January 31, 2025, after which W&C shall have the option to extend such services for one year to January 31, 2026, at a cost of \$192,000;
- (c) Digiflex, and its sole director and voting shareholder, Mr. Mohamed Mardukhi (**Mardukhi**), are restrained from discontinuing, altering, interfering with, suspending or terminating the supply of services as required by the Companies, or from exercising any other remedy provided under any agreements between Digiflex and the Companies;
- (d) the Companies shall be entitled to the continued use of the Digiflex Software and services provided by Digiflex under those agreements, and Digiflex shall support the services provided to W&C under those agreements on the same basis as they did prior to the Digiflex Consent Order; and
- (e) Digiflex and Mardukhi shall not accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, license or permit in favour of or held by the Companies except with written consent of the Companies and the Monitor or leave of the Court.

29 At the time of the Digiflex Consent Order, the *CCAA* stay period was set to expire on April 30, 2025 and, as noted above, the TSA's term for its Western Business could potentially be extended to August 2025.

30 On February 7, 2025, SEC, the Debtors and the Monitor agreed to a written amendment to the TSA which provided that the TSA's term for the Western Business and the Eastern Business could be extended to August 2025.

31 On February 21, 2025, the Court approved an extension of the Stay Period to August 20, 2025. By this time, W&C's employees had been hired by SEC or SEDCC, at least some of them had been seconded back to W&C to conclude the transition, and W&C continued to provide logistics and other services to SEC in connection with W&C's business and the TSA.³ Digiflex was on the service list by this time but did not attend or take any position with respect to this order.

32 On March 18, 2025, SEC exercised its right to extend the TSA to August 20, 2025.

33 In late-May 2025, SEC advised the Monitor that SEC required the continued use of the Digiflex Software past August 20, 2025, to complete the transition of the logistics business to SEDCC.

34 In June 2025, the Monitor's counsel advised W&C's counsel that SEDCC required extension of the *CCAA* and the TSA past the August 20, 2025, expiry date: the "work they are doing on the replacement IT work is progressing but it is not clear they are going to be finished by August. They are therefore asking for a TSA amendment and stay extension to December 31, 2025".⁴

35 On August 5, 2025, the Monitor requested that W&C apply for an approval for a further amendment to the TSA to extend its term to February 15, 2026.

36 In August 2025:

(a) W&C applied to extend the Stay Period and the TSA to September 30, 2025, to give W&C time to review and consult with stakeholders about a further extension to the TSA. It was the understanding of Patrick Carey (**Carey**), W&C's CEO until December 31, 2024, and consultant until April 30, 2025, and its then director, that the extension of the TSA to February 15, 2026, was necessary "for SEC's and SEDCC's continued use" of the Digiflex Software. Carey also deposed that since the closing of the Transaction, W&C "has been providing services to SEC pursuant to TSA", that W&C continued to conduct business in most provinces and territories in Canada, and that "SEC, through SEDCC, carries on the logistics business of [W&C] under the TSA";

(b) SEC applied for an order granting the Monitor enhanced powers. In its August 13, 2025, application, SEC confirmed that, "in order to have the continued use of the Digiflex software and services as it completes the transition under the TSA, SEC requires that the TSA be extended for a further six-month period, such that it would expire on February 15, 2026". Its application also stated that "the business of the [Companies] has been transferred to SEC"; and

(c) the Monitor applied to approve certain of its activities and its fees.

37 The matter came before me on August 18, 2025. By that time, some aspects of the relief requested were adjourned until August 26, 2025. W&C, after further consultation with the Monitor and SEC, sought the extension of the TSA to February 15, 2026, instead of only to September 30, 2025. Although Digiflex had not filed any evidence, Mardukhi appeared and expressed Digiflex's concern and belief that SEC was abusing the *CCAA* process to continue to use Digiflex's Software.

38 I granted the requested Stay Period extension to September 30, 2025 only, not February 15, 2026, as requested, for these reasons (emphasis added):

My concern about this part of the application relates more to the lack of evidence about why a further extension of the TSA to February, of 2026 is needed. I didn't note any particular reasons given other than it seems obvious from the totality of the evidence before me that the reason for needing to extend the TSA relates to the ongoing need for certain software and services, related services being provided by [Digiflex]. There may be other reasons, but that is the only one that stood out as material to me. This CCAA has been ongoing for quite some time, and the orders approving the transaction with 7-Eleven and the transition services were all predicated on negotiated agreements that had a certain end date for the TSA process, or TSA agreement which, at least at the time the orders were granted, was thought obviously and held to be enough time to complete this part of this restructuring.

The Court needs more evidence about why a further number of months is needed, and the concern is made worse by the order of December 17th, 2024, which effectively requires [Digiflex] to continue providing services. **So in my mind, there is an issue about whether or not the continued provision of the services is really part of the restructuring any longer, or is it just something that 7-Eleven would like.** So there is just not enough evidence before me to make a determination on that point. I do note it does appear, from what I see in the evidence, that [Digiflex], although clearly affected by a continuation of the TSA, does not appear to have been involved in recent negotiations relating to the extension of the TSA, based on the record I have. So I don't have evidence about why the extension is needed specifically, what efforts have been made to resolve the transition in a timely fashion. I am not saying there aren't reasons. They are just not before me.

I don't have evidence about what will happen to the restructuring process as a whole if the TSA is not continued or extended and the requirement that goes hand in hand with that for [Digiflex] to continue to provide service and for those reasons, I am not prepared to grant the order that has been requested, but I do believe and accept what I have been told that there will be an impact on [7-Eleven's] transition to some extent if the software services are not continued to be provided.

So I will take Mr. Reid up on his alternative argument, which was his original application of the companies, was to keep the TSA date aligned with the stay. I don't want to, just because there is not sufficient evidence right now, cause an unnecessary disruption if there is good reason for a continued extension of the TSA. I do note [Digiflex] had at least some notice of this, didn't file any evidence and if it has a real concern, it might consider filing evidence or seeking to ask some questions on an affidavit or so forth. It has not engaged in those processes.

So I am satisfied that the TSA can continue to the same period of time as the stay, which is

September 30th, so that more information can be provided if [. . .] they continue to want to pursue that extension.

39 On August 25, 2025, Digiflex issued invoices to W&C/Loudon to continue providing Maintenance Services under the Maintenance Agreements until September 30, 2025. W&C paid those invoices.

40 On August 26, 2025, the Court granted the Monitor enhanced powers with respect to the Companies. Carey subsequently resigned as W&C's only director.

41 On September 9, 2025, the Monitor applied to extend the Stay Period, and to approve the extension of the term of the TSA, to February 15, 2026. The Monitor advised the Court⁵ that it was the Monitor's understanding that Digiflex's Software was run on servers located in the Debtor's offices, and was critical for W&C's logistics business that was transferred to SEC under the Transaction. The Monitor advised that SEDCC has been developing its own integration software to enable data to be moved from the Debtor's systems to SEC/SEDCC systems, which the Monitor understood would be fully operational by February 15, 2026.

42 On September 19, 2025, the matter came before Justice Feasby. Digiflex did not file an application or evidence, but made several written submissions to the Court. Digiflex sought a declaration that W&C's Digiflex software licence agreement⁶ was terminated, to block SEC/SEDCC from using Digiflex's Software, and damages. Much (but not all) of what it relied on pre-dated the Digiflex Consent Order, and it made some of the same arguments it had made to the Monitor before the Digiflex Consent Order. In essence, Digiflex asserted that SEC was abusing the *CCAA* process by attempting to hide the fact that business was being carried on as SEC/SEDCC and not W&C, and that SEDCC/SEC were infringing Digiflex's copyright (among other things) by using the Digiflex Software without authorization. In oral submissions, Digiflex asked the Court to "make a judgment that [SEC] has been using our software without the licence since they finalized the purchase of [W&C]", to "make SEDCC pay our licence and maintenance invoices from November 1, 2024, plus interest, so they can legally use our ERP software for as long as needed". Digiflex advised that, if that was done, Digiflex would have no objection to the TSA extension.

43 SEC/SEDCC confirmed to Justice Feasby that they were committed to completing the transition away from the Digiflex Software by February 15, 2026, if the extension was granted.

44 On September 19, 2025, Justice Feasby granted an order (**Feasby Order**) extending the Stay Period, and approving the extension of the TSA, to February 15, 2026, but did so without prejudice to Digiflex's right to seek the termination of the TSA or otherwise commence proceedings against SEC.

45 Following the Feasby Order, Digiflex invoiced W&C/Loudon for Maintenance Services to end February 15, 2026, and W&C/Loudon paid those invoices.

46 On October 3, 2025, Digiflex confirmed a November 27, 2025 booking on the commercial list. On November 13, 2025, it filed the Digiflex Application. On November 21, 2025, the Monitor requested leave to bring the Monitor Application at the same time as the Digiflex Application, which was consented to by Digiflex and which I permitted.

47 I heard the applications on November 27, 2025, and reserved my decision.

III. Issues

48 The issues are:

- (a) Should the Digiflex Application be Granted?
- (b) Should the Monitor Application be Granted?

IV. Analysis

A. Should the Digiflex Application be Granted?

1. The Positions of the Parties

49 Digiflex wants the stay lifted so that it can immediately terminate the Licence Agreements between W&C and Digiflex, and obtain a declaration that it has no further obligation to make its software available to SEC/SEDCC (directly or through W&C), or to provide services to SEC/SEDCC or W&C/Loudon. If SEC/SEDCC still requires the Digiflex Software, Digiflex's position is that SEC/SEDCC must have a new software licence agreement and maintenance agreement, and must pay a significant licence fee in the invoiced amount as outlined earlier. At the same time, in oral argument, Digiflex advised the Court that it does not really take issue with its licences with Loudon.

50 Digiflex asserts (among other things) that:

- (a) the Digiflex Software is protected by copyright under the *Copyright Act*, RSC 1985, c C-42;
- (b) there are no orders or agreements which require Digiflex to provide access to the Digiflex Software, or to provide associated services, to SEC/SEDCC;
- (c) the Licence Agreements are perpetual and not transferable;

(d) access to the Digiflex Software was not included or contemplated in the Transaction or the TSA;

(e) SEC/SEDCC is using Digiflex's Software in breach of the Licence Agreement and Digiflex's copyright, and SEC/SEDCC is stealing from Digiflex; and

(f) the continued compulsion of Digiflex to provide access to the Digiflex Software and associated services is akin to a granting a mandatory injunction against Digiflex that has caused and will continue to cause it prejudice.

51 The Monitor's asserts (among other things) that Digiflex's position ignores the fact that W&C, through SEC/SEDCC seconded employees, continues to operate and provide services to SEC/SEDCC pursuant to the TSA, including by using the Digiflex Software. The Monitor advises that W&C will remain in business until all its obligations under the TSA are satisfied. The Monitor's position is that the provision of those services under the TSA was a fundamental component of the court-approved Transaction. It argues that granting the Digiflex Application would undermine that approval and the sanctity of the bargain with SEC, which greatly benefited the Companies' stakeholders, would cause harm to SEC/SEDCC because it continues to rely on W&C's access to the Digiflex Software (and will continue to do so until February 15, 2026), and would put W&C in a position of being unable to honour its obligations under the TSA.

52 SEC/SEDCC's position is that it would be impossible for SEC/SEDCC to continue logistics operations required for SEC's retail stores if the Digiflex Software is not useable. It requires the *status quo* to be maintained until February 15, 2026, to allow it to transition to a different ERP platform. It notes that Digiflex has been paid for Maintenance Services for W&C/Loudon up until February 15, 2026, and that SEC/SEDCC do not need Maintenance Services or General Helpdesk Services beyond that date. It asserts it requires the assignment of the Licence Agreements after February 15, 2026, solely for the purposes of being able to access historical data for records retention, audit and tax purposes.

53 No other party took a position with respect to the Digiflex Application.

2. Legal Framework for Application to Lift CCAA Stay

54 The Court has the discretion to lift or vary a stay of proceedings under the CCAA in accordance with the procedure set out in the court's stay order:  ***Montréal (City) v Deloitte Restructuring Inc*, 2021 SCC 53** at paras 50-51; ***Canadian Airlines Corp (Re)***, 2000 CanLII 28202 (AB KB) at paras 14-21; ***Yukon Zinc Corporation (Re)*, 2015 BCSC 1961** at para 26(a); ***Canwest Global Communications Corp*, 2011 ONSC 2215** at paras 19, 27 [***Canwest 2011***].

55 The onus is on the party seeking to lift the stay, which has been described as a "heavy"

onus, because lifting a stay is not routine: *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 809 at para 67, leave to appeal dismissed 2021 ABCA 85; *Alignvest Private Debt Ltd v Surefire Industries Ltd*, 2015 ABQB 148 at para 42, appeal dismissed 2015 ABCA 355; *Canwest 2011* at para 27; *Canwest Global Communications Corp (Re)*, 2009 CanLII 70508 (ON SC) [*Canwest 2009*] at para 32; *Timminco Limited (Re)*, 2012 ONSC 2515 [*Timminco 2012*] at para 16; *Yukon Zinc* at para 26(b).

56 In *Canadian Airlines*, at paras 15-19, Justice Paperny (as she then was) noted that in considering whether to lift a stay under the *CCAA*, the Court must consider the particular facts, the balancing of various interests, and the purpose of the *CCAA*. Over the years since that decision, courts have described various non-exhaustive factors in different ways. Based on these decisions, I find that a summary of non-exhaustive factors includes:

- (a) whether the applicant has “serious grounds” or “sound reasons” or lifting the stay. Non-exhaustive examples include when a *CCAA* plan is likely to fail or has not been put forward in a timely way, hardship or prejudice to the applicant caused by the stay, a necessity for payment, loss of security, the protection of a pre-stay right or a right which could be lost due to the passage of time (for example, limitations);
- (b) the merits of the proposed action or step, where relevant;
- (c) whether the prejudice caused by the stay is material and unique to the applicant;
- (d) the relative prejudice of affected parties;
- (e) the balance of convenience;
- (f) the status of the *CCAA* proceedings and the impact lifting the stay will have on them;
- (g) whether the debtor company, the applicant seeking the stay, and any other relevant stakeholders have acted in good faith and with diligence: *CCAA* section 18.6; *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 70 [*Century Services 2010*];
- (h) whether lifting the stay is consistent with the remedial objectives of the *CCAA*. Like any discretionary decision under the *CCAA*, the court’s discretion to lift a *CCAA* stay must be exercised in furtherance of the *CCAA*’s remedial purpose: *Canada v Canada North Group Inc*, 2021 SCC 30 at para 138, citing *Century Services 2010* at paras 58-61; *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 at para 50; and
- (i) whether it is in the interests of justice, or would be equitable, to lift the stay.

See: *Bellatrix Exploration* at paras 66-68; *Accel Canada Holdings Limited (Re)*, 2020 ABQB 182 at para 66; *Alignvest* at paras 41-43; *Canadian Airlines* at paras 14-21; *Yukon Zinc* at para 26; *Azure Dynamics Corporation (Re)*, 2012 BCSC 781 at paras 5-7; *3S Printers*

Inc (Re), 2011 BCSC 630 at para 32; *BioSteel Sports Nutrition Inc, (Re)*, 2024 ONSC 2459 at paras 33-34; *Nuance Pharma Ltd v Antibe Therapeutics Inc*, 2024 ONSC 7210 at para 115; *Timminco Limited (Re)*, 2014 ONSC 3393 at paras 50-52; *Canwest 2011* at para 27; *Timminco 2012* at para 16; *Canwest 2009* at paras 32-33; *ICR Commercial Real Estate (Regina) Ltd v Bricore Land Group Ltd*, 2007 SKCA 72 at para 68; *D Vachon Investments inc c Ernst & Young inc*, 2025 QCCA 476 at paras 19-22; *Arrangement relating to 9304-7033 Québec inc*, 2025 QCCS 2425 at paras 46-47; *Arrangement relatif à NMX Residual Assets Inc*, 2024 QCCS 2599 at para 63; *Arrangement relatif à 9424-9356 Québec inc*, 2021 QCCS 5319 at para 10; *Pascan Aviation inc (Arrangement relatif à)*, 2016 QCCS 1444 at para 19.

3. Assessment and Decision

57 I have considered all of these factors and the positions of the parties.

58 For the reasons set out below, I decline to exercise my discretion to lift the stay as requested by Digiflex, but I do provide it some relief. Some key factors are expressly addressed below.

a. The Feasby Order

59 Digiflex did not apply to terminate the TSA as contemplated by the Feasby Order. Although this was raised in argument, neither the Monitor nor SEC/SEDCC took a strong position that this nuance had any real impact on the Digiflex Application. I find it does not.

60 A court order should be interpreted as a holistic document, by reading the language of the order as a whole, in the context of the pleadings, the arguments made by the parties, the factual and legal context or circumstances in which the order was granted, and the intention of the court granting the order: *Lay v Lay*, 2024 ABCA 26 at para 10;  *Kantor v Kantor*, 2023 ABCA 237 at para 23; *Weinrich Contracting Ltd v Wiebe*, 2022 ABCA 176 at para 25.

61 The Feasby Order expressly referenced certain steps that could be taken based on the submissions made by Digiflex at the time, and the Feasby Order would not prejudice those steps. The clear intention of the Feasby Order was to allow Digiflex to file an application to assert its positions without being prejudiced by the decision to extend the Stay Period and the TSA to February 15, 2026.

62 In any event, the Feasby Order did not preclude other applications. Digiflex was entitled to apply to vary the stay under the terms of the ARIO (paragraph 56) and to seek leave of the Court to terminate or cease to perform obligations under the Digiflex Consent Order (paragraph 5(b)).

b. The Transaction and the TSA Contemplated W&C/Loudon's Continued Use of the Digiflex Software and Maintenance Services

63 I disagree with one of Digiflex’s key positions, namely its interpretation of the APA and the TSA to the effect that they did not contemplate the Debtors’ continued use and maintenance of the Digiflex Software under the Licence Agreements and the Maintenance Agreements for the benefit of SEC/SEDCC. I find they did.

64 The goal of contractual interpretation is to determine the objective intent of the parties at the time the contract was made through the application of legal principles of interpretation:  ***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157** at para 79;  ***Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53** at para 49;  ***Remington Development Corporation v Canadian Pacific Railway Company*, 2025 ABCA 244** at para 43.

65 Provisions must be interpreted in light of the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract:  ***Remington Development*** at para 43;  ***Sattva*** at paras 47, 49;  ***IFP*** at para 79;  ***Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4** at para 64.

66 Courts must consider the relevant surrounding circumstances, including the “objective evidence of the background facts at the time of the execution of the contract . . . that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting”:  ***IFP*** at paras 82-83;  ***Sattva*** at para 58;  ***Remington Development*** at para 47.

67 Relevant background facts can include the genesis, aim or purpose of the contract, the nature of the relationship created by the contract, the nature or custom in the industry in which the contract was executed, antecedent agreements leading up to the contract, and even negotiations if they shed light on the factual matrix:  ***IFP*** at paras 83-85 and the cases cited therein;   ***Alberta Union of Provincial Employees v Alberta Health Services*, 2020 ABCA 4** at para 32.

68 “Surrounding circumstances” does not include the parties’ subjective intentions and cannot be used to add to, detract from, vary, or otherwise overwhelm the written words:  ***Sattva*** at paras 59-60;  ***IFP*** at paras 81-82; ***Talwandi Video Lab Inc v 1441419 Alberta Ltd*, 2024 ABCA 140** at para 11;   ***Alberta Union*** at para 26;  ***Remington Development*** at para 47;  ***SA v Metro Vancouver Housing Corp*, 2019 SCC 4** at para 30;  ***Heritage Property Corporation v Triovest Inc*, 2025 ABCA 64** at para 14.

69 Digiflex argues that it and its agreements are not mentioned anywhere in the APA or the TSA. Digiflex’s implication is that the Licence Agreements were missed or SEC/SEDCC made a strategic decision not to include them and SEC/SEDCC is now trying to manipulate the CCAA process to fix its mistake or strategic error in not dealing with the Licence Agreements at the time of the Transaction.

70 As noted above, it is correct, and acknowledged by the Monitor and SEC/SEDCC, that the Licence Agreements are not part of the Purchased Assets under the APA, nor are they expressly referenced in the TSA. But that does not end the matter.

71 The commercial context of the Transaction and the TSA included that SEC was not acquiring all the Companies' assets, but rather a specific set of assets for the future logistics operations required for SEC's retail store operations. To obtain the benefit of the purchase for the Companies' and its stakeholders, the Debtors were to continue to provide services to SEC during the transition. The obvious commercial purpose of this was to ensure continuity of distribution and logistics operations necessary to minimize disruption to SEC's retail 7-Eleven operations during the transition.

72 Under the APA, among other things:

(a) SEC acquired the "Purchased Assets" (APA, clause 2.1), but not the "Excluded Assets", which were all assets not included in the definition of Purchased Assets (APA clause 2.2);

(b) the Purchased Assets included, among other things, all furniture, fixtures, equipment, machinery and all other tangible personal property owned by the Companies in Alberta and British Columbia (APA clause 2.1(a));

(c) the Purchased Assets included a list of defined Assigned Contracts which were to be assigned to SEC (APA clauses 2.1(b) and 2.4). SEC was entitled to add to or delete from the list of Assigned Contracts until Closing. It therefore had the option to include the Licence Agreements but did not do so. All contracts that were not Assigned Contracts were "Excluded Contracts". Although some software licences were included as Assigned Contracts, the Digiflex Licence Agreements were not Assigned Contracts. Therefore, they were Excluded Contracts;

(d) the TSA shall be entered into and shall set out the terms and conditions pursuant to which the Companies "will continue to provide logistics services to the Purchaser on a revenue neutral basis" and that the Companies "will continue to have access to the Purchased Assets for the purposes set out in the TSA" (APA, clause 5.6);

(e) it was expressly contemplated that the Excluded Contracts would be retained by the Companies and disclaimed in the CCAA process "subject at all times to their obligations under the TSA" (APA clause 2.4(e)). It was, therefore, expressly contemplated that the Companies would have to maintain their interest in Excluded Contracts (including the Licence Agreements) to provide services under the TSA; and

(f) the Companies were to commence an immediate orderly wind-down and termination of third-party customer business such that as soon as possible following Closing, other than residual wind-down activities, the Purchaser will be the only go-forward customer of the

Companies, as contemplated by the TSA (APA, clause 5.10).

73 Under the TSA, among other things:

(a) the Debtors are to provide the Services, which are the Ongoing Services and the Transition Services, both of which are set out in schedules to the TSA;

(b) the Ongoing Services include all services currently provided by the Debtors to the Purchaser under existing contracts between the parties, including executive, financial, sales management, purchasing, logistics and customs, information technology, employment, health safety and environment (**HSE**), and human resources (**HR**) services. This included a requirement to “operate all information technology systems and services in a manner consistent with the periods prior to Closing, unless otherwise directed by Purchaser”; and

(c) the Transition Services include executive, nominee responsibilities, financial, sales management, purchasing, logistics and customs, information technology/data, HSE, HR, reporting and *CCAA* services. The information technology/data services expressly contemplated that the Companies would assist the Purchaser with integrating the “Debtor’s information technology systems” into the Purchaser’s environment, with data migration, and with maintaining “the Purchaser’s access to Debtor’s information technology systems”.

74 Properly interpreted, I find that the Licence Agreements were Excluded Contracts and, although the Companies did not own the Digiflex Software, they had licences to access it and use it. I find that access to and use of the Digiflex Software formed a part of the Companies’ information technology systems which they were obligated to maintain access to and use to provide Services to the Purchaser during the term of the TSA.

75 I disagree with Digiflex’s narrow interpretation of Services. In the commercial context of the APA and TSA, it was not objectively intended by the parties to exclude access to software required to operate the Companies’ logistics business when they all knew that business was integral to avoid disruption to SEC’s retail operations during the anticipated transition. The fact that the parties decided not to definitely list the Excluded Contracts in the APA, or not expressly reference the Licence Agreements in these agreements, does not change this interpretation.

c. No Lack of Good Faith in the Transaction

76 *CCAA* section 18.6 provides that “any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings” and that, if a court finds a person has failed to do so, the court on application may “make any order it considers appropriate in the circumstances”. Appropriateness, good faith and due diligence are baseline considerations the Court should always bear in mind: *Century Services 2010* at para 70.

77 I find that there is no evidence of a lack of good faith on the part of the Companies, SEC or the Monitor in how the Transaction, the APA or the TSA were structured, papered and proposed for the Court's approval.

78 The specific reason why the Licence Agreements were not included in the APA, and not dealt with at the time of the APA is not before me. The only parties who could provide that contextual evidence were the Companies, SEC or the Monitor. A court may exercise its discretion to draw an adverse inference against a party that fails or refuses to bring forward evidence on a key point, upon considering various factors: *Stikeman Elliott LLP v 2083878 Alberta Ltd*, 2019 ABCA 274 at para 87 (Slatter JA in dissent);  *Greco v Calgary (City)*, 2025 ABKB 629 at paras 169-172.

79 Affidavits from key witnesses from both the Companies and 7-Eleven were before me and Digiflex could have questioned on those affidavits under rule 6.7 to obtain more evidence. When Digiflex attended before me on August 18, 2025, I expressly invited it to consider questioning on affidavits. It chose not to do that.

80 Digiflex also did not seek further evidence from the Monitor. Court-appointed officers, such as monitors, are not typically subject to cross-examination except in exceptional or unusual circumstances: *Canadian Western Bank v Goshen Professional Care Inc*, 2025 SKKB 5 at paras 47-48. However, monitors often voluntarily answer interrogatories. See, for example: *Accel Canada Holdings Limited (Re)*, 2020 ABQB 116 at para 1; *Re Plan of Compromise or arrangement*, 2024 ONSC 5416 (Ont. S.C.J. [Commercial List]) at para 3; *Pride Group Holdings Inc et al*, 2024 ONSC 5902 at para 3; *Re Blue Lobster Capital Limited et al*, 2025 NSSC 243 at 6.

81 In the circumstances, Digiflex has not proven that SEC/SEDCC or the Monitor did not act in good faith with respect to the Transaction, and I decline to draw an adverse inference against them.

d. The Agreements with Digiflex Should have Been Addressed Sooner

82 Although I have found that the APA and the TSA contemplate the Companies' continued use of the Digiflex Software under the TSA during the transition, and I have not drawn an adverse inference against the parties to that transaction, this does not absolve these parties of any responsibility for the circumstances now before the Court.

83 The Monitor gave notice to all known creditors of the Companies (including Digiflex)⁷ that the Companies were in CCAA protection in June 2023 (although Digiflex asserts it did not receive the letter).

84 However, Digiflex was not given notice of the application to approve the Transaction, the APA and the TSA. It is unclear on the record before me when and if Digiflex was first served

with the AVO (Mardukhi's evidence is that he first learned that W&C was winding down and a new distribution company taking over in July 2024).

85 The Licence Agreements were not expressly referenced in the Transaction approval application materials. The risks associated with not providing Digiflex notice or expressly dealing with Digiflex contracts at the time of the Transaction approval were not addressed or explained. Yet the Digiflex Software is now acknowledged to be critical to ongoing operations and performance of the TSA Services. There is no evidence that the omission of Digiflex agreements in the Transaction was a mistake or oversight, which means it was likely a choice. The Monitor acknowledges the Digiflex contracts were likely available to SEC in the due diligence process under the SISP. That can be reasonably inferred.

86 Digiflex was already restrained by the stay imposed by the ARIIO. In that context, the formal approval of transactions that expressly required Digiflex's ongoing performance of services and access to its software, for a potentially indefinite time dependent on the diligence and resource allocation of a third-party purchaser in a major transition, clearly affected Digiflex. I disagree with the Monitor on this point and find that Digiflex should have been given notice of the Transaction approval. Third-party counterparties to agreements with debtors under CCAA protection must also be treated fairly and equitably: *In Re Hudson's Bay Company*, 2025 ONSC 5998 at paras 32; *Veris Gold Corp (Re)*, 2015 BCSC 1204 at para 58.

87 Had notice to, and more complete information about, Digiflex been given at the time the Transaction and TSA were approved, the issues now before me would very likely have been raised earlier and a commercial or judicial resolution may have been achieved with less expense and risk, and with more go-forward certainty for all parties. As pointed out by Digiflex, this is similar to what happened in an analogous situation involving software used by a debtor company in *Re Nortel Networks Corporation et al*, 2016 ONSC 2732 at para 35. See also *Nexient Learning Inc (Re)*, 2009 CanLII 72037 (ON SC) at para 84.

e. The Digiflex Consent Order

88 However, the Transaction parties' role in causing the current circumstances is not determinative. I disagree with Digiflex that the Digiflex Consent Order is irrelevant to the applications before me. To the contrary, it is both relevant and material.

89 It is important to put into context Digiflex's state of knowledge and position at the time it agreed to the terms of the Digiflex Consent Order. Critically, at that time, Digiflex had already taken the position that "7-Eleven has effectively taken over the operations for more than a year now", that Digiflex's software licence agreement with W&C should not have been in effect since the closing of the Transaction, that a new licence was required, and that 7-Eleven wanted to "pretend they are [W&C] to avoid paying licensing and maintenance fees."⁸ Digiflex asserted:

Instead of acknowledging the need for a new license, 7-Eleven decided to hide behind CCAA and [W&C], and now they seem to be trying to set up the 7-Eleven Distribution

Canada business inside the existing [W&C] ERP databases.⁹

90 These are some of the very same positions that Digiflex now takes. In that context, rather than asserting its position to the Court or seeking to lift the stay of proceedings in December 2024, Digiflex decided to reach a commercial arrangement with the Monitor and the Companies as reflected in the Digiflex Consent Order. Parties should be expected to be held to their bargains in the insolvency context: *ATB Financial v Mayfield Investments Ltd*, 2024 ABKB 635 at para 40.

91 In my view, by agreeing to the Digiflex Consent Order, Digiflex effectively acknowledged that, up to that time, its software was being used by W&C and Digiflex was providing Maintenance Services to W&C, under the agreements with Digiflex. This is clear by the reference to (emphasis added) “Digiflex shall **continue** to provide maintenance services . . . to [W&C]”, and its consent that “the **Companies** shall be entitled to the **continued** use of the software and services provided by Digiflex pursuant to the terms of the Digiflex Agreements and Digiflex and Mardukhi shall support the services provided to [W&C] **on the same basis they did prior to the date of this Order**”. That is, notwithstanding its position that a new licence was already required for SEC based on what was actually happening post-Closing, Digiflex agreed to continue to provide *status quo* access to and maintenance of the Digiflex Software, and knew it was doing so, for the purposes of the TSA.

92 Further, Digiflex agreed that it would continue to provide *status quo* access to and maintenance of its software, on the same basis, until the later of the *CCAA* stay being lifted or the end of the TSA term, which patently created a potentially indeterminate period. Therefore, Digiflex agreed to have the length of time the *status quo* would be maintained with respect to its software to be out of its control. I give Digiflex’s argument that it agreed to the Digiflex Consent Order on the assumption the Stay Period would end in April 2025 little weight.

93 It is obvious that the Monitor, the Debtors, the Court and other stakeholders (including SEC) relied on the Digiflex Consent Order in the ongoing management and response to the *CCAA* proceedings, the performance of the TSA, and the continued transition of the Companies’ logistics business to SEC/SEDCC.

94 In all these circumstances, Digiflex’s attempt before me to rely on events that predated the Digiflex Consent Order are viewed with special scrutiny and are given much less weight. I find it would be an abuse of the *CCAA* process for it, a year later, to now raise and rely on the state of affairs prior to the Digiflex Consent Order in these proceedings. Digiflex had an opportunity to raise its concerns and position in these *CCAA* proceedings in late 2024, and chose instead to agree to a consent court order. Part of the Court’s supervisory role in *CCAA* proceedings is to ensure that the process unfolds in a fair and transparent manner. Digiflex’s attempt to revive and rely on the allegations that pre-dated the Digiflex Consent Order, almost a year later, is not consistent with an orderly *CCAA* process. Digiflex did not act in a fair and

transparent manner in this regard.

f. There is a Non-Frivolous Dispute About Whether the Digiflex Software is Being Used under or in Breach of the Licence Agreement, or in Breach of Copyright

95 In addition to relying on matters that pre-date the Digiflex Consent Order, Digiflex also relies on matters after the Digiflex Consent Order. For example, Digiflex points to further steps that have been taken to wind-down W&C, including SEC/SEDCC hiring 450 W&C employees, SEC/SEDCC employees using its software, Digiflex receiving emails from SEC/SEDCC email addresses, the wind-down of the W&C website and sign-in for customers, and the replacement of W&C logos on documents generated using or in conjunction with the software.

96 The reality is that Digiflex's Application is completely founded on its asserted position that W&C is no longer the one using the Digiflex Software, it is SEC/SEDCC. This is the foundation for its argument that there has been a breach of the Licence Agreement by W&C and a breach of copyright by SEC/SEDCC.

97 The problem with Digiflex's position, on the record before me, is that the question of which entity has been using the Software, and whether W&C remains operational, is in dispute and the record is not sufficient for me to fairly determine that issue in a final way in this summary process. Digiflex's counsel, when asked, indicated it did not seek or require a finding of fact on this key issue.

98 The Monitor, a court officer currently holding enhanced powers with respect to W&C's management, advises that W&C continues to operate under the TSA, and is legally the party using the Digiflex Software, through former W&C employees that are now SEC/SEDCC employees seconded back to W&C for that purpose. Again, I note that Digiflex did not question SEC/SEDCC, or seek an evidentiary process with the Monitor, to explore in a concrete way exactly where, by whom and how the Digiflex Software is being used.

99 I find that the fact SEC/SEDCC employees seconded to W&C may be using the Digiflex Software to support SEDCC's business, that Digiflex is receiving emails from SEC/SEDCC email addresses, or that logos on documents have been changed, is insufficient to prove for the purposes of this summary process that W&C has breached the Licence Agreements or any copyright. The facts relied on by Digiflex are also consistent with W&C continuing to provide a portion of the logistics services to SEC as W&C has always done, as part of the continued provision of Services under the TSA (including as contemplated in the Digiflex Consent Order).

100 I further understand that Digiflex has commenced an action in Federal Court against SEC and/or SEDCC for breach of Digiflex's copyright, which will raise this very same issue. My finding here is an interim finding based on a limited record, and is not intended to, and does not, create a binding decision on these disputed points. Based on the record before me, I find that Digiflex's assertions of Licence Agreement and copyright breaches are not frivolous.

101 Whether the Companies and SEC/SEDCC have in fact operated beyond the scope of what was approved in the TSA, or in breach of the Licence Agreements or copyright, is a matter to be determined by settlement or a trial process, not this interim, summary *CCAA* application.

g. Digiflex Delay in Seeking Relief

102 I find that Digiflex has not pursued relief from the Court expeditiously. I understand that it has been on the service list since December 2024. It was likely served with the February 2025 application materials for the extension of the Stay Period, together with the related Monitor's report. These materials disclosed the amendment to the TSA to extend its term to August 2025, that the Companies continued to wind down operations, that all remaining W&C employees were hired by SEC or SEDCC, and that some of those employees had been seconded back to W&C to facilitate the wind-down and transition of the companies' business.¹⁰ Digiflex waited almost eight months to formally pursue its rights. It only retained counsel when expressly directed to do so by Justice Feasby.

103 Creditors in *CCAA* proceedings must advance their positions in a timely way, with an appropriate evidentiary foundation: *Delta 9 Cannabis Inc (Re)*, 2025 ABKB 52 at paras 139-140. Digiflex did not do that with appropriate diligence.

h. Digiflex's Stated Purpose May Not be Furthered by Lifting the Stay

104 Digiflex's stated goal is to stop SEC/SEDCC and W&C from accessing or using the Digiflex Software moving forward. However, if the stay is lifted, it is not clear that Digiflex would be in a position to terminate the Licence Agreements. That would likely depend on the core disputed issue of whether W&C has breached them, as discussed above.

105 Further, one of the licence agreements provides (emphasis added):¹¹

LICENCE TERMINATION. If Customer breaches any of its obligations hereunder, or if the Customer becomes insolvent, files a petition in bankruptcy, or has filed against it an involuntary petition in bankruptcy, or has a receiver appointed over all or substantially all of its assets, **then Digiflex may, at its option, if there are any amounts owing by Customer to Digiflex, immediately terminate the License To Use granted hereunder upon written notice to Customer.** In case of receivership or bankruptcy the License To Use shall be continued provided the Receiver or Trustee in Bankruptcy assumes all of the Customer's obligations under this agreement. If the License To Use is so terminated, all the Licence fees paid hereunder will be deemed to have been paid for the use of the Package during the time it was in Customer's possession and Customer shall not be entitled to a refund of any portion of the License To Use fee. In addition, in the event of a breach by Customer of any of its obligations hereunder, Digiflex shall be entitled to seek equitable relief, including by way of injunction, to protect its interests herein, it being acknowledged by the Customer that Digiflex would suffer irreparable harm by any such breach and that

damages would be an inadequate remedy. [. . .]

106 This provision provides that if W&C/Loudon are in breach of the Licence Agreements, then they can terminate them “if there are amounts owing by Customer”, and may have a right to seek an injunction. However, there is no amount currently owing to Digiflex under the Licence Agreements (the licence fee was prepaid long ago), and it does not seem likely there will be any amounts owing in the near term given that Maintenance Services have already been paid for to February 15, 2026.

i. Overstated or Unproven Prejudice

107 Digiflex asserts it and Mardukhi will suffer prejudice and hardship if it is not granted relief. I find this to be overstated. Digiflex was pre-paid for the Licence Agreements and so has not received further licence fees since the *CCAA* proceedings started. However, Digiflex has continued to be paid for its Maintenance Services and General Helpdesk Services.

108 Digiflex’s assertion that Mardukhi wants to retire is also of limited weight. First, Digiflex is a corporation and the evidence is that it has contract workers available to assist in the event Mardukhi wishes to transition some of the required work to them. Further, by agreeing to the Digiflex Consent Order, Digiflex must be taken to have been aware that it might be required to provide services into 2026.

109 Further, and in any event, the Monitor (on behalf of W&C) and SEC/SEDCC have advised that they will not require Maintenance Services after February 15, 2026, and do not seek to assign the Maintenance Agreements to SEC/SEDCC. So, Mardukhi and Digiflex’s continued active involvement will accordingly and effectively be wound down within two months.

110 What Digiflex really laments is the potential loss of a new and significant licence fee that it would not have an entitlement to (if at all), but for the insolvency of the Companies. It is noted that the Companies had already advised Digiflex they were moving to another ERP software and Digiflex had already organized a wind-down in operations in anticipation of that move. In any event, for the reasons outlined earlier, Digiflex’s entitlement to a new licence fee is founded upon its position that the Licence Agreements have been breached, and it is SED/SEDCC using its software. As noted, that issue cannot be determined in this process.

111 SEC/SEDCC’s alleged harm or prejudice is also overstated. In an affidavit from 7-Eleven, it is suggested that the termination of access to the Digiflex Software would “result in the immediate discontinuation of the SEDCC business, including the catastrophic disruption of the SEC retail business across Canada”. In SEC/SEDCC’s brief, they argue that if the Licence Agreements are not assigned and Digiflex is permitted to terminate them “there will be a loss of 540 7-Eleven retail locations in five provinces across Canada and yet another insolvent retailer”.¹²

112 The Court must assume that sophisticated commercial businesses will behave rationally: *Cleo Energy Corp (Re)*, 2025 ABKB 621 at para 25. With respect, it is simply not believable that SEC/SEDCC and 7-Eleven would irrationally allow a catastrophic failure of its Canadian retail chain over the need to enter into a new software licence agreement with Digiflex, especially given that Digiflex has made it very clear it is willing to give SEC/SEDCC unlimited access to the Digiflex Software for its invoiced licence fee. The rational response from SEC/SEDCC, if it has no other options, would be to pay Digiflex the licence fee. The prejudice or hardship for SEC/SEDCC is simply that it does not want to pay the fee. It perceives Digiflex as extracting a ransom.

113 At a practical level, at its core the dispute between the parties on these applications is primarily about the licence fee, and the suggestions otherwise are not persuasive. One party wants it paid and the other doesn't want to pay it, and they each find the other's position abhorrent.

j. SEC/SEDCC's Delay in Transition to New ERP Software

114 With respect, SEC/SEDCC's approach to the transition away from services requiring the Digiflex Software has been slow. The APA and TSA, as approved, contemplated transition by August 2025. 7-Eleven's evidence is that it takes 18 months to build out an ERP software system. SEC must be taken to have known of the existence of the Digiflex Software when the APA/TSA were entered into and approved in November 2023. 18 months from November 2023 would have been May 2025 (well within the originally anticipated term of the TSA).

115 Further, by no later than July 2024, SEC knew work was required and there may be issues with Digiflex. 18 months from that time would have been December 2025. However, SEC says that it was "unable" to start working on a new ERP system until November 2024 because its financial and IT resources were busy. At the same time, however, it describes the Digiflex Software as of "mission critical importance".

116 In my view, SEC/SEDCC's evidence reflects consequences of its resource allocation decisions or choices, or possibly lack of diligence, rather than an *inability* to start the ERP transition process earlier. SEC/SEDCC effectively caused or contributed to the need for the Digiflex Software longer than had originally been anticipated. SEC/SEDCC is responsible, at least in part, for the extended time the Digiflex Software and services have been required.

117 Purchasers gaining the benefit of CCAA processes, in particular with ongoing stay requirements against third parties, are expected to earnestly and expeditiously dedicate resources to effect transitions of purchased assets or businesses as soon as reasonably possible. The resources required to accomplish this should be factored into their decision-making on price and transition planning. In this case, the need for expeditious and diligent transition was heightened by the terms of the Digiflex Consent Order, which bound Digiflex for a period outside

Digiflex's control and at least partly within SEC/SEDCC's control.

118 In hindsight, it does not appear to me that SEC/SEDCC gave the new ERP system the early and urgent attention it deserved and required in the circumstances.

k. The Impact on the CCAA Proceedings and the Companies' Stakeholders

119 The Transaction closed in November 2023. The transition of the Purchased Assets to SEC/SEDCC is largely complete and cannot be unwound: see *Nexient* at para 83. Approximately 450 employee jobs were saved by the Transaction. These CCAA proceedings are almost complete (although I am aware that the Monitor has scheduled time with Justice Feasby on February 12, 2026, for another Stay Period extension application). The benefit of the Transaction has already largely been realized.

120 The Monitor was unable to point to any specific negative impact to the Companies, their creditors, or other stakeholders if the Digiflex Application is granted. No other stakeholders took a position on the application. SEC/SEDCC did not suggest it would sue someone (or the basis upon which it would do that), if the Court grants the Digiflex Application.

121 The Monitor argues that the Digiflex Application should be denied in order to protect the integrity of the Companies' CCAA process and the Court's orders, including the approval of the Transaction and the TSA. The Monitor highlights, and I find, that the Transaction benefited the Companies' stakeholders and appears to have avoided the loss of significant jobs and a potential damaging ripple impact on SEC/SEDCC's retail operations. Further, concerns have been raised about discouraging future purchasers in CCAA if post-closing transition is not facilitated.

122 I agree that it is critical to uphold the fairness and transparency of the CCAA process, including to uphold the reasonable expectations of the court-approved Purchaser of a significant component of the Companies' assets. It is also often appropriate to reasonably facilitate transitions. However, in all the circumstances, I find it is unlikely that granting the Digiflex Application would put a chill on future CCAA restructurings. As noted, purchasers of assets or businesses under CCAA restructuring processes well know they must take reasonable steps to transition in a timely and efficient manner and cannot expect to impose unreasonably on other third parties.

123 In my view, it is equally or more likely that allowing the CCAA to be used to protect a debtor and a purchaser of assets, for an indefinite or multi-year post-closing transition process when third party contracts are affected, would not be consistent with the CCAA's remedial objectives of "timely, efficient and impartial resolution" of a debtor's insolvency:  *Callidus* at paras 40-42; *Delta 9* at para 33. This is particularly so when affected third party contractual counterparties are not provided notice of the approval process and those contracts were not specifically raised with, or addressed by, the Court at the time of the transaction approval (but

could have been). Again, third parties must also be treated fairly and equitably: *Hudson's Bay* at para 32; *Veris Gold* at para 58.

124 Allowing the stay and the Digiflex Consent Order to continue beyond February 15, 2026, *vis a vis* Digiflex, the Digiflex Software and the Licence Agreements, would serve to undermine the overall fairness and transparency of the CCAA process. On SEC/SEDCC's own evidence, by then the transition contemplated by the Transaction will be complete (at least as it relates to the Digiflex Software). To continue the stay and the Digiflex Consent Order *vis a vis* Digiflex beyond that time would no longer be for the purpose of facilitating CCAA restructuring but rather to use the Court's protection to unfairly benefit a purchaser in its ongoing post-restructuring business.

I. Conclusion

125 For at least the above reasons, Digiflex has not met its burden to establish that it is appropriate to grant the Digiflex Application on the terms requested. I also do not grant the declarations sought. The transition away from the Digiflex Software is to be completed in two months, and the balance of convenience, equity, and interests of justice support maintaining the *status quo* until February 15, 2026, to allow the Companies, the Monitor and SEC/SEDCC to complete the transition process by that date.

126 However, the transition must then end as it relates to Digiflex. The balance of convenience, equity and interests of justice require SEC/SEDCC and the Monitor to dedicate the necessary resources to finish the transition away from the Digiflex Software within this time frame. After that, with respect to the Licence Agreements, the parties should be free to exercise their rights accordingly (acknowledging the dispute about whether there has been a breach of the Licence Agreements or copyright). To be clear, I make no findings and do not intend to bind any future court addressing the dispute about whether the Licence Agreements or copyright has been breached or infringed since the Digiflex Consent Order, on a more complete record or at trial.

127 With respect to the Maintenance Services under the Maintenance Agreements, and the General Help Desk Services, SEC/SEDCC has expressed that they are not required or desired beyond February 15, 2026, and those agreements can likely be terminated in accordance with their terms or by agreement.

128 Accordingly, I order that the stay shall be lifted *vis a vis* Digiflex at 11:59 p.m. on February 15, 2026. The ARIO, the Digiflex Consent Order, and any other orders in these proceedings are varied to the extent necessary to implement this decision. The Monitor's counsel is directed to prepare the form of order with the proposed amendments to the orders in these proceedings as required. If any issues arise with respect to the specific terms of the order, the Monitor may contact my office, and I can settle the terms of the required variation order.

B. Should the Monitor Application be Granted?

129 The primary relief sought in the Monitor Application is the dismissal of the Digiflex Application, which has already been addressed above.

130 The secondary relief is the Proposed Assignments from W&C/Loudon to SEC/SEDCC under section 11.3 of the *CCAA*. SEC/SEDCC propose to pay W&C/Loudon \$80,000 for the assignment of the Licence Agreements.

131 The Proposed Assignments relief was sought by the Monitor using its enhanced powers, at the request of SEC/SEDCC and in response to the Digiflex Application.

132 In the SEC/SEDCC brief, SEC/SEDCC confirmed that, although the Licence Agreements “are perpetual, SEDCC does not anticipate requiring the use of such licences beyond February 2026”. The Monitor Application was, not surprisingly, focussed on the need to ensure access to the Digiflex Software during the transition to February 15, 2026.

133 Given that I have lifted the stay effective February 15, 2026, there no longer appears to be a need for the Proposed Assignments for the purposes of the transition, as applied for by the Monitor.

134 However, immediately before these Applications, SEC/SEDCC wrote to the Monitor’s counsel and advised that, even if the Digiflex Application was not granted, SEC/SEDCC required future access to the Digiflex Software after February 15, 2026 to be able to access historical electronic records and documents that are only accessible through the software, for “multi-year record and document audit and [Canada Revenue Agency] retention obligations”. This was also briefly discussed at the hearing.

135 During the hearing, Digiflex advised that the Digiflex Software could be configured to something referred to as “read-only”¹³ mode to facilitate access for document retention / access purposes and, if that was all that is required it is a possible solution and Digiflex is amenable to maintaining the licence or allowing that access. It is not clear to me if this is contemplated by the Licence Agreements or would require a limited new commercial arrangement. It is also unclear whether the perpetual nature of the Licence Agreements is actually needed or appropriate for this limited purpose. These nuances were not addressed by the parties in evidence or argument.

136 Further, it was also not addressed in evidence whether W&C/Loudon or SEC/SEDCC may be able to export the historical records data to avoid the need to keep access to the software in read-only mode post February 15, 2026. I had understood from the Monitor’s 17th supplemental report, the Monitor’s 18th Report, 7-Eleven’s September 8, 2025 affidavit, and SEC/SEDCC’s November 21, 2025 brief, that part of the transition work included SEC/SEDCC developing its own “integration software” to move data from the Debtor’s systems. In the

circumstances, notwithstanding counsel's letters and submissions, it is unclear, factually, whether an assignment of the Licence Agreements is actually necessary for records retention, audit or tax purposes once the underlying data is moved to SEC/SEDCC's systems.

137 Rather than engaging in a detailed analysis under section 11.3 of the *CCAA* at this time, I find that it is appropriate to adjourn this aspect of the Monitor Application to allow the interested parties, with the benefit of these reasons, to see if they can work out an appropriate compromise or commercial arrangement to facilitate ongoing access to the Digiflex Software for SEC/SEDCC's records retention and audit purposes (if that is in fact even necessary).

138 The Court is hopeful that, with the guidance of these reasons, a reasonable and appropriate commercial arrangement can be reached with respect to any post-February 15, 2026, access to the Digiflex Software for records retention and audit purposes. If not, I seize myself of the Proposed Assignments application and the parties may contact the commercial coordinator to seek my directions on an appropriate procedure for further evidence (if required) and submissions. I am hopeful that will not be necessary.

V. Conclusion

139 The Digiflex Application is not granted as requested but the stay is lifted *vis a vis* Digiflex effective February 15, 2026, at 11:59 p.m. to allow it to pursue whatever rights it might have (if any) in respect of its agreements with the Companies. The relief sought in paragraph 1(a)(i) of the Monitor Application is granted. The relief sought in paragraph 1(a)(ii) of the Monitor Application is dismissed based on my decision in the Digiflex Application. The relief sought in paragraph 1(a)(iii) of the Monitor Application is adjourned on the terms above.

140 The parties have had mixed success with respect to the Digiflex Application and paragraph (1)(a)(ii) of the Monitor Application. Based on that, and my findings herein, I find it appropriate and order that the parties shall bear their own costs of those applications. Costs related to the Proposed Assignments aspect of the Monitor Application is deferred pending agreement of the parties or my later decision, if required.

Applications granted in part.

Footnotes

1 Defined as the "Digiflex Agreements" in the Monitor Application.

2 Referred to as Helpdesk Level 2 Support. I understand that the General Helpdesk Services are different than the Maintenance Services and, in particular, are different than the hotline service under the Maintenance Services Agreements.

3 Affidavit No. 7 of Patrick Carey sworn February 10, 2025 at paras 20 and 34. Monitor's 15th Report dated February 13, 2025 at para 3.

- 4 Affidavit No. 8 of Patrick Carey sworn August 15, 2025, at para 30 and Exhibit D.
- 5 Second Supplement to the Monitor's 17th Report dated September 11, 2025.
- 6 Which is one of the Licence Agreements.
- 7 Monitor's 18th Report dated November 20, 2025, para 2 and Appendix A (CCAA Notice to Creditors dated June 28, 2023). See also Monitor List of Creditors as at June 22, 2023) available at <https://www.ksvadvisory.com/experience/case/wallace-and-carey>.
- 8 Mardukhi November 14, 2025 Affidavit, Exhibit M (December 3, 2024 email from Digiflex to Monitor).
- 9 Mardukhi November 14, 2025 Affidavit, Exhibit P (December 6, 2024 email from Digiflex to Monitor).
- 10 Monitor's 15th Report dated February 13, 2025 at para 2-3; Affidavit No. 7 of Patrick Carey sworn February 10, 2025 at para 34.
- 11 I was advised that the terms of the various Licence Agreements with W&C/Loudon are substantially the same.
- 12 Bench Brief of SEC and SEDCC filed November 21, 2025.
- 13 This was also referenced at the hearing as "archive mode".

TAB 5

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] 3 R.C.S. 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

Headnote

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to

Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No “gap” should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No “gap” should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown.

Taxation --- Taxe sur les produits et services — Perception et versement — Montant de TPS détenu en fiducie

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi

sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d’une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu’elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l’intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l’égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l’insolvabilité (LFI), et ni l’une ni l’autre de ces lois ne prévoyait que les créances relatives à la TPS bénéficiaient d’un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l’art. 222(3) de la LTA comme ayant implicitement abrogé l’art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n’y avait aucune certitude, en vertu de l’ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l’objet d’aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Taxation --- Principes généraux — Priorité des créances fiscales dans le cadre de procédures en faillite

Débitrice devait à la Couronne des montants de TPS qu’elle n’avait pas remis, en vertu de la Loi sur la taxe d’accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d’une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu’elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l’intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l’égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l’insolvabilité (LFI), et ni l’une ni l’autre de ces lois ne prévoyait que les créances

relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

The debtor company owed the Crown under the Excise Tax Act (ETA) for GST that was not remitted. The debtor commenced proceedings under the Companies' Creditors Arrangement Act (CCAA). Under an order by the B.C. Supreme Court, the amount of the tax debt was placed in a trust account, and the remaining proceeds from the sale of the debtor's assets were paid to the major secured creditor. The debtor's application for a partial lifting of the stay of proceedings in order to assign itself into bankruptcy was granted, while the Crown's application for the immediate payment of the unremitted GST was dismissed.

The Crown's appeal to the B.C. Court of Appeal was allowed. The Court of Appeal found that the lower court was bound by the ETA to give the Crown priority once bankruptcy was inevitable. The Court of Appeal ruled that there was a deemed trust under s. 222 of the ETA or that an express trust was created in the Crown's favour by the court order segregating the GST funds in the trust account.

The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Deschamps J. (McLachlin C.J.C., Binnie, LeBel, Charron, Rothstein, Cromwell JJ. concurring): A purposive and contextual analysis of the ETA and CCAA yielded the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the CCAA when it amended the ETA in 2000. Parliament had moved away from asserting priority for Crown claims in insolvency law under both the CCAA and Bankruptcy and Insolvency Act (BIA). Unlike for source deductions, there was no express statutory basis in the CCAA or BIA for concluding that GST claims enjoyed any preferential treatment. The internal logic of the CCAA also militated against upholding a deemed trust for GST claims.

Giving the Crown priority over GST claims during CCAA proceedings but not in bankruptcy would, in practice, deprive companies of the option to restructure under the more flexible and responsive CCAA regime. It seemed likely that Parliament had inadvertently succumbed to a

drafting anomaly, which could be resolved by giving precedence to s. 18.3 of the CCAA. Section 222(3) of the ETA could no longer be seen as having impliedly repealed s. 18.3 of the CCAA by being passed subsequently to the CCAA, given the recent amendments to the CCAA. The legislative context supported the conclusion that s. 222(3) of the ETA was not intended to narrow the scope of s. 18.3 of the CCAA.

The breadth of the court's discretion under the CCAA was sufficient to construct a bridge to liquidation under the BIA, so there was authority under the CCAA to partially lift the stay of proceedings to allow the debtor's entry into liquidation. There should be no gap between the CCAA and BIA proceedings that would invite a race to the courthouse to assert priorities.

The court order did not have the certainty that the Crown would actually be the beneficiary of the funds sufficient to support an express trust, as the funds were segregated until the dispute between the creditor and the Crown could be resolved. The amount collected in respect of GST but not yet remitted to the Receiver General of Canada was not subject to a deemed trust, priority or express trust in favour of the Crown.

Per Fish J. (concurring): Parliament had declined to amend the provisions at issue after detailed consideration of the insolvency regime, so the apparent conflict between s. 18.3 of the CCAA and s. 222 of the ETA should not be treated as a drafting anomaly. In the insolvency context, a deemed trust would exist only when two complementary elements co-existed: first, a statutory provision creating the trust; and second, a CCAA or BIA provision confirming its effective operation. Parliament had created the Crown's deemed trust in the Income Tax Act, Canada Pension Plan and Employment Insurance Act and then confirmed in clear and unmistakable terms its continued operation under both the CCAA and the BIA regimes. In contrast, the ETA created a deemed trust in favour of the Crown, purportedly notwithstanding any contrary legislation, but Parliament did not expressly provide for its continued operation in either the BIA or the CCAA. The absence of this confirmation reflected Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings. Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings, and so s. 222 of the ETA mentioned the BIA so as to exclude it from its ambit, rather than include it as the other statutes did. As none of these statutes mentioned the CCAA expressly, the specific reference to the BIA had no bearing on the interaction with the CCAA. It was the confirmatory provisions in the insolvency statutes that would determine whether a given deemed trust would subsist during insolvency proceedings.

Per Abella J. (dissenting): The appellate court properly found that s. 222(3) of the ETA gave priority during CCAA proceedings to the Crown's deemed trust in unremitted GST. The failure to exempt the CCAA from the operation of this provision was a reflection of clear legislative intent. Despite the requests of various constituencies and case law confirming that the ETA took precedence over the CCAA, there was no responsive legislative revision and the BIA remained the only exempted statute. There was no policy justification for interfering, through interpretation, with this clarity of legislative intention and, in any event, the application of other

principles of interpretation reinforced this conclusion. Contrary to the majority's view, the "later in time" principle did not favour the precedence of the CCAA, as the CCAA was merely re-enacted without significant substantive changes. According to the Interpretation Act, in such circumstances, s. 222(3) of the ETA remained the later provision. The chambers judge was required to respect the priority regime set out in s. 222(3) of the ETA and so did not have the authority to deny the Crown's request for payment of the GST funds during the CCAA proceedings.

La compagnie débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA). La débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC). En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs de la débitrice a servi à payer le créancier garanti principal. La demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement immédiat des montants de TPS non remis a été rejetée.

L'appel interjeté par la Couronne a été accueilli. La Cour d'appel a conclu que le tribunal se devait, en vertu de la LTA, de donner priorité à la Couronne une fois la faillite inévitable. La Cour d'appel a estimé que l'art. 222 de la LTA établissait une fiducie présumée ou bien que l'ordonnance du tribunal à l'effet que les montants de TPS soient détenus dans un compte en fiducie créait une fiducie expresse en faveur de la Couronne.

Le créancier a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Deschamps, J. (McLachlin, J.C.C., Binnie, LeBel, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Une analyse téléologique et contextuelle de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000. Le législateur avait mis un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité, sous le régime de la LACC et celui de la Loi sur la faillite et l'insolvabilité (LFI). Contrairement aux retenues à la source, aucune disposition législative expresse ne permettait de conclure que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel sous le régime de la LACC ou celui de la LFI. La logique interne de la LACC allait également à l'encontre du maintien de la fiducie réputée à l'égard des créances découlant de la TPS.

Le fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet, dans les faits, de priver les compagnies de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC. Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle, laquelle pouvait être corrigée en donnant préséance à l'art. 18.3 de

la LACC. On ne pouvait plus considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC parce qu'il avait été adopté après la LACC, compte tenu des modifications récemment apportées à la LACC. Le contexte législatif étayait la conclusion suivant laquelle l'art. 222(3) de la LTA n'avait pas pour but de restreindre la portée de l'art. 18.3 de la LACC.

L'ampleur du pouvoir discrétionnaire conféré au tribunal par la LACC était suffisant pour établir une passerelle vers une liquidation opérée sous le régime de la LFI, de sorte qu'il avait, en vertu de la LACC, le pouvoir de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation. Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse, puisque les fonds étaient détenus à part jusqu'à ce que le litige entre le créancier et la Couronne soit résolu. Le montant perçu au titre de la TPS mais non encore versé au receveur général du Canada ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Fish, J. (souscrivant aux motifs des juges majoritaires) : Le législateur a refusé de modifier les dispositions en question suivant un examen approfondi du régime d'insolvabilité, de sorte qu'on ne devrait pas qualifier l'apparente contradiction entre l'art. 18.3 de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle. Dans un contexte d'insolvabilité, on ne pourrait conclure à l'existence d'une fiducie présumée que lorsque deux éléments complémentaires étaient réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la LFI qui confirme l'existence de la fiducie. Le législateur a établi une fiducie présumée en faveur de la Couronne dans la Loi de l'impôt sur le revenu, le Régime de pensions du Canada et la Loi sur l'assurance-emploi puis, il a confirmé en termes clairs et explicites sa volonté de voir cette fiducie présumée produire ses effets sous le régime de la LACC et de la LFI. Dans le cas de la LTA, il a établi une fiducie présumée en faveur de la Couronne, sciemment et sans égard pour toute législation à l'effet contraire, mais n'a pas expressément prévu le maintien en vigueur de celle-ci sous le régime de la LFI ou celui de la LACC. L'absence d'une telle confirmation témoignait de l'intention du législateur de laisser la fiducie présumée devenir caduque au moment de l'introduction de la procédure d'insolvabilité. L'intention du législateur était manifestement de rendre inopérantes les fiducies présumées visant la TPS dès l'introduction d'une procédure d'insolvabilité et, par conséquent, l'art. 222 de la LTA mentionnait la LFI de manière à l'exclure de son champ d'application, et non de l'y inclure, comme le faisaient les autres lois. Puisqu'aucune de ces lois ne mentionnait spécifiquement la LACC, la mention explicite de la LFI n'avait aucune incidence sur l'interaction avec la LACC. C'étaient 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 préséance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurait la disposition postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la LACC.

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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

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

s. 23(3) — referred to

s. 23(4) — referred to

Cités et villes, Loi sur les, L.R.Q., c. C-19

en général — referred to

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

art. 2930 — referred to

Companies' Creditors Arrangement Act, Act to Amend, S.C. 1952-53, c. 3

Generally — referred to

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36

Generally — referred to

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

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — referred to

s. 11(4) — referred to

s. 11(6) — referred to

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

s. 11.09 [en. 2005, c. 47, s. 128] — considered
s. 11.4 [en. 1997, c. 12, s. 124] — referred to
s. 18.3 [en. 1997, c. 12, s. 125] — considered
s. 18.3(1) [en. 1997, c. 12, s. 125] — considered
s. 18.3(2) [en. 1997, c. 12, s. 125] — considered
s. 18.4 [en. 1997, c. 12, s. 125] — referred to
s. 18.4(1) [en. 1997, c. 12, s. 125] — considered
s. 18.4(3) [en. 1997, c. 12, s. 125] — considered
s. 20 — considered
s. 21 — considered
s. 37 — considered
s. 37(1) — referred to

Employment Insurance Act, S.C. 1996, c. 23

Generally — referred to

s. 86(2) — referred to
s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

s. 222(1) [en. 1990, c. 45, s. 12(1)] — referred to
s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

Fairness for the Self-Employed Act, S.C. 2009, c. 33

Generally — referred to

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

s. 227(4) — referred to
s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — referred to

Interpretation Act, R.S.C. 1985, c. I-21

s. 44(f) — considered

Personal Property Security Act, S.A. 1988, c. P-4.05

Generally — referred to

Sales Tax and Excise Tax Amendments Act, 1999, S.C. 2000, c. 30

Generally — referred to

Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1

Generally — referred to

s. 69 — referred to

s. 128 — referred to

s. 131 — referred to

Statutes considered *Fish J.*:

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

Generally — referred to

s. 67(2) — considered

s. 67(3) — considered

Canada Pension Plan, R.S.C. 1985, c. C-8

Generally — referred to

s. 23 — considered

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

Generally — referred to

s. 11 — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

Employment Insurance Act, S.C. 1996, c. 23

Generally — referred to

s. 86(2) — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(1) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3)(a) [en. 1990, c. 45, s. 12(1)] — considered

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

Generally — referred to

s. 227(4) — considered

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — considered

s. 227(4.1)(a) [en. 1998, c. 19, s. 226(1)] — considered

Statutes considered *Abella J.* (dissenting):

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

Generally — referred to

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

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

Interpretation Act, R.S.C. 1985, c. I-21

s. 2(1) "enactment" — considered

s. 44(f) — considered

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

Generally — referred to

Deschamps J.:

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

1. Facts and Decisions of the Courts Below

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

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which

mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

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

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

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (  2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* , [2005] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

8 Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the

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

2. Issues

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

- (1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?
- (2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?
- (3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

3. Analysis

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

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

3.1 Purpose and Scope of Insolvency Law

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors

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

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

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

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

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under

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

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

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

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

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the

Bankruptcy and Insolvency Act of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the CCAA, the House of Commons committee studying the BIA's predecessor bill, C-22, seemed to accept expert testimony that the BIA's new reorganization scheme would shortly supplant the CCAA, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

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

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

They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other

creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re* , 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville*  (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re* , 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

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

3.2 GST Deemed Trust Under the CCAA

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

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in  *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp., Re* , 2009 QCCS 6332 (C.S. Que.), leave to appeal granted, 2010 QCCA 183 (C.A. Que.)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for

unremitted GST. In oral argument, the question of whether  *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in  *Ottawa Senators*.

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

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

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

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

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

33 In *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the *Alberta Personal Property Security Act*, S.A. 1988, c. P-4.05 (“*PPSA*”). As then worded, an *ITA* deemed trust over the debtor’s property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the “*Sparrow Electric* amendment”).

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

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

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

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

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears

to have, subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

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

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

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

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

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

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

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

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

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

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

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

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

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*.  *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219, [2003] G.S.T.C. 21 (Alta. Q.B.); *Gauntlet*

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

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

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

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in  *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes’ wording, a purposive and contextual analysis to determine

Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the  *Sparrow Electric* amendment.

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

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

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

48 Arguably, the effect of  *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If  *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it

would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at “ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer” (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament’s express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

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

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

52 I am not persuaded that the reasoning in  *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in  *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he

did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from “identical” to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

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

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

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

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now

discuss how courts have interpreted the scope of their discretionary powers in supervising a CCAA reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the CCAA helps in understanding how the CCAA grew to occupy such a prominent role in Canadian insolvency law.

3.3 Discretionary Power of a Court Supervising a CCAA Reorganization

57 Courts frequently observe that “[t]he CCAA is skeletal in nature” and does not “contain a comprehensive code that lays out all that is permitted or barred” (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), at para. 44, *per* Blair J.A.). Accordingly, “[t]he history of CCAA law has been an evolution of judicial interpretation” (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List])), at para. 10, *per* Farley J.).

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

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

The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Nova Metal Products Inc. v. Comiskey (Trustee of)*  (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the CCAA takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor’s business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*  (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders,

and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re* [redacted], 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* [redacted] (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* [redacted], 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), *aff'd* [redacted] (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see Metcalfe & Mansfield). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA*'s supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

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

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are

in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re* [2003] 3 B.C.L.R. (4th) 236 (B.C. C.A.), at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* [2005] 75 O.R. (3d) 5 (Ont. C.A.), paras. 31-33, *per* Blair J.A.).

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

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

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

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, “subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances” (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

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

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when

exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

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

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

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

74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown’s GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

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

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown’s deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA*,

the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

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

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

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

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

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

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

3.4 Express Trust

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

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

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

85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor’s assets. The court’s solution was to accept LeRoy Trucking’s proposal to segregate those monies until that dispute could be resolved. Thus

there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with  *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

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

4. Conclusion

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

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

Fish J. (concurring):

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of

the appeal as she suggests.

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

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

93 In upholding deemed trusts created by the ETA notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* [2005] 3 S.C.R. 3, 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

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

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

II

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

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

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

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

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

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

(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*....

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 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 11¹ 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

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

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

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

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

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), s. 222(3) of the *ETA* is in “clear conflict” with s. 18.3(1) of the CCAA (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“*BIA*”).

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

The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with “any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)”, s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* The *BIA* and the

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

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

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

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

While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

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

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

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

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

125 The “later in time” principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

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

(*Municipalité*) , [1997] 2 S.C.R. 862 (S.C.C.)).

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

[T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ...:

The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

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

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

129 It is true that when the *CCAA* was amended in 2005,² s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, “later in time” provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663 (Fed. C.A.), dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as “new law” unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the “former enactment”, is repealed and

another enactment, in this section called the “new enactment”, is substituted therefor,

...

(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

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

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

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

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

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

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

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

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

time” provision (Sullivan, at p. 347).

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

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

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

136 I would dismiss the appeal.

Appeal allowed.
Pourvoi accueilli.

Appendix

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

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

...

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

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

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

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

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

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

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

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

...

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

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

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

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

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

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

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

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

and\

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

in subsection 23(3) or (4) of the *Canada Pension Plan*,

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

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

...

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

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

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

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

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

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

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

related interest, penalties or other amounts.

...

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

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

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

...

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

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

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

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

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

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

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

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

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

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

...

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

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

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

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

- (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
- (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the

province is a “province providing a comprehensive pension plan” as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a “provincial pension plan” as defined in that subsection,

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

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

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

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

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

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

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

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

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

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

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance*

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

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

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

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

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

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

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

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

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

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in

subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a “provincial pension plan” as defined in that subsection,

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

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

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

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

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

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

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

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her

Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

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

...

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

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

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

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

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

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

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

(b.1) such goods and services tax credit payments and prescribed payments relating to

the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (a) or (b),

but it shall comprise

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

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

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

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

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

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

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

86. (1) Status of Crown claims — In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any

body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

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

- (a) subsections 224(1.2) and (1.3) of the *Income Tax Act*;
- (b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or
- (c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum
 - (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
 - (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

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

Footnotes

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

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

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