COURT FILE NUMBER	2401-17986	Clerk's stamp
COURT	COURT OF KING'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY	
MATTER	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF 420 INVESTMENTS LTD., 420 PREMIUM MARKETS LTD., GREEN ROCK CANNABIS (EC 1) LIMITED and 420 DISPENSARIES LTD.	C30795
APPLICANT	HIGH PARK SHOPS INC.	
RESONDENTS	420 INVESTMENTS LTD., 420 PREMIUM MARKETS LTD., GREEN ROCK CANNABIS (EC 1) LIMITED, and 420 DISPENSARIES LTD.	
DOCUMENT	**BOOK OF AUTHORITIES TO THE BENCH BRIEF OF THE APPLICANTS**	

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
4200 Bankers Hall West
888-3rd Street SW
Calgary, AB T2P 5C5

Karen Fellowes, K.C. / Archer Bell
Tel: (403) 724-9469 / (403) 724-9485
Fax: (403) 266-9034
Email: kfellowes@stikeman.com / abell@stikeman.com

File No.: 155857.1002

TABLE OF AUTHORITIES

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

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

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

Current to March 17, 2025

Last amended on December 12, 2024

À jour au 17 mars 2025

Dernière modification le 12 décembre 2024

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

OFFICIAL STATUS OF CONSOLIDATIONS

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

Published consolidation is evidence

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

Inconsistencies in Acts

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

CARACTÈRE OFFICIEL DES CODIFICATIONS

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

Codifications comme élément de preuve

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

Incompatibilité — lois

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

LAYOUT

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

MISE EN PAGE

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

NOTE

This consolidation is current to March 17, 2025. The last amendments came into force on December 12, 2024. Any amendments that were not in force as of March 17, 2025 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 17 mars 2025. Les dernières modifications sont entrées en vigueur le 12 décembre 2024. Toutes modifications qui n'étaient pas en vigueur au 17 mars 2025 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

TABLE OF PROVISIONS

An Act to facilitate compromises and arrangements between companies and their creditors

TABLE ANALYTIQUE

Loi facilitant les transactions et arrangements entre les compagnies et leurs créanciers

Single judge may exercise powers, subject to appeal

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

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

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

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

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

Form of applications

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

Forme des demandes

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

Documents that must accompany initial application

(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

a) d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;

b) d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;

c) d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Publication ban

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

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

Interdiction de mettre l'état à la disposition du public

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

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

General power of court

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

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

Pouvoir général du tribunal

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

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

RELATED PROVISIONS

— R.S., 1985, c. 27 (2nd Supp.), s. 11

Transitional: proceedings

11 Proceedings to which any of the provisions amended by the schedule apply that were commenced before the coming into force of section 10 shall be continued in accordance with those amended provisions without any further formality.

— 1990, c. 17, s. 45(1)

Transitional: proceedings

45 (1) Every proceeding commenced before the coming into force of this subsection and in respect of which any provision amended by this Act applies shall be taken up and continued under and in conformity with that amended provision without any further formality.

— 1997, c. 12, s. 127

Application

127 Section 120, 121, 122, 123, 124, 125 or 126 applies to proceedings commenced under the *Companies' Creditors Arrangement Act* after that section comes into force.

— 1998, c. 30, s. 10

Transitional — proceedings

10 Every proceeding commenced before the coming into force of this section and in respect of which any provision amended by sections 12 to 16 applies shall be taken up and continued under and in conformity with that amended provision without any further formality.

— 2000, c. 30, s. 156(2)

(2) Subsection (1) applies to proceedings commenced under the Act after September 29, 1997.

— 2000, c. 30, s. 157(2)

(2) Subsection (1) applies to proceedings commenced under the Act after September 29, 1997.

— 2000, c. 30, s. 158(2)

(2) Subsection (1) applies to proceedings commenced under the Act after September 29, 1997.

DISPOSITIONS CONNEXES

— L.R. (1985), ch. 27 (2e suppl.), art. 11

Disposition transitoire : procédure

11 Les procédures intentées en vertu des dispositions modifiées en annexe avant l'entrée en vigueur de l'article 10 se poursuivent en conformité avec les nouvelles dispositions sans autres formalités.

— 1990, ch. 17, par. 45(1)

Disposition transitoire : procédures

45 (1) Les procédures intentées avant l'entrée en vigueur du présent paragraphe et auxquelles s'appliquent des dispositions visées par la présente loi se poursuivent sans autres formalités en conformité avec ces dispositions dans leur forme modifiée.

— 1997, ch. 12, art. 127

Application

127 Les articles 120, 121, 122, 123, 124, 125 ou 126 s'appliquent aux procédures intentées sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* après l'entrée en vigueur de l'article en cause.

— 1998, ch. 30, art. 10

Procédures

10 Les procédures intentées avant l'entrée en vigueur du présent article et auxquelles s'appliquent des dispositions visées par les articles 12 à 16 se poursuivent sans autres formalités en conformité avec ces dispositions dans leur forme modifiée.

— 2000, ch. 30, par. 156(2)

(2) Le paragraphe (1) s'applique aux procédures intentées en vertu de la même loi après le 29 septembre 1997.

— 2000, ch. 30, par. 157(2)

(2) Le paragraphe (1) s'applique aux procédures intentées en vertu de la même loi après le 29 septembre 1997.

— 2000, ch. 30, par. 158(2)

(2) Le paragraphe (1) s'applique aux procédures intentées en vertu de la même loi après le 29 septembre 1997.

— 2001, c. 34, s. 33(2)

(2) Subsection (1) applies to proceedings commenced under the Act after September 29, 1997.

— 2005, c. 47, s. 134, as amended by 2007, c. 36, s. 107

Companies' Creditors Arrangement Act

134 An amendment to the *Companies' Creditors Arrangement Act* that is enacted by any of sections 124 to 131 of this Act applies only to a debtor company in respect of whom proceedings commence under that Act on or after the day on which the amendment comes into force.

— 2007, c. 29, s. 119

Companies' Creditors Arrangement Act

119 An amendment to the *Companies' Creditors Arrangement Act* made by section 104 or 106 of this Act applies only to a debtor company in respect of which proceedings under that Act are commenced on or after the day on which the amendment comes into force.

— 2007, c. 36, s. 111

Companies' Creditors Arrangement Act

111 The amendment to the *Companies' Creditors Arrangement Act* that is enacted by section 67 of this Act applies only to a debtor company in respect of whom proceedings commence under that Act on or after the day on which the amendment comes into force.

— 2018, c. 27, s. 271

Companies' Creditors Arrangement Act

271 Subsection 36(8) of the *Companies' Creditors Arrangement Act*, as enacted by section 269, applies only in respect of proceedings that are commenced under that Act on or after the day on which this section comes into force.

— 2001, ch. 34, par. 33(2)

(2) Le paragraphe (1) s'applique aux procédures intentées en vertu de la même loi après le 29 septembre 1997.

— 2005, ch. 47, art. 134, modifié par 2007, ch. 36, art. 107

Loi sur les arrangements avec les créanciers des compagnies

134 Toute modification à la *Loi sur les arrangements avec les créanciers des compagnies* édictée par l'un des articles 124 à 131 de la présente loi ne s'applique qu'aux compagnies débitrices à l'égard desquelles une procédure est intentée sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* à la date d'entrée en vigueur de la modification ou par la suite.

— 2007, ch. 29, art. 119

Loi sur les arrangements avec les créanciers des compagnies

119 La modification apportée à la *Loi sur les arrangements avec les créanciers des compagnies* par les articles 104 ou 106 de la présente loi ne s'applique qu'aux compagnies débitrices à l'égard desquelles une procédure est intentée sous le régime de cette loi à la date d'entrée en vigueur de la modification ou par la suite.

— 2007, ch. 36, art. 111

Loi sur les arrangements avec les créanciers des compagnies

111 La modification à la *Loi sur les arrangements avec les créanciers des compagnies* édictée par l'article 67 de la présente loi ne s'applique qu'aux compagnies débitrices à l'égard desquelles une procédure est intentée sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* à la date d'entrée en vigueur de la modification ou par la suite.

— 2018, ch. 27, art. 271

Loi sur les arrangements avec les créanciers des compagnies

271 Le paragraphe 36(8) de la *Loi sur les arrangements avec les créanciers des compagnies*, édicté par l'article 269, ne s'applique qu'à l'égard des procédures intentées sous le régime de cette loi à la date d'entrée en vigueur du présent article ou par la suite.

— 2019, c. 29, s. 150

150 Section 11.001, subsections 11.02(1) and 11.2(5) and sections 11.9 and 18.6 of the *Companies' Creditors Arrangement Act*, as enacted by sections 136 to 140, apply only in respect of proceedings that are commenced under that Act on or after the day on which that section or subsection, as the case may be, comes into force.

— 2019, ch. 29, art. 150

150 L'article 11.001, les paragraphes 11.02(1) et 11.2(5) et les articles 11.9 et 18.6 de la *Loi sur les arrangements avec les créanciers des compagnies*, édictés par les articles 136 à 140, ne s'appliquent qu'à l'égard des procédures intentées sous le régime de cette loi à la date d'entrée en vigueur de l'article ou du paragraphe, selon le cas, ou par la suite.

— 2023, c. 6, s. 7(2)

Exception — companies

7 (2) Subsections 5(1) and (2) do not apply in respect of a company that, on the day before the day on which those subsections come into force, participated in a prescribed pension plan for the benefit of its employees until the fourth anniversary of the day on which this Act comes into force.

— 2023, ch. 6, par. 7(2)

Exception — compagnies

7 (2) Les paragraphes 5(1) et (2) ne s'appliquent pas à la compagnie qui, la veille de leur entrée en vigueur, participait à un régime de pension réglementaire institué pour ses employés, et ce, jusqu'au quatrième anniversaire de l'entrée en vigueur de la présente loi.

— 2024, c. 15, s. 276

Companies' Creditors Arrangement Act

276 The definition ***company*** in subsection 2(1) of the *Companies' Creditors Arrangement Act*, as enacted by section 274, applies only in respect of proceedings that are commenced under that Act on or after the day on which that section 274 comes into force.

— 2024, ch. 15, art. 276

Loi sur les arrangements avec les créanciers des compagnies

276 La définition de *compagnie*, au paragraphe 2(1) de la *Loi sur les arrangements avec les créanciers des compagnies*, édictée par l'article 274, ne s'applique qu'à l'égard des procédures intentées sous le régime de cette loi à la date d'entrée en vigueur de cet article 274 ou après cette date.

AMENDMENTS NOT IN FORCE

— 2024, c. 15, s. 274

274 The definition *company* in subsection 2(1) of the *Companies' Creditors Arrangement Act* is replaced by the following:

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

MODIFICATIONS NON EN VIGUEUR

— 2024, ch. 15, art. 274

274 La définition de *compagnie*, au paragraphe 2(1) de la *Loi sur les arrangements avec les créanciers des compagnies*, est remplacée par ce qui suit :

compagnie Toute personne morale constituée par une loi fédérale ou provinciale ou sous son régime et toute personne morale qui possède un actif ou exerce des activités au Canada, quel que soit l'endroit où elle a été constituée, ainsi que toute fiducie de revenu. La présente définition exclut les banques, les banques étrangères autorisées au sens de l'article 2 de la *Loi sur les banques*, les compagnies de télégraphe, les compagnies d'assurances, les sociétés auxquelles s'applique la *Loi sur les sociétés de fiducie et de prêt* et les établissements publics d'enseignement postsecondaire prévus par règlement. (*company*)

9354-9186 Québec inc. and 9354-9178 Québec inc. *Appellants*

v.

Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier *Respondents*

and

Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals *Interveners*

- and -

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited) *Appellants*

v.

Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier *Respondents*

and

9354-9186 Québec inc. et 9354-9178 Québec inc. *Appelantes*

c.

Callidus Capital Corporation, International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier *Intimés*

et

Ernst & Young Inc., IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited), Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)), Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation *Intervenants*

- et -

IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)) *Appelantes*

c.

Callidus Capital Corporation, International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier *Intimés*

et

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

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

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

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

B. *Callidus ne devrait pas être autorisée à voter sur son nouveau plan*

[56] En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la *LACC* qui peuvent limiter son droit de voter (p. ex., par. 22(3)), ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Nous concluons qu'une telle limite découle de l'art. 11 de la *LACC*, qui confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter lorsqu'il agit dans un but illégitime. Le juge surveillant est mieux placé que quiconque pour déterminer s'il doit exercer ce pouvoir dans un cas donné. À notre avis, le juge surveillant n'a, en l'espèce, commis aucune erreur en exerçant son pouvoir discrétionnaire pour empêcher Callidus de voter sur le nouveau plan.

(1) Les paramètres du droit d'un créancier de voter sur un plan d'arrangement

[57] L'approbation par les créanciers d'un plan d'arrangement ou d'une transaction est l'une des principales caractéristiques de la *LACC*, tout comme la supervision du processus assurée par le juge surveillant. Lorsqu'un plan est proposé, le juge surveillant peut, sur demande, ordonner que soit convoquée une assemblée des créanciers pour que ceux-ci puissent voter sur le plan proposé (*LACC*, art. 4 et 5). Le juge surveillant a le pouvoir discrétionnaire de décider ou non d'ordonner qu'une assemblée soit convoquée. Pour les besoins du vote à l'assemblée des créanciers, la compagnie débitrice peut établir des catégories de créanciers, sous réserve de l'approbation du tribunal (*LACC,* par. 22(1)). Peuvent faire partie de la même catégorie les créanciers « ayant des droits ou intérêts à ce point semblables [. . .] qu'on peut en conclure qu'ils ont un intérêt commun » (*LACC*, par. 22(2); voir aussi L. W. Houlden, G. B. Morawetz, et J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4e éd. (feuilles mobiles)), vol. 4, §149). Si la « double majorité » requise dans chaque catégorie de créanciers — rappelons qu'il s'agit de la majorité en *nombre* d'une catégorie, qui représente aussi les deux-tiers en *valeur* des réclamations de cette catégorie — vote

provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the *CCAA* context (para. 36).

[69] Oversight of the plan negotiation, voting, and approval process falls squarely within the supervising judge's purview. As indicated, there are no specific provisions in the *CCAA* which govern when a creditor who is otherwise eligible to vote on a plan may nonetheless be barred from voting. Nor is there any provision in the *CCAA* which suggests that a creditor has an absolute right to vote on a plan that cannot be displaced by a proper exercise of judicial discretion. However, given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, creditors should only be barred from voting where the circumstances demand such an outcome. In other words, it is necessarily a discretionary, circumstance-specific inquiry.

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

[71] The discretion to bar a creditor from voting in furtherance of an improper purpose under the *CCAA* parallels the similar discretion that exists under the *BIA*, which was recognized in *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296. In *Laserworks*, the Nova Scotia

précisément compétence, l'art. 11 est nécessairement la disposition à laquelle on peut recourir d'emblée pour fonder la compétence du tribunal. Comme l'a dit le juge Blair dans l'arrêt *Stelco*, l'art. 11 [TRADUCTION] « fait en sorte que la plupart du temps, il est inutile de recourir à la compétence inhérente » dans le contexte de la *LACC* (par. 36).

[69] La supervision des négociations entourant le plan, tout comme le vote et le processus d'approbation, relève nettement de la compétence du juge surveillant. Comme nous l'avons dit, aucune disposition de la *LACC* ne vise le cas où un créancier par ailleurs admissible à voter sur un plan peut néanmoins être empêché de le faire. Il n'existe non plus aucune disposition de la *LACC* selon laquelle le droit que possède un créancier de voter sur un plan est absolu et que ce droit ne peut pas être écarté par l'exercice légitime du pouvoir discrétionnaire du tribunal. Toutefois, étant donné le régime de la *LACC*, dont l'un des aspects essentiels tient à la participation du créancier au processus décisionnel, les créanciers ne devraient être empêchés de voter que si les circonstances l'exigent. Autrement dit, il faut nécessairement procéder à un examen discrétionnaire axé sur les circonstances propres à chaque situation.

[70] L'article 11 constitue donc manifestement la source de la compétence du juge surveillant pour rendre une ordonnance discrétionnaire empêchant un créancier de voter sur un plan d'arrangement. L'exercice du pouvoir discrétionnaire doit favoriser la réalisation des objets réparateurs de la *LACC* et être fondé sur les considérations de base que sont l'opportunité, la bonne foi et la diligence. Cela signifie que, lorsqu'un créancier cherche à exercer ses droits de vote de manière à contrecarrer, à miner ces objectifs ou à aller à l'encontre de ceux-ci — c'est-à-dire à agir dans un « but illégitime » — le juge surveillant a le pouvoir discrétionnaire d'empêcher le créancier de voter.

[71] Le pouvoir discrétionnaire d'empêcher un créancier de voter dans un but illégitime au sens de la *LACC* s'apparente au pouvoir discrétionnaire semblable qui existe en vertu de la *LFI*, lequel a été reconnu dans l'arrêt *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R.

Court of Appeal concluded that the discretion to bar a creditor from voting in this way stemmed from the court's power, inherent in the scheme of the *BIA*, to supervise "[e]ach step in the bankruptcy process" (at para. 41), as reflected in ss. 43(7), 108(3), and 187(9) of the Act. The court explained that s. 187(9) specifically grants the power to remedy a "substantial injustice", which arises "when the *BIA* is used for an improper purpose" (para. 54). The court held that "[a]n improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament" (para. 54).

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

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

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

(2d) 296. Dans *Laserworks*, la Cour d'appel de la Nouvelle-Écosse a conclu que le pouvoir discrétionnaire d'empêcher un créancier de voter de cette façon découlait du pouvoir du tribunal, inhérent au régime établi par la *LFI*, de superviser [TRADUCTION] « [c]haque étape du processus de faillite » (par. 41), comme l'indiquent les par. 43(7), 108(3) et 187(9) de la Loi. La cour a expliqué que le par. 187(9) confère expressément le pouvoir de remédier à une « injustice grave », laquelle se produit « lorsque la *LFI* est utilisée dans un but illégitime » (par. 54). La cour a statué que « [l]e but illégitime est un but qui est accessoire à l'objet pour lequel la loi en matière de faillite et d'insolvabilité a été adoptée par le législateur » (par. 54).

[72] Bien qu'elle ne soit pas déterminante, l'existence de ce pouvoir discrétionnaire en vertu de la *LFI* étaye l'existence d'un pouvoir discrétionnaire semblable en vertu de la *LACC* pour deux raisons.

[73] D'abord, cette conclusion serait compatible avec le fait que la Cour a reconnu que la *LACC* « établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire » que sous le régime de la *LFI* (*Century Services*, par. 14 (nous soulignons)).

[74] Ensuite, la Cour a reconnu les bienfaits de l'harmonisation, dans la mesure du possible, des deux lois. À titre d'exemple, dans l'arrêt *Indalex*, la Cour a souligné que « pour éviter de précipiter une liquidation sous le régime de la *LFI*, les tribunaux privilégieront une interprétation de la *LACC* qui confère [. . .] aux créanciers [des droits analogues] » à ceux dont ils jouissent en vertu de la *LFI* (par. 51; voir également *Century Services*, par. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283, par. 34-46). Ainsi, lorsque les lois permettent une interprétation harmonieuse, il y a lieu de retenir cette interprétation [TRADUCTION] « afin d'écarter les embûches pouvant découler du choix des créanciers de "recourir à la loi la plus favorable" [en matière d'insolvabilité] » (*Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274, par. 78; voir aussi par. 73). À notre avis, la manière dont a été formulé le « but illégitime » dans l'arrêt *Laserworks* — c'est-à-dire un but accessoire à l'objet de la loi en

discretion is to be exercised in accordance with the *CCAA*'s objectives as an insolvency statute.

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

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation . . . . If the *CCAA* is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute. [Emphasis added.]

("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30)

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

matière d'insolvabilité — s'harmonise parfaitement avec la nature et la portée du pouvoir discrétionnaire judiciaire que confère la *LACC*. En effet, comme nous l'avons expliqué, ce pouvoir discrétionnaire doit être exercé conformément aux objets de la *LACC* en tant que loi en matière d'insolvabilité.

[75] Nous soulignons également que la reconnaissance de l'existence de ce pouvoir discrétionnaire sous le régime de la *LACC* favorise l'équité fondamentale qui [TRADUCTION] « imprègne le droit et la pratique en matière d'insolvabilité au Canada » (Sarra, « The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », p. 27; voir également *Century Services*, par. 70 et 77). Comme le fait observer la professeure Sarra, l'équité commande que les juges surveillants soient en mesure de reconnaître les situations où les parties empêchent la réalisation des objectifs de la loi et de prendre des mesures utiles à leur égard :

> [TRADUCTION] Le régime d'insolvabilité canadien repose sur la présomption que les créanciers et le débiteur ont pour objectif commun de maximiser les recouvrements. L'aspect substantiel de la justice dans le régime d'insolvabilité repose sur la présomption que toutes les parties concernées sont exposées à de réels risques économiques. L'injustice réside dans les situations où seules certaines personnes sont exposées aux risques, tandis que d'autres tirent en fait avantage de la situation. [. . .] Si l'on veut que la *LACC* reçoive une interprétation téléologique, les tribunaux doivent être en mesure de reconnaître les situations où les gens ont des intérêts opposés et s'emploient activement à contrecarrer les objectifs de la loi. [Nous soulignons.]

(« The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », p. 30)

Dans le même ordre d'idées, la surveillance du régime de droit de vote prévu par la *LACC* qu'exerce le juge surveillant ne doit pas seulement assurer une application stricte de la Loi, mais doit aussi favoriser la réalisation de ses objectifs. Nous estimons que la réalisation des objectifs de politique de la *LACC* nécessite la reconnaissance du pouvoir discrétionnaire d'empêcher un créancier de voter s'il agit dans un but illégitime.

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

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

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

[78] The supervising judge considered the whole of the circumstances and concluded that Callidus's vote would serve an improper purpose (paras. 45 and 48). We agree with his determination. He was aware that, prior to the vote on the First Plan, Callidus had chosen not to value *any* of its claim as unsecured and later declined to vote at all — despite the Monitor explicitly inviting it do so.[4] The supervising judge was also aware that Callidus's First Plan had failed to receive the other creditors' approval at the creditors' meeting of December 15, 2017, and that Callidus had chosen not to take the opportunity to amend or increase the value of its plan at that time, which it was entitled to do (see *CCAA*, ss. 6 and 7; Monitor, I.F., at para. 17). Between the failure of the First Plan and the proposal of the New Plan — which was identical to the First Plan, save for a modest increase of $250,000 — none of the factual circumstances relating to Bluberi's financial or business

[4] It bears noting that the Monitor's statement in this regard did not decide whether Callidus would ultimately have been entitled to vote on the First Plan. Because Callidus did not even attempt to vote on the First Plan, this question was never put to the supervising judge.

[76] La question de savoir s'il y a lieu d'exercer le pouvoir discrétionnaire dans une situation donnée appelle une analyse fondée sur les circonstances propres à chaque situation qui doit mettre en balance les divers objectifs de la *LACC*. Comme le démontre le présent dossier, le juge surveillant est le mieux placé pour procéder à cette analyse.

(3) Le juge surveillant n'a pas commis d'erreur en interdisant à Callidus de voter

[77] À notre avis, la décision du juge surveillant d'empêcher Callidus de voter sur le nouveau plan ne révèle aucune erreur justifiant l'intervention d'une cour d'appel. Comme nous l'avons expliqué, il faut adopter l'attitude de déférence appropriée à l'égard des décisions discrétionnaires de ce genre. Il convient de mentionner que, lorsqu'il a rendu sa décision, le juge surveillant connaissait très bien les procédures fondées sur la *LACC* relatives à Bluberi. Il les avait présidées pendant plus de 2 ans, avait reçu 15 rapports du contrôleur et avait délivré environ 25 ordonnances.

[78] Le juge surveillant a tenu compte de l'ensemble des circonstances et a conclu que le vote de Callidus viserait un but illégitime (par. 45 et 48). Nous sommes d'accord avec cette conclusion. Il savait qu'avant le vote sur le premier plan, Callidus avait choisi de n'évaluer *aucune partie* de sa réclamation à titre de créancier non garanti et s'était par la suite abstenue de voter — bien que le contrôleur l'ait expressément invité à le faire[4]. Le juge surveillant savait aussi que le premier plan de Callidus n'avait pas reçu l'aval des autres créanciers à l'assemblée des créanciers tenue le 15 décembre 2017, et que Callidus avait choisi de ne pas profiter de l'occasion pour modifier ou augmenter la valeur de son plan à ce moment-là, ce qu'elle était en droit de faire (voir *LACC*, art. 6 et 7; contrôleur, m.i., par. 17). Entre l'insuccès du premier plan et la proposition du nouveau plan — qui était identique au premier plan, hormis la modeste augmentation de 250 000 $ — les

[4] Il convient de souligner que la déclaration du contrôleur à cet égard ne permettait pas de décider si Callidus aurait finalement eu le droit de voter sur le premier plan. Comme Callidus n'a même pas essayé de voter sur le premier plan, cette question n'a jamais été soumise au juge surveillant.

Ontario Supreme Court
Economopoulos, Re,
Date: 2000-08-04

In the Matter of the Bankruptcy of Constantine “Gus” Economopoulos (of the Township of Southwest Oxford, County of Oxford, Province of Ontario)

Ontario Superior Court of Justice [In Bankruptcy] Gillese J.

Judgment: August 4, 2000

Docket: 35-081303

A. D’Ascanio, for Proposal Debtor.

D. Swift, for Opposing Creditor.

Gillese J. **(orally):**

[1] This is Court File No. 35-081303, Ontario Superior Court of Justice in Bankruptcy, in the matter of the proposal of Constantine “Gus” Economopoulos, of the Township of Southwest Oxford, in the County of Oxford, in the Province of Ontario. A. D’Ascanio appearing for the proposal debtor, I. Wallace and D. Swift appearing for an opposing creditor. The matter was heard July 19 and 20, 2000, in London.

[2] The Trustee in Bankruptcy, Price Waterhouse Coopers brings a motion pursuant to S.59 of the Bankruptcy Act, asking for court approval of the Amended Proposal of Mr. Economopoulos. I apologize for any poor pronunciation of names. Mr. Nicolopoulos appears as an objecting creditor and opposes the motion.

[3] The proposal debtor argues that to permit the objecting creditor to participate in the motion would be an abuse of process because the objecting creditor had no direct claim against the proposal debtor. The objecting creditor admits that he bought the claim of a third party creditor. He also acknowledges the ongoing civil litigation between himself and the proposal debtor.

[4] The third party creditor initially issued a petition in bankruptcy against the proposal debtor. The objecting creditor took over the petition when he bought the third party claim. The fact that he had taken over the petition was not divulged to motion judges hearing matters in the

petition at various points, although it was a relevant matter. The objecting creditor states in his affidavit of the 13th of June, 2000, that he continued the bankruptcy process as it might allow him “the opportunity to resolve” the civil litigation matter between himself and the proposal debtor.

[5] There was no denial that his purpose was to use the bankruptcy proceedings to end shareholder litigation by putting the proposal debtor into bankruptcy.

[6] The proposal debtor argues that the objecting creditor ought not to be allowed to vote on the proposal, nor to bring its objections to this court. The question of the propriety of voting is moot and need not be decided as the objecting creditor conceded at the outset of the hearing of this motion that whether his vote was counted or not, more than the requisite number of creditors had approved the proposal. Therefore, as I see it, the only matter to be determined between the parties is whether the objecting creditor has status to participate in the motion to approve the proposal.

[7] The objecting creditor argued that, as a creditor, he had the right to be heard on the motion. It is my view that, based on the wording of S.59(1) of The Bankruptcy Act, the objecting creditor does have the right to be heard and that it is mandatory that I hear his objections. I will read S.59(1) at this time:

> The Court shall, before approving the proposal, hear a report of the Trustee in the prescribed form respecting the terms thereof, and the conduct of the debtor and, in addition, shall hear the Trustee, the debtor, the person making the proposal, any opposing objecting or dissenting creditor and such further evidence as the Court may require, (emphasis added)

[8] In my view, the motivation of the creditor is not relevant to the question of his status to be heard. He has that right pursuant to the legislation. The objecting creditor’s motive or purpose is relevant at the point that the Court considers the objections raised and when it determines how much weight to give to those objections.

[9] It is wiser, in my view, that the objecting creditor be heard and purpose taken into consideration later as a factor in determining the weight to be given to the objections, than to

[33] If I did need to consider the matter of weight, and I do not believe that I do given my previous findings, at this point I would also consider the motive behind the objecting creditor in coming forward. That motive was self interest in civil litigation against the proposal debtor, not the interests of the general body of creditors.

[34] In conclusion, I find that the terms of the amended proposal are reasonable, made in good faith and calculated to benefit the general body of creditors. The creditors are better off under the amended proposal than they would be in a bankruptcy. Nothing raised by the objecting creditor causes me to doubt these conclusions. An order shall go for the reasons given approving the amended proposal.

[35] The funds held pursuant to the amended proposal shall be dispersed to the Trustee. In the event an appeal is filed from this decision, the Trustee shall not pay out the property unless and until the appeal is dismissed. If an appeal is successfully taken, the Trustee shall forthwith return the funds to—now Mr. D'Ascanio, I was not sure, did you not want them to flow back through your office? Last day you indicated that the flow of monies, on court approval, was to go out to the Trustee to hold until the result of any possible appeal, but if the appeal were successful, my notes show that you had asked that the Trustee should return the funds directly to Mr. Bullock?

[36] MR. D'ASCANIO: No, to me.

[37] THE COURT: So, if an appeal is successfully taken, the Trustee shall forthwith return the funds to the solicitor for the proposal debtor, namely, Mr. D'Ascanio.

[38] And counsel, I will just read the endorsement then:

> For reasons delivered orally today, the motion for court approval of the amended proposal is granted.

[39] Do you wish those terms about the flow of funds on the back of the motion record?

[40] MR. D'ASCANIO: Your Honor, I would for practical purposes, that way when I take out the order I don't have to actually order a copy of the transcript.

[41] THE COURT: Alright. Let me just read then the back of the motion record has now been endorsed to read as follows:

Date: 19980213 Docket: CA 141313

NOVA SCOTIA COURT OF APPEAL

Freeman, Pugsley and Cromwell, JJ.A.

BETWEEN:

3004876 Nova Scotia Limited

Appellant

-and-

LASERWORKS COMPUTER SERVICES INC.

Respondent

James A. Musgrave for the Appellant

Roy F. Redgrave for the Respondent

D. Bruce Clarke and Pamela J. Clarke-Priddle for the Respondent - Trustee

Appeal Heard: December 9, 1997

Judgment Delivered: February 13, 1998

THE COURT: The appeal is dismissed, per reasons for judgment of Freeman, J.A.; Pugsley and Cromwell, JJ.A., concurring.

FREEMAN, J.A.:

The respondent LaserWorks Computer Services Inc., a dealer in supplies for laser printers, made a proposal to its creditors under the provisions of the **Bankruptcy and Insolvency Act,** R.S.C. 1985, c. B-3 (the **BIA**).

A competitor, Datarite, operating through the appellant 3004876 Nova Scotia Limited, acquired the claims of eighteen creditors and voted them over the objections of LaserWorks at the meeting of creditors, defeating the proposal. Only two of the remaining sixteen creditors opposed the proposal.

Acceptance required votes representing a majority in number and two-thirds in value of the class of unsecured creditors present in person or by proxy. The Registrar of Bankruptcy of the Supreme Court of Nova Scotia in Bankruptcy, Tim Hill, found:

> Upon the vote being taken, fourteen creditors with a total claim value of $206,531.65 voted in favour of the proposal. Twenty creditors with a total claim of $140, 370.00 voted against the proposal. Thus 41% of creditors representing 59% of the claims voted pro, and 59% of the creditors with 40.5% of the claims voted con. The proposal was defeated, subject to the resolution of the objections before the court today.

At the hearing into the objections the Registrar, after hearing evidence from the appellant's solicitor Victor Goldberg, who was not counsel on the appeal, disallowed the appellant's votes. He found the proposal had been accepted by the votes of the other creditors. His decision was upheld by Justice Stewart on an appeal to the Supreme Court of Nova Scotia in Bankruptcy.

Issues and Standard of Review

The overriding issue is whether the court's inherent supervisory jurisdiction should be invoked to interfere in a proposal to creditors under the **BIA** when it appears the statutory process is being used for purposes not contemplated by Parliament.

The appellant submits it was a true appeal before Justice Stewart, and not a hearing *de novo*, on the authority of **Re McCulloch Estate** (1992), 13 C.B.R. (3d) 201 Tr. Div.) and **Cockfield Brown Inc. (Trustee of) v. Reseau de Television TVA Inc.** (1988), 70 C.B.R. (N.S.) 59 (Que. C.A.) On further appeal to this court the grounds are whether Justice Stewart erred in:

1. Failing to reverse the Registrar's finding that 18 creditors of LaserWorks assigned their rights to the appellant;

2. Sustaining the Registrar's finding that Datarite engaged in an improper purpose in acquiring and voting the claims of the 18 creditors;

3. Sustaining the Registrar's finding that the Appellant's purpose in acquiring and voting the claims was relevant; and

4. Concluding that there was an abuse on a minority of a class of unsecured creditors and that a duty in this respect was owed by the appellant.

> The court found that there had been an improper use of the bankruptcy legislation. The effect of the agreement was to embroil the creditor in the improper objectives of the franchisees who were intermeddling in the proceeding. This tainted the whole proceeding. Clearly where the object of the intermeddling party is to bring about the bankruptcy of the debtor an improper purpose is present. The court will act to prevent such an abuse of the legislation.
>
> The other cases I have referred to, **Dimples Diapers Inc.** and **Shepard** also deal with bankruptcy petitions instigated for an improper collateral purpose. In **Dimples** that purpose was to recover a trademark and a business opportunity. In **Shepard** that purpose was to obtain control of certain shares.
>
> While this case does not involve a bankruptcy petition, it does involve the placing of Laserworks into bankruptcy. In my view, it would be wrong to allow Datarite to do in the proposal process what it cannot do by petition. Datarite's intention was to place Laserworks in bankruptcy. The motive was to remove a competitor. That motive reveals an improper purpose. The court will not allow to be done by the back door what cannot be done by the front.
>
> By entering into this arrangement with the numbered company the eighteen creditors have tainted themselves and become embroiled in the improper purpose of Datarite. Their votes cannot stand. If Laserworks has the right to be free of this type of interference the Court must be able to fashion a remedy. This court does have the inherent jurisdiction to supervise the bankruptcy process and consequently the conduct of creditors where that conduct constitutes an abuse of the provisions of the BIA. While creditors can certainly vote in their own best interest, they may not collude with a third party to place a debtor in bankruptcy for an improper purpose. Such activity lacks commercial morality and offends the integrity of the bankruptcy process.

While Datarite was not permitted to vote the claims it had acquired, they remained debts of the insolvent debtor.

Justice Stewart

The first ground of appeal to this court, the issue of whether the claims of 18 creditors were actually assigned to Datarite, does not appear to have been a ground of appeal before Justice Stewart.

On the next two grounds of appeal, whether the Registrar failed to appreciate the evidence before him in concluding that Datarite's purpose in acquiring and voting the 18 claims was an improper one, and whether such purpose was a relevant consideration, Justice Stewart, in upholding the Registrar, took a different route to arrive at the same conclusion. She stated:

> Although stated in the context of voting by debenture holders when the majority had votes to modify the rights of the debenture holders in a clause, the statements of principle by Viscount Haldane of the Judicial Committee of the Privy Council in **British America Nickel Corporation v. M. J. O'Brien,** [1927] A.C. 369 at p. 371 are, no less, here applicable:

procedure was followed, and the objections were considered by the Registrar who had jurisdiction under s.187(9) to remedy substantial injustice.

Motive or purpose is not relevant to objections to proofs of claim based on statutory exceptions under the **BIA**. These are established in several sections, including s.109(1), persons who had not duly proved and lodged a claim; s.54(3), a relative of the debtor (who may vote against but not for a proposal); 109(4), the debtor as proxy for a creditor; s.109(6), a creditor who did not deal with the debtor at arm's length (with exceptions); s.110(1), a person with a claim acquired after the bankruptcy unless the entire claim is acquired; s.111, a creditor with a claim on or secured by a current bill of exchange (subject to conditions); s.112, a creditor holding security (subject to conditions); and s. 113(2), a trustee as proxy (subject to restrictions). See also s. 109, the trustee as creditor.

(It will be noted that many of these exceptions arise from circumstances that could give rise to conflict of interest. This will be considered further under the fourth ground of appeal.)

However the statutory exceptions are not a code exhausting the forms in which substantial injustice may manifest itself. Objections will be sustained under s. 108(3) if they result from a crime or a tort against the debtor or a crteditor. In the present appeal, and in the authorities cited by the Registrar, the substantial injustice assumes the guise of tortious behavior, to which motive is relevant. In the s. 108(3) context the commonest torts, or instances of substantial injustice arising from tortious behavior, relate to abuse of process and fraud. However conspiracy to harm was also found in **Dimples Diapers.**

Tortious or tort-tike behavior falling short of a fully developed tort susceptible of formal proof or definition can nevertheless result in substantial injustice, particularly for persons at a point so vulnerable they must resort to insolvency protection. (See **Shepard**.) In my view that is why Parliament chose the language it did in s.187(9): to create a discretionary jurisdiction in courts that is not fettered, for example, by the high standards required for establishing such torts as abuse of process in other contexts. What remains to be considered is the threshold level of the substantial injustice which will result in remedial action by the court.

(ii)The Authorities

The four cases cited by the Registrar establish that the threshold is crossed when the **BIA** is used for an improper purpose. An improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament.

Farley J. held in **Dimples Diapers** that:

> . . . the **Bankruptcy Act**, R.S.C. 1985, c. B-3 has as its purpose the provision of "the orderly and fair distribution of the property of a bankrupt among its creditors on a pari passu basis". (L.W.Houlden and C.H.Morawetz, Bankruptcy Law of **Canada**, 3rd ed. (looseleaf) (Toronto: Carswell, 1989) at p. 1-3 [A&4]....

In the cases cited the improper purpose takes the form of abuse of process or tortious behavior closely analogous to abuse of process. In each case the court reacted to what could be seen as substantial injustice. The remedy of choice arising under s. 43(7) is refusal of the petition. The appropriate remedy in the present case is rejection of the tainted votes.

In **Shepard** it was found that the purpose of the petitioner was to gain control over certain shares of the debtor, an important business advantage. "It is not appropriate or indeed, correct in law, to have the courts facilitate such an objective when the objective is very clearly the main purpose of the application." This finding is consistent with a finding of substantial injustice resulting from abuse of process.

(iii) The Present Case

It is most significant that the appellant was not a creditor of LaserWorks prior to the proposal. Intermeddling by strangers to the pre-existing debtor creditor relationship for an improper purpose was a determinative factor in **Pappy's Good Eats.** The practice of buying dubious claims against an insolvent for purposes foreign to the bankruptcy process was denounced in the English cases cited in **de la Hooke.** The Registrar in the present case understandably looked askance at it. Few legitimate reasons come to mind for buying into a bankrupt estate. When somebody does so, it is a matter of common sense to assume, subject to correction, they intend to use the bankruptcy process for some purpose it was not meant for. In the present case it was readily apparent that mischief was afoot.

The "orderly and fair distribution of the property of a bankrupt among its creditors on a pari passu basis" was not the purpose behind the acts of the appellant. The appellant made separate approaches to each of the eighteen creditors whose claims it succeeded in acquiring. It negotiated a separate deal with each for varying considerations presumably seen to be more advantageous to the creditor than reliance on the proposal. From most of them it obtained an agreement, an executed assignment and a proxy. It purported to vote the proxies of former creditors whose claims had been assigned to it. Its purpose was not an orderly recovery of debts from the debtors assets but to limit competition by the debtor in its own marketplace by rejecting the debtor's proposal and forcing it into bankruptcy.

The appellant was acting on its own making sharp use of the provisions of the **BIA** for its own advantage. There was no evidence that the co-operating creditors were part of a conspiracy with the appellant to injure the debtor. Otherwise the tort of conspiracy to injure could be found where the predominant purpose of the appellant's conduct is to cause injury to the plaintiff, whether the means used by the defendants are lawful or unlawful: **Canada Cement LaFarge Ltd, v. British Columbia Lightweight Aggregate Ltd.,** [1983] 1 S.C.C. 452.

It is undeniable that the appellant caused injury to the debtor not negligently but deliberately. The debtor made its proposal to avoid bankruptcy; bankruptcy therefore must have been seen by Laserworks as a more injurious alternative than acceptance of the proposal by the creditors. Laserworks had the heavy burden of persuading its creditors that their best interests lay in approving the proposal; it did not have the impossible burden of dissuading a financially stronger competitor bent on using the provisions of the **BIA** to destroy it as a competitor. The appellant derailed the proposal procedure to force the debtor into bankruptcy. Using bankruptcy to cause injury, thereby eliminating the debtor as an entity capable of competing in the marketplace, is abusive of the purpose of the BIA. It does not qualify as "the orderly and fair distribution of (its) property." Annihilation of an individual business or a company may be an unfortunate consequence of a bankruptcy, an unavoidable side-effect, but it is not the purpose of the **BIA**. Use of the **Act** to accomplish such an objective is in my view so abusive of the purpose of the legislation as to engage the supervisory jurisdiction of the courts under s. 187(9). It is a substantial injustice to be remedied.

A Canadian case supporting a broad interpretation of the right of creditors to vote on proposals is **Re Bedard Louis Inc.** (1991) 22 C.B.R. (3d) 218. The debtor sued three creditors who had sought to seize his goods before judgment for amounts far exceeding their claims against him. One creditor petitioned for a receiving order, and the Quebec Superior Court rejected the debtor's argument that the petitioner was not a creditor because of the large undecided actions. The debtor was declared bankrupt and later filed a proposal. The trustee refused to let the three creditors vote at a creditors' meeting considering the proposal because of a possible conflict of interest. The Superior Court allowed an appeal against the trustee's decision, and the Quebec Court of Appeal upheld the Superior Court, holding (headnote) that:

> No provision of the Act authorizes the trustee to exclude a creditor whom he considers to have a conflict of interest. The debtor's action for damages against the creditors, which constituted a debt not yet payable, did not strip the creditors of their status of ordinary creditors. By the proposal, the debtor presented the creditors with terms of payment which were different from those provided legally by contract.
>
> The Act was intended to allow the voting of all duly acknowledged creditors. Exceptions to that rule were properly specified in the Act and none of them pertained to a creditor against whom a debtor had filed legal proceedings.

The Proposals Part of the **BIA** recognizes only two classes of creditors, secured creditors who are presumably protected by the security they hold, and unsecured creditors, all the others. This does not appear to meet Viscount Haldane's criterion of a special class bound to exercise its voting rights for the benefit of the class as a whole. That concept seems surplus to and difficult to reconcile with the scheme of the **BIA** where, as the Quebec Court of Appeal found in **Bedard,** all duly acknowledged creditors are entitled to vote as they please, subject to exceptions set out in the **Act** (and the exception for tortious or criminal behavior.)

As remarked above, those exceptions reflect the manner in which Parliament dealt with conflicts of interest which might arise in the context of voting on proposals. Parliament has obviously legislated on the subject and cannot be assumed to have created by implication an exception for general, unspecified, conflicts of interest. The mere fact that a creditor is also a competitor of the debtor or otherwise in a conflict of interest with the debtor does not give rise to a statutory exception. The scheme for protecting minority creditors adopted under the BIA was not a class voting concept but rather a system of specific exceptions coupled with a discretionary power in the courts to remedy substantial injustice.

It is not necessary to make a final determination on this point. The rational of Justice Stewart's decision is found in her adoption of the Registrar's conclusions as to improper purpose in the following passage:

> The applicant is not entitled to use its votes to achieve this improper purpose. The Registrar's decision prevents an abuse on a minority of the class of unsecured creditors and in so doing upholds a fundamental and viable in the circumstances principle of class voting. He did not err in concluding improper purpose is relevant.

That is, while the Registrar's decision was consistent with considerations of class voting, he was upheld on his findings of improper purpose.

I would dismiss the fourth ground of appeal.

Conclusion

The appellant attempted to abuse the provisions of the **BIA** by using them to intermeddle for an improper purpose with the proposal of a debtor to its creditors, giving rise to a substantial injustice. This affected not only the debtor but the remaining creditors who supported the proposal. The Registrar made no error in discerning this from the evidence and in exercising the court's discretionary jurisdiction to remedy substantial injustice. He was upheld on appeal to the Supreme Court. The appellant's actions are not to be condoned. I would dismiss the appeal with costs which I would fix costs at $3,000 plus disbursements to the Respondent and $3,000 plus disbursements to the Trustee.

Freeman, J. A.

Concurred in:

Pugsley, J.A.
Cromwell. J.A.

Promax Energy Inc. v. Lorne H. Reed & Associates Ltd., 2002 ABCA 239

Date: 20021015
Docket: 01-00375

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR. JUSTICE BERGER
THE HONOURABLE MADAM JUSTICE FRUMAN
THE HONOURABLE MR. JUSTICE WITTMANN

BETWEEN:

PROMAX ENERGY INC.

Appellant

- and -

LORNE H. REED & ASSOCIATES LTD.,
ALBREDA RESOURCES LTD. and
HUDSON & COMPANY INSOLVENCY TRUSTEES INC.

Respondents

Appeal from the Whole of the Judgment of
THE HONOURABLE MR. JUSTICE D.G. HART
Granted the 19th day of September 2001

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

COUNSEL:

B.R. Crump
For the Appellant

J.S. Shortt
For the Respondents - Lorne H. Reed & Associates Ltd.

P.D. Edwards
For the Respondents - Albreda Resources Ltd.

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

BERGER, J.A. (for the Court):

[1] Thank you counsel for your patience. We do not consider it necessary to call upon counsel for the Respondents with respect to this appeal. Mr. Justice Wittmann will deliver the unanimous judgment of the Court.

WITTMANN, J.A. (for the Court):

[2] Counsel for the Appellant has fairly conceded that if we agree with the chambers judge on the issue of collateral or improper purpose, we would find against the Appellant on this central issue, resulting in a dismissal of the appeal. We agree with the chambers judge on this point where, relying on ***Re Laserworks Computer Services Inc***. (1998), 37 B.L.R. (2d) 226 (N.S.C.A.), he found that the proposal for annulment by the Appellant was conceived for a purpose not intended or contemplated by the legislation.

[3] In so concluding, the chambers judge had the advantage of thorough argument on the issues of breach of the proposal and material non-disclosure. The chambers judge acknowledged a legitimate business purpose in proposing the annulment. He also properly defined the purpose of the legislation: to provide the orderly and fair distribution of the property of a bankrupt. Finally, he found that the collateral purpose was “to get out from under the royalties encumbering this production.”

[4] This finding, mindful of the standard of review applicable by this Court, must result in the dismissal of the appeal.

APPEAL HEARD on OCTOBER 8, 2002

MEMORANDUM FILED at EDMONTON, Alberta,
this 15th day of OCTOBER, 2002

WITTMANN, J.A.

SUBMISSIONS BY COUNSEL CONCERNING COSTS.

BERGER, J.A.:

[5] As to the question of costs on appeal, both Respondents are entitled to their costs to be taxed in Column 3.

APPEAL HEARD on OCTOBER 8, 2002

MEMORANDUM FILED at EDMONTON, Alberta,
this 15th day of OCTOBER, 2002

_____

BERGER, J.A.

Court of Queen's Bench of Alberta

Citation: Schendel Management Ltd, 2019 ABQB 545

Date: 20190719
Docket: BK03 115990, BK03 115991
Registry: Edmonton

In the Matter of

the Notice of Intention to Make a Proposal of Schendel Mechanical Contracting Ltd

the Notice of Intention To Make a Proposal of Schendel Management Ltd.

the Notice of Intention To Make a Proposal of 687772 Alberta Ltd.

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

A. Introduction

[1] A secured creditor applies under ss. 50(12) and s. 69.4 of the *Bankruptcy and Insolvency Act* (*BIA*) for orders deeming refused a joint proposal made by three related corporations, lifting the proposal stay of proceedings, and appointing a receiver and manager. The corporations oppose all aspects. The proposal trustee provided stage-setting submissions but did not take a position.

[2] I find, under ss. 50(12) *BIA*, that the application is not likely to be accepted by the creditors (and is thus deemed refused), that the corporations are bankrupt as a result, and that

Schendel who at ATB was running or reviewing its account at any particular time. ATB was indeed working with, and funding, Schendel through a financial crunch for many months before and even after the hospital-work halt.[7] It was entitled to intensify its scrutiny of Schendel's loans and overall business condition as it did, to obtain more information via that scrutiny, and to demand payment (in light of commitment-letter defaults and, in any case, the demand character of the loans here) when it did, and to notify Schendel of its intention to enforce security per the *BIA*-prescribed notice period. ATB had no duty to forbear from enforcing its rights.

[29] As for whether Schendel might have been able to pursue restructuring earlier and more effectively, and assuming that to be so, Schendel knew its own financial condition throughout. It was not incumbent on ATB to guide Schendel's rescue efforts. In any case, Schendel pointed to no material difference that earlier restructuring efforts might have made.

[30] In any case, Schendel ended up filing a proposal, regardless of any perceived difficulties with ATB's conduct. That filing triggered a right for ATB (in fact, any Schendel creditor) to apply under ss. 50(12) for "deemed refusal." The narrow test (as noted) is whether the proposal is unlikely to be accepted.

[31] As Schendel acknowledges, ATB is the sole occupant of the secured class, and the support of that class is necessary for proposal approval. Those are just "givens" in the circumstance here i.e. reflect ATB's position as Schendel's principal lender, its security, and the *BIA*'s treatment of secured creditors in proposals i.e. are not a function of ATB's conduct in its dealings with Schendel.

[32] As for how ATB is using its veto position derived from those circumstances (i.e. to seek a "proposal deemed refused" ruling), Schendel argues that that decision is commercially unreasonable and inequitable. In support it cites cases such as ***Prudential Transportation Ltd v West Coast Logistics Ltd***[8] and ***Laserworks Computer Services Inc (Re.)***[9]

[33] The Alberta Court of Appeal endorsed the ***Laserworks*** approach to "improper purpose" in ***Promax Energy Inc v Lorne H Reed & Associates Ltd***[10]:

> [2] Counsel for the Appellant has fairly conceded that if we agree with the chambers judge on the issue of collateral or improper purpose, we would find against the Appellant on this central issue, resulting in a dismissal of the appeal. We agree with the chambers judge on this point where, relying on ***Re Laserworks Computer Services Inc***. [citation omitted], he found that *the proposal for annulment by the Appellant was conceived for a purpose not intended or contemplated by the legislation.*
>
> [3] In so concluding, the chambers judge had the advantage of thorough argument on the issues of breach of the proposal and material non-disclosure. The chambers judge acknowledged a legitimate business purpose in proposing the annulment. He also properly defined the purpose of the legislation: to provide the orderly and fair distribution of the property of a bankrupt. *Finally, he found that*

[7] Affidavit of Alex Corbett filed April 4, 2019, paras 31-41
[8] 2017 BCSC 1970
[9] 1998 NSCA 42
[10] 2002 ABCA 239

> *the collateral purpose was "to get out from under the royalties encumbering this production."*
>
> [4] This finding, mindful of the standard of review applicable by this Court, must result in the dismissal of the appeal. [emphasis added]

[34] Those cases are distinguishable. They deal with creditors attempting to use the insolvency system for an improper purpose e.g. attempting to drive a competitor out of business or escaping from a royalty regime.

[35] No evidence here showed that ATB was attempting to pursue an improper purpose, whether within the meaning of those cases or otherwise. Instead, ATB was pursuing its interests and asserting its rights *within the bounds of, and for purposes squaring with, the Canadian insolvency system* i.e. recovering its loans.

[36] In ***Hypnotic Clubs Inc (Re)***[11], Cumming J. held:

> The intent and policy underlying the BIA is that *creditors* should consider and *vote* upon a *proposal* advanced pursuant to a NOI as they see fit in their own *self interest*. ...
>
> ...
>
> ... the underlying policy of the BIA [includes] letting creditors *vote* as they choose in respect of accepting or rejecting a *proposal* .... [emphasis added]

[37] Given its secured position, the *BIA* provisions governing secured creditors and the approval of proposals, and the proposal itself, ATB is entitled to oppose the proposal and, on the basis of that opposition, seek a "deemed refused" ruling.

[38] By ATB's calculations it foresees materially greater recoveries in a bankruptcy or receiver than via the proposal. The proposal trustee is currently reviewing the "bankruptcy versus proposal" outcomes and is due to report shortly on that. Schendel does not agree with ATB; it filed the proposal on the basis it would produce a more favourable outcome for all the creditors, including ATB, than bankruptcy. It points to recovery estimates showing that ATB may fare better under the proposal than its low-end estimate of receivership recovery and may even recovery (slightly) more than its high-end estimate.

[39] I make no ruling on the respective anticipated recoveries i.e. what is the likely better avenue recovery-wise. I simply note that ATB believes, on reasonable, or at least defensible, or at least arguable, grounds, that it will fare better by a receivership than under the proposal i.e. ATB is not acting perversely or vindictively or otherwise than in its own economic interests i.e. it is not pursuing any ulterior purposes.

[40] To summarize here, I find that ATB has been acting in good faith and in a commercially reasonable way, including in deciding to oppose the proposal and seek a "deemed refused" ruling.

Andover Mining Corp (Re) **also distinguishable**

[41] Schendel also cited this decision.[12] It too is distinguishable, concerning a clash between a request for more time to file a proposal and a creditor seeking to terminate the proposal

[11] 2010 ONSC 2987 at paras 33 and 36

In the Court of Appeal of Alberta

Citation: 12178711 Canada Inc v Wilks Brothers, LLC, 2020 ABCA 430

Date: 20201201
Docket: 2001-0206-AC
Registry: Calgary

Between:

12178711 Canada Inc., Calfrac Well Services Ltd., Calfrac (Canada) Inc., Calfrac Well Services Corp. and Calfrac Holdings LP, by its General Partner Calfrac (Canada) Inc.

Respondents

- and -

Wilks Brothers, LLC

Appellant

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Peter Martin
The Honourable Mr. Justice Frans Slatter

Memorandum of Judgment of the Honourable Madam Justice Paperny
Concurred in by the Honourable Mr. Justice Martin

Memorandum of Judgment of the Honourable Mr. Justice Slatter
Concurring in the Result

Appeal from the Final Order by
The Honourable Mr. Justice D.B. Nixon
Dated the 30th day of October, 2020
Filed on the 2nd day of November, 2020
(Docket: 2001 08434)

Memorandum of Judgment of
The Honourable Madam Justice Paperny

Introduction

[1] This is an appeal from the approval of a plan of arrangement put forward by the respondent Calfrac Entities under the *Canada Business Corporations Act*, RSC 1985, c C-44 (*CBCA*), s. 192 (the Plan). The Plan is a recapitalization transaction designed to reduce Calfrac's outstanding indebtedness and annual cash interest payments and improve its liquidity to provide the sustainable capital structure required for Calfrac to continue its business operations. The chambers judge reviewed the Plan pursuant to s 192 of the *CBCA*, concluded it met the statutory requirements and was fair and reasonable, and granted the Final Order approving the Plan on October 30, 2020.

[2] The appellant Wilks Brothers (Wilks Bros) is a competitor of Calfrac and a shareholder, holding approximately 20% of the Calfrac shares. Wilks Bros is also a creditor of Calfrac, having recently acquired over 50% of Calfrac's Second Lien Notes. Wilks Bros submits that the Final Order was granted in error and should be overturned.

Background

[3] Calfrac commenced the *CBCA* proceedings on July 31, 2020. The drop in global energy markets and commodity prices in the first quarter of 2020, combined with the COVID-19 pandemic, saw the demand for Calfrac's services decline precipitously. This necessitated a recapitalization. Although Calfrac had earlier attempted to reduce its debt, including an exchange offer of its Senior Unsecured Notes for Second Lien Notes completed in February 2020, its capital structure and liquidity position became untenable and Calfrac could no longer operate effectively. It therefore embarked on a financial structure review process.

[4] The capital structure of Calfrac consists of: (a) first lien credit facilities provided by a syndicate of banks and other financial institutions pursuant to a credit agreement (First Lien Credit Agreement); (b) Second Lien Notes issued pursuant to a trust indenture dated February 14, 2020; (c) Senior Unsecured Notes due 2026 to the Senior Unsecured Noteholders (SUNs); and (d) the common shares of Calfrac.

[5] A US$18,352,265 interest payment to the SUNs was due on June 15, 2020. Calfrac deferred the interest payment for a 30-day grace period. Non-payment prior to the expiry of the grace period would have resulted in cross-defaults under Calfrac's First Lien Credit Agreement and its Second Lien Note indenture.

[6] Calfrac negotiated a recapitalization with those of its key stakeholders who were supportive and willing to enter into discussions, and obtained the preliminary interim order on July 13, 2020,

> Second, Wilks Brothers has indicated that it believes these actions should be a Chapter 11 proceeding. I find that would be collateral to the purpose of the *CBCA* planned arrangement provisions, which have been broadly interpreted to support restructuring debt outside of insolvency proceedings;
>
> Third, Wilks Brothers has aggressively purchased securities in an attempt to block this arrangement from proceeding;
>
> Fourth, it its role as Shareholder, there has been no legitimate commercial reason for Wilks Brothers to oppose the Arrangement in this manner. I make that observation because the general body of the Shareholders in Calfrac will benefit from the completion of the Arrangement, relative to other outcomes.
>
> Fifth, the Wilks Brothers' proposal represents an attempt to obtain control of the Calfrac Group for an improper purpose, and
>
> Sixth, the Takeover Bid, including its opportunistically late timing, is a collateral attack upon the Applicant's restructuring transactions.

[62] The chambers judge found that the intentions and motivations of Wilks Bros demonstrated it was acting not as a genuine creditor, but rather as a competitor of Calfrac, and its ultimate aim was to see Calfrac forced into a Chapter 11 proceeding in the United States so as to enable Wilks Bros to purchase Calfrac's assets in a distressed situation.

[63] In making these findings and considering them as part of his assessment, the trial judge relied on long standing recognition that where a stakeholder is voting for a purpose collateral to the intention of the applicable legislation its votes can be disregarded. The Supreme Court of Canada recently described this discretion in the context of the CCAA (*9354-9186 Quebec Inc v Callidus Capital Corp*, 2020 SCC 10 at para 56):

> A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to … a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. We conclude that one such constraint arises from s 11 of the CCAA, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. Supervising judges are best-placed to determine whether this discretion should be exercised in a particular case.

[64] The finding that a creditor is acting for an improper purpose is contextual. In *Laserworks*, a Nova Scotia Court of Appeal decision under the *Bankruptcy and Insolvency Act*, the court defined an improper purpose as "any purpose collateral to the purpose for which the *Bankruptcy and Insolvency Act* was enacted by Parliament": see para 54. The motive of the creditor was to remove a competitor, said by the registrar to "offend the integrity of the bankruptcy process".

[65] In *Callidus*, in the context of the CCAA (which requires a vote), the Supreme Court of Canada found a creditor to be acting for an improper purpose where it is "seeking to exercise its voting rights in a manner that frustrates, undermines or runs counter to the [above-stated] objectives": para 70. The *CBCA*, of course, does not require a vote.

[66] All three statutes have common purposes: facilitating a restructuring that compromises certain legal rights of stakeholders in a manner that is fair having regard to the broader goal – a restructured company for the benefit of all stakeholders. It is reasonable to conclude that, where a creditor is acting contrary to that purpose, to thwart the restructuring for its own purposes, it may well be found to be acting for an improper purpose. Having regard to the recent amendments to the CCAA, and particularly to the requirement in s 18.6 that all parties act in good faith, it is fair to assume that there will be increased scrutiny of stakeholder conduct, and that principles of creditor democracy and good faith dealings will be invoked to limit unbridled self interest.

[67] The determination of whether Wilks Bros was acting for an improper purpose is a finding of mixed fact and law and as such is subject to a deferential standard of review. The findings of the chambers judge are supported in the evidence and no palpable and overriding error has been demonstrated. In any event, the chambers judge did not use these findings to constrain the appellant's right to vote. Rather, he noted these findings to contrast the appellant's position with that of all other stakeholders who had an interest in the outcome and who were supportive of the arrangement. There was nothing improper or unfair in this characterization.

[68] The chambers judge was entitled to conclude, as he did, that there was no genuine commercial reason for Wilks Bros to oppose the arrangement other than its desire to see the arrangement fail. That conclusion, however, did not impact his analysis on the overall fairness of the transaction.

Conclusion

[69] The focus of the inquiry under s. 192 is a determination of whether the statutory prerequisites are satisfied, whether the arrangement serves a valid business purpose, and whether the arrangement is fair and reasonable. The chambers judge heard every application with respect to this arrangement and made a careful review of the record. He concluded that the prerequisites were met, that the purpose of the arrangement is to ensure Calfrac's ongoing financial viability for the benefit of all its stakeholders, and that the affected stakeholders had been treated fairly.

[70] I see no reviewable error in the findings and analysis of the chambers judge or in his ultimate conclusions on the relevant issues. The appeal is accordingly dismissed.

Appeal heard on November 25, 2020

Memorandum filed at Calgary, Alberta
this 1st day of December, 2020

Appearances:

C.D Simard
D.H. Brunsdon/M.S. Shakra/K.J. Zych (no appearance)
for the Respondents

T.P. O'Leary
J. Salmas/S. Van Allen (no appearance)
for Wilimington Trust National Association

R.J. Chadwick
B. Whiffin (no appearance)
for Ad Hoc Committee Noteholders

L.E. Thacker/D. Knoke
P.H. Griffin (no appearance)
for G2S2 Capital Inc.

J.G.A. Kruger, Q.C.
for First Lienholders

H.A. Gorman, Q.C.
for Special Committee of Directors

T. Pinos
L. Jackson/J.M. Holowachuk/R. Jacobs/J.L. Oliver (no appearance)
for the Appellant

Court of King's Bench of Alberta

Citation: 420 Investments Ltd (Re), 2025 ABKB 183

Date: 20250327
Docket: 2401 17986
Registry: Calgary

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 420 Investments Ltd., 420 Premium Markets Ltd., Green Rock Cannabis (EC 1) Limited and 420 Dispensaries Ltd.

Reasons for Decision
of the
Honourable Justice M.H. Bourque

I. Introduction and Background

A. NOI Proceedings

[1] On May 29, 2024 (**Filing Date**), 420 Investments Ltd (**420 Parent**), 420 Premium Markets Ltd (**420 OpCo**), and Green Rock Cannabis (EC 1) Limited (**Green Rock**), (collectively, **NOI Entities**) each filed a Notice of Intention to Make a Proposal (**NOI**) pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC 1985 c B-3 (***BIA***), (**NOI Proceedings**). KSV Restructuring Inc (**KSV**) consented to act as proposal trustee (**Proposal Trustee**) in the NOI Proceedings.

[2] On June 27, 2024, the Court granted an order, among other things, extending the stay and time to make a proposal to August 12, 2024, approving a key employee retention plan, and granting typical administration and related charges.

[3] On August 12, 2024, the Court granted two orders, among other things, further extending the stay and time to make a proposal to September 26, 2024, and directing and accelerating the scheduling of an appeal of the decision of Applications Judge Farrington's decision in an action involving, on the one hand, 420 Parent, and, on the other, Tilray Inc (**Tilray**) and High Park Shops Inc. (**High Park**) (**Tilray Litigation**), described in greater detail below.

B. *CCAA* Proceedings

[4] On September 19, 2024, the Court granted an initial order on the application of the NOI Entities and 420 Dispensaries Ltd (**Dispensaries**) (collectively, **Applicants**) continuing the NOI

[46] First, in the context of the *CCAA* proceedings, while the quantum of recovery is an important consideration in assessing the best interests of creditors, it is not the only one. Undoubtedly, unsecured creditors strive for the greatest recovery possible; however, as Counsel for RioCan pointed out, unsecured creditors, such as RioCan, which supports the Proposed Plan, are also interested in "certainty and finality in a speedy process". While not necessarily quantifiable in pecuniary terms, I agree that certainty and finality can provide a range of value to stakeholders, depending on their circumstances, and is an important consideration in the best interests analysis.

[47] Second, while the Proposed Plan does not offer immediate 100% recovery, it does offer a path to full recovery. As currently contemplated, affected creditors are expected to receive 55 cents on the dollar and can elect between two options that may make them whole in the future. One option involves the election to receive such number of 420 Parent shares equal in value to the differential. Some creditors, perhaps those having confidence in 420 Parent's management team and longer-term prospects, may find this option attractive as it represents an opportunity to invest and obtain considerably more than the differential. The other option, a future right to receive the differential via proceeds from the successful prosecution of and recovery from the Tilray Litigation, may be attractive to those affected creditors who value certainty and finality in a speedy process.

[48] Third, I find it essential to consider whose interests the Joint Bid *best* serves. I find the answer is evident: High Park.

[49] When the Applicants sought the SISP Order, they argued that the Tilray Litigation should not be included. High Park strenuously argued that it should be included. In deciding to include the Tilray Litigation in the SISP, Justice Jones posited that the best way to determine the value of the Applicants' assets was to include all of them in the SISP, including the Tilray Litigation, and that some useful information *may* emerge from the process. Based on my review of the information provided by the Monitor in the confidential appendices to its Second and Third Reports, it turns out that very little information regarding the valuation of the Tilray Litigation emerged.

[50] In my view, the fact that very little useful information about the value of the Tilray Litigation emerged is likely explained by the unique nature of this intangible asset. Some intangible assets are not only more easily valued than others, but they may also be more desirable to an investor. Take, for instance, an intangible asset, such as goodwill or a client list. A hypothetical investor may be inclined to acquire and ascribe value to that asset because it contributes positively to the underlying business's profit-making apparatus. Compare that scenario with an interest in a contractual breach lawsuit, which is also an intangible asset. In my view, there are several reasons why a hypothetical investor may be less inclined to acquire or value such an asset. Although potentially lucrative if successful, lawsuits generally do not significantly contribute to a business's profit-making apparatus. They generally don't increase revenue or attract a new business clientele. They require time and often divert management's attention from its focus on the business and its profitability. A hypothetical investor may not wish to retain those in the management group with the requisite information and knowledge to pursue the lawsuit successfully.

[51] Unlike the hypothetical investor, High Park is highly motivated to acquire the Tilray Litigation. By submitting the Joint Bid, which would have resulted in the acquisition of nearly all

the Applicants' assets, including the Tilray Litigation, for a price that results in full recovery to all creditors (which High Park says is the only bid in the stakeholders' best interests), not only can High Park set as low a price as possible for the Tilray Litigation but it can also argue that any arrangement or compromise plan put forward that does not offer full recovery is not in the stakeholders' best interests. It's a circular argument.

[52] I am not persuaded that the Creditors' Meeting Order should not be granted because it is not in the creditors' best interests.

b) Is there no hope that the creditors will approve the Proposed Plan?

[53] High Park submits that there is no hope that the creditors will approve the Proposed Plan as it appears unlikely that those creditors are aware of at least one alternative available that would see them immediately repaid in full: the Joint Bid. At least one unsecured creditor, with knowledge of the Joint Bid, indicated at the hearing of this application that it supported the Proposed Plan, preferring certainty and finality over recovery.

[54] I am not persuaded that the Creditors' Meeting Order should not be granted because there is no hope that the creditors will approve the Proposed Plan.

c) Did the process not evolve fairly or transparently?

[55] High Park submits that, in exercising its discretion whether to grant the Creditors' Meeting Order, I should examine the unique circumstances surrounding the SISP that was conducted and then "abruptly" abandoned. High Park points to the fact that the Applicants "plainly did not want to include the Litigation Asset in the SISP." While it is true that the Applicants argued against the inclusion of the Tilray Litigation in the SISP, they were also clear that they did not view their insolvency as a liquidation, nor were they obliged to put everything on the market, nor complete a sale under the SISP. That the Applicants did not proceed with a transaction under the SISP and instead are now proceeding with the Proposed Plan does not mean the process did not evolve fairly or transparently. I find no unfairness or lack of transparency in how the process evolved.

[56] High Park also advances arguments regarding the funding the Applicants have obtained to fund the Proposed Plan, which High Park says may impact its ability to recover amounts advanced under the Loan Agreement. According to High Park, the details of the proposed financing ought to be disclosed to creditors and the Court. Based on the record before me, I am unable to determine whether the new funding will adversely impact High Park's ability to eventually recover on the Bridge Loan. That said, as Feasby J determined, repayment of the Bridge Loan is contingent on the Court's determination of whether the Arrangement Agreement has been terminated. At this stage, I am not prepared to deny the Creditors' Meeting Order because of the potential impact the proposed financing may have on repayment of the Bridge Loan. Depending on the outcome of the Creditors' Meeting and the hearing in the Court of Appeal, this may be an issue better suited for the Sanction Hearing.

d) Should the Proposed Plan not be approved by the Court?

[57] In its brief, High Park argues that the Court should not approve the Proposed Plan for two main reasons: (i) it is an affected creditor entitled to vote on the Proposed Plan, and (ii) there is no reasonable chance that the applicants will be able to continue their business if the Proposed Plan is approved. I will address these issues in reverse order.

(1) Is there no reasonable chance that the applicants will be able to continue their business if the Proposed Plan is approved?

[58] High Park advances several arguments under this heading, which I find to be largely speculative.

[59] Regarding the appeal of the Feasby Decision, the Court of Appeal's disposition may render the Applicants unable to continue their business if repayment of the Bridge Loan becomes enforceable. However, that is not the current situation, and these *CCAA* proceedings should not be grounded to a halt awaiting the outcome. Nor should they be because the Applicants have not disclosed how they intend to fund the continued pursuit of the Tilray Litigation.

[60] Regarding High Park's submission that 420 Parent has no means to repay the Nomos debt and that that debt will be immediately due upon implementation of the Proposed Plan if approved by the creditors and sanctioned by the Court, I have no information regarding Nomos' intentions if the Proposed Plan is approved. Given that the Applicants were able to obtain financing to fund the Proposed Plan, I surmise that the Applicants and/or the proposal funder may have received some assurances regarding Nomos' intentions.

(2) Is High Park an affected creditor entitled to vote at the Creditors' Meeting?

[61] Although it is generally accepted that creditors with provable claims are usually entitled to vote on plans of arrangement, it is "subject to the proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote" (***Callidus***, para 56; ***Delta 9***, para 19). Barring a creditor from voting at a plan approval meeting should only occur "where the circumstances demand such an outcome", which is "necessarily a discretionary, circumstance-specific inquiry" (***Callidus***, para 69). In addition (at para 70):

> ... The exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an "improper purpose" — the supervising judge has the discretion to bar that creditor from voting.

See also: ***Canada v Canada North Group***, 2021 SCC 30, per Côté J at para 21; per Karakatsanis J at para 138.

[62] The Applicants argue that High Park's claim is contingent. They submit that the situation is analogous to that in ***Nalcor Energy v Grant Thornton Poirier Ltd***, 2015 NBQB 20. I agree with High Park that the facts of that case are very different. Importantly, the case did not, like here, involve an advance of money. In the High Park Counterclaim, the issue for determination is the timing of when the advance of money is repayable, an issue which Feasby J determined was not capable of being decided in a summary way. As matters stand, the Bridge Loan is not currently repayable and will not be until after a decision has been made at trial. Several years away.

[63] In my view, this case presents unique circumstances that necessitate denying High Park the right to vote on the Proposed Plan. Repayment of the Bridge Loan is currently not enforceable, and it is unlikely to become enforceable for some time. A trial decision favourable

to 420 Parent may result in the Bridge Loan being set off against damages awarded to 420 Parent. If High Park were allowed to vote at the creditors' meeting, the outcome would be a foregone conclusion. In my view, to allow High Park to vote would unduly prejudice the other creditors, particularly the unsecured creditors, who are not awaiting a trial judgment but are presently owed money, and who may be interested in certainty and finality in a speedy process.

[64] Moreover, a failed creditors' meeting would undoubtedly lead to the resumption of the SISP and the likely liquidation of the Applicants. It is not readily apparent to me that a liquidation of the Applicants is required. As the Applicants' CEO, Mr. Morrow, attests, the Applicants have been able to run on a cashflow positive basis in these proceedings without the need for DIP financing. It must also be recalled that the Applicants find themselves in these *CCAA* proceedings as a result of the High Park Summary Judgment and High Park's enforcement measures. Those measures have ceased in light of the Feasby Decision.

[65] For these reasons, I am exercising my discretion to deny High Park the right to vote on the Proposed Plan at the Creditors' Meeting.

e) Creditors' Meeting Order is granted

[66] For all these reasons, the application seeking an order permitting the filing of the Proposed Plan and calling the Creditors' Meeting is granted.

B. Should the *CCAA* Stay be Extended?

[67] The current *CCAA* Stay is set to expire on Monday. Given my decision to permit the filing of the Proposed Plan and calling the Creditors' Meeting, extending the stay is appropriate. I am satisfied that the Applicants have acted and continue to act in good faith and with due diligence.

[68] Although the Applicants had requested that the stay be extended to April 30, 2025, this may not provide sufficient time to finalize the Proposed Plan and hold the Creditors' Meeting. The Applicants also expressed some willingness to call the meeting for a date after the hearing of the appeal of the Feasby Decision. I express no opinion on the appropriateness of delaying the Creditors' Meeting. Given these considerations and the costs associated with a court application to merely extend the stay, I would order the stay be extended to Friday, May 23, 2025.

C. Resumption of SISP with Enhanced Powers to the Monitor

[69] Given my decision to permit the filing of the Proposed Plan and calling the Creditors' Meeting, I dismiss High Park's application seeking the resumption of the SISP and the granting of enhanced powers to the Monitor.

Heard on the 14th day of March, 2025.
Dated at the City of Calgary, Alberta this 27th day of March, 2025.

M.H. Bourque
J.C.K.B.A.

Appearances:

Karen Fellowes KC, Archer Bell, and Matti Lemmens, Stikeman Elliott LLP
for the Applicants, 420 Investments Ltd., 420 Premium Markets Ltd., Green Rock Cannabis (EC 1) Limited and 420 Dispensaries Ltd.

Kelly J. Bourassa, Jenna Willis and N. Huertas, Blake, Cassels & Graydon LLP
for the Respondents High Park Shops Inc.

S. Miller, JSS Barristers
Litigation Counsel for High Park Shops Inc.

Michael Selnes, Bennett Jones LLP
for the Monitor, KSV Restructuring Inc.

L. Galessiere, Camelino Galessiere LLP
for RioCan REIT

M. Fleming, Loopstra Nixon LLP
for Nomos Capital

G. Schacter for Stoke Inventory Partners Inc.

D. Segal, Justice Canada
for Canada Revenue Agency

COUR SUPÉRIEURE

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE CHICOUTIMI

N° : 150-11-001706-027

DATE : 28 MAI 2003

SOUS LA PRÉSIDENCE DE : L'HONORABLE JEAN LEMELIN, j.c.s.

DANS L'AFFAIRE DE LA PROPOSITION DE :

TRIAGE T.R.I.M.LTÉE
Débitrice - Requérante

BENOÎT GIRARD MÉTAL INC.
Requérante
c.
SURINTENDANT DES FAILLITES
et
LES ENTREPRISES ALFRED BOIVIN INC.
et
GAÉTAN BOIVIN
Intimés
et
TREMBLAY & CIE LTÉE, SYNDICS ET GESTIONNAIRES
Mis en cause

JUGEMENT SUR REQUÊTES EN APPEL D'UNE DÉCISION
DE LA PRÉSIDENTE DE L'ASSEMBLÉE

---

[1] Par leurs requêtes, qui sont au même effet, Triage T.R.I.M. Ltée (la proposante) et Benoît Girard Métal inc. (Benoît Girard), une créancière, demandent au Tribunal d'annuler la décision de la présidente de l'assemblée des créanciers convoquée pour

voter sur une proposition concordataire et de déclarer la proposition acceptée par les créanciers.

LES FAITS PERTINENTS

[2] La proposante, une entreprise spécialisée dans le recyclage des matières résiduelles, dépose, le 20 septembre 2002, un avis d'intention de soumettre une proposition à ses créanciers.

[3] Après deux prorogations de délai accordées par le Tribunal, la proposition est déposée le 17 décembre 2002.

[4] Le 19 décembre 2002, le syndic désigné à la proposition convoque les créanciers à une assemblée prévue pour le 16 janvier 2003 pour voter sur la proposition.

[5] Selon le rapport du syndic désigné, daté du 18 décembre 2002, la proposition offrait aux créanciers ordinaires le paiement d'un dividende estimé à 20% des créances prouvées en règlement complet et final.

[6] Ce rapport précisait aussi ce qui suit :

> « La proposition est rendue possible par la vente de la totalité des actions de la débitrice à une autre entreprise, laquelle vente est conditionnelle à la conclusion d'une entente avec le principal créancier, Banque de Développement du Canada, et à l'approbation de la présente proposition par les créanciers ordinaires. »

[7] La seule actionnaire de la proposante est Groupe Chalifour inc., un holding familial qui avait lancé Triage T.R.I.M. Ltée en 1999 et depuis, y a investi des sommes importantes.

[8] De fait, c'est la requérante Benoît Girard qui, le 20 novembre 2002, signe avec Groupe Chalifour inc. une promesse d'achat et de vente de 100% du capital-actions des actions de la proposante ainsi qu'une convention de bail et de gestion intérimaire de certains actifs et passifs. C'est précisément cette transaction qui rendait possible la proposition.

[9] Cette convention était conditionnelle à ce que la Banque de Développement du Canada, la titulaire de la dette à long terme garantie par hypothèque de premier rang sur tous les actifs de la proposante, y consente.

[10] La convention était aussi conditionnelle à ce que la proposition soumise par la proposante soit approuvée par les créanciers réunis en assemblée.

> heavy burden of persuading its creditors that their best interests lay in approving the proposal; it did not have the impossible burden of dissuading a financially stronger competitor bent on using the provisions of the BIA to destroy it as a competitor. The appellant derailed the proposal procedure to force the debtor into bankruptcy. Using bankruptcy to cause injury, thereby eliminating the debtor as an entity capable of competing in the marketplace, is abusive of the purpose of the BIA. It does not qualify as ''the orderly and fair distribution of (its) property.'' Annihilation of an individual business or a company may be an unfortunate consequence of a bankruptcy, an unavoidable side-effect, but it is not the purpose of the BIA. Use of the Act to accomplish such an objective is in my view so abusive of the purpose of the legislation as to engage the supervisory jurisdiction of the courts under s. 187(9). It is a substantial injustice to be remedied. »

[84] Le Tribunal conclut dans le même sens. À cause de l'action d'Alfred Boivin, la proposante n'a pas eu l'occasion de convaincre ses créanciers que sa proposition, de surcroît amendée, était intéressante pour eux. Le processus statutaire, démocratique, axé sur la compromission et la chance offerte à un commerçant malchanceux ou inhabile de continuer en affaires, tel qu'envisagé par la L.F.I., a été, ici, entravé par l'action habile mais illégale d'Alfred Boivin.

[85] Le Tribunal conclut que les requêtes en appel doivent être accueillies aux fins d'invalider les votes par procuration enregistrée par M^{e} Pierre Tremblay et/ou monsieur Gaétan Boivin.

[86] Les conventions d'annulation des cessions de créance ayant été reconnues valides, les créanciers ont retrouvé leur créance. Leurs preuves de réclamations ne seront donc pas invalidées comme le demandent les requérantes. Les votes qui s'y rattacheraient normalement ne seront cependant pas computés. En effet, puisque cette convention accordait un droit de vote à Gaétan Boivin et/ou Alfred Boivin, vote qui fut enregistré mais que le Tribunal invalide par le présent jugement, ce droit de vote ne retournera pas aux créanciers dans le cadre de l'approbation de la proposition. Ces votes ne seront donc pas computés relativement à l'approbation de la proposition.

Le cas de Nutrinor

[87] La créance de Nutrinor était de 40 191,86 $ et monsieur Armand Chalifour, président du Groupe Chalifour, en était caution.

[88] Initialement, le 20 décembre 2002, Nutrinor a voté en faveur de la proposition, même avant qu'elle ne soit amendée. Plus tard, le 9 janvier 2003, Nutrinor change d'idée et décide de voter contre.

[89] Cette décision était motivée surtout par le fait que dans des procédures engagées pour recouvrer le cautionnement d'Armand Chalifour, ce dernier contestait la validité de son engagement. Assuré de 20% de sa créance mais incertain de la validité du cautionnement, Nutrinor affirme avoir décidé de voter contre la proposition.

Mary Danyluk *Appellant*

v.

Ainsworth Technologies Inc., Ainsworth Electric Co. Limited, F. Jack Purchase, Paul S. Gooderham, Jack A. Taylor, Ross A. Pool, Donald W. Roberts, Timothy I. Pryor, Clifford J. Ainsworth, John F. Ainsworth, Kenneth D. Ainsworth, Melville O'Donohue, Donald J. Hawthorne, William I. Welsh and Joseph McBride Watson *Respondents*

INDEXED AS: DANYLUK *v.* AINSWORTH TECHNOLOGIES INC.

Neutral citation: 2001 SCC 44.

File No.: 27118.

2000: October 31; 2001: July 12.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Administrative law — Issue estoppel — Employee filing complaint against employer under Employment Standards Act seeking unpaid wages and commissions — Employee subsequently commencing court action against employer for wrongful dismissal and unpaid wages and commissions — Employment standards officer dismissing employee's complaint — Employer arguing that employee's claim for unpaid wages and commissions before court barred by issue estoppel — Whether officer's failure to observe procedural fairness in deciding employee's complaint preventing application of issue estoppel — Whether preconditions to application of issue estoppel satisfied — If so, whether this Court should exercise its discretion and refuse to apply issue estoppel.

In 1993, an employee became involved in a dispute with her employer over unpaid commissions. No agreement was reached, and the employee filed a complaint under the *Employment Standards Act* ("ESA") seeking

Mary Danyluk *Appelante*

c.

Ainsworth Technologies Inc., Ainsworth Electric Co. Limited, F. Jack Purchase, Paul S. Gooderham, Jack A. Taylor, Ross A. Pool, Donald W. Roberts, Timothy I. Pryor, Clifford J. Ainsworth, John F. Ainsworth, Kenneth D. Ainsworth, Melville O'Donohue, Donald J. Hawthorne, William I. Welsh et Joseph McBride Watson *Intimés*

RÉPERTORIÉ : DANYLUK *c.* AINSWORTH TECHNOLOGIES INC.

Référence neutre : 2001 CSC 44.

N° du greffe : 27118.

2000 : 31 octobre; 2001 : 12 juillet.

Présents : Le juge en chef McLachlin et les juges Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit administratif — Préclusion découlant d'une question déjà tranchée — Plainte déposée par une employée contre son employeur en vertu de la Loi sur les normes de l'emploi et réclamant le versement de salaire et commissions impayés — Action en dommages-intérêts pour congédiement injustifié et pour salaire et commissions impayés intentée subséquemment par l'employée contre l'employeur — Rejet de la plainte par l'agente des normes d'emploi — Préclusion découlant d'une question déjà tranchée plaidée par l'employeur à l'égard de la réclamation pour salaire et commissions impayés — L'inobservation de l'équité procédurale par l'agente des normes dans sa décision sur la plainte de l'employée empêche-t-elle l'application de cette doctrine? — Les conditions d'application de la préclusion découlant d'une question déjà tranchée sont-elles réunies? — Dans l'affirmative, notre Cour doit-elle exercer son pouvoir discrétionnaire et refuser d'appliquer cette doctrine?

En 1993, un différend relatif à des commissions impayées a opposé une employée et son employeur. Aucune entente n'est intervenue et l'employée a déposé, en vertu de la *Loi sur les normes d'emploi* (la « LNE »),

unpaid wages, including commissions. The employer rejected the claim for commissions and eventually took the position that the employee had resigned. An employment standards officer spoke with the employee by telephone and met with her for about an hour. Before the decision was made, the employee commenced a court action claiming damages for wrongful dismissal and the unpaid wages and commissions. The ESA proceedings continued, but the employee was not made aware of the employer's submissions in the ESA claim or given an opportunity to respond to them. The ESA officer rejected the employee's claim and ordered the employer to pay her $2,354.55, representing two weeks' pay in lieu of notice. She advised the employer of her decision and, 10 days later, notified the employee. Although she had no appeal as of right, the employee was entitled to apply under the ESA for a statutory review of this decision. She elected not to do so and carried on with her wrongful dismissal action. The employer moved to strike the part of the statement of claim that overlapped the ESA proceeding. The motions judge considered the ESA decision to be final and concluded that the claim for unpaid wages and commissions was barred by issue estoppel. The Court of Appeal affirmed the decision.

une plainte dans laquelle elle réclamait le versement de salaire impayé, y compris des commissions. L'employeur a rejeté sa demande de commissions et a finalement considéré qu'elle avait remis sa démission. Une agente des normes d'emploi a eu un entretien téléphonique avec l'employée, qu'elle a ensuite rencontrée pendant environ une heure. Avant que la décision soit rendue, l'employée a intenté une action en dommages-intérêts pour congédiement injustifié dans laquelle elle demandait le paiement du salaire et des commissions. La procédure prévue par la LNE a suivi son cours, mais l'employée n'a pas été avisée des arguments invoqués par l'employeur au sujet de sa plainte et elle n'a pas eu la possibilité d'y répondre. L'agente des normes d'emploi a rejeté la réclamation de l'employée et a ordonné à l'employeur de verser à cette dernière la somme de 2 354,55 $, soit deux semaines de salaire, à titre d'indemnité de préavis. Elle a informé l'employeur de sa décision et, 10 jours plus tard, elle en a avisé l'employée. L'employée ne pouvait interjeter appel de plein droit mais elle avait, en vertu de la LNE, le droit de demander la révision de cette décision. Elle a choisi de ne pas le faire et a plutôt poursuivi son action en dommages-intérêts pour congédiement injustifié. L'employeur a présenté une requête en radiation de la partie de la déclaration qui recoupait la procédure engagée en vertu de la LNE. Le juge des requêtes a considéré que la décision fondée sur la LNE était définitive et il a conclu que la préclusion découlant d'une question déjà tranchée faisait obstacle à la réclamation pour salaire et commissions impayés. La Cour d'appel a confirmé la décision.

Held: The appeal should be allowed.

Arrêt : Le pourvoi est accueilli.

Although, in general, issue estoppel is available to preclude an unsuccessful party from relitigating in the courts what has already been litigated before an administrative tribunal, this is not a proper case for its application. Finality is a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a public policy doctrine designed to advance the interests of justice. Where, as here, its application bars the courthouse door against a claim because of an administrative decision made in a manifestly improper and unfair manner, a re-examination of some basic principles is warranted.

Bien que, en règle générale, la préclusion découlant d'une question déjà tranchée (*issue estoppel*) puisse être invoquée pour empêcher une partie déboutée de saisir les cours de justice d'une question qu'elle a déjà plaidée sans succès devant un tribunal administratif, il ne s'agit pas en l'espèce d'une affaire où il convient d'appliquer cette doctrine. Le caractère définitif des instances est une considération impérieuse et, en règle générale, une décision judiciaire devrait trancher les questions litigieuses de manière définitive, tant qu'elle n'est pas infirmée en appel. Toutefois, la préclusion est une doctrine d'intérêt public qui tend à favoriser les intérêts de la justice. Dans les cas où, comme en l'espèce, par suite d'une décision administrative prise à l'issue d'une procédure qui était manifestement inappropriée et inéquitable, l'application de cette doctrine empêche le recours aux cours de justice, il convient de réexaminer certains principes fondamentaux.

justice. Where as here, its application bars the courthouse door against the appellant's $300,000 claim because of an administrative decision taken in a manner which was manifestly improper and unfair (as found by the Court of Appeal itself), a re-examination of some basic principles is warranted.

20 The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel *per rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farwell v. The Queen* (1894), 22 S.C.R. 553, at p. 558; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmested and G. D. Watson, *Ontario Civil Procedure* (loose-leaf), vol. 3 Supp., at 21§17 *et seq*. Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223.

21 These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-

une doctrine d'intérêt public qui tend à favoriser les intérêts de la justice. Dans les cas où, comme en l'espèce, par suite d'une décision administrative prise à l'issue d'une procédure qui était manifestement inappropriée et inéquitable (conclusion tirée par la Cour d'appel elle-même), l'application de cette doctrine empêche l'appelante de s'adresser aux cours de justice pour réclamer les 300 000 $ qui lui seraient dus, il convient de réexaminer certains principes fondamentaux.

Le droit s'est doté d'un certain nombre de moyens visant à prévenir les recours abusifs. L'un des plus anciens est la doctrine de la préclusion *per rem judicatem*, qui tire son origine du droit romain et selon laquelle, une fois le différend tranché définitivement, il ne peut être soumis à nouveau aux tribunaux : *Farwell c. La Reine* (1894), 22 R.C.S. 553, p. 558, et *Angle c. Ministre du Revenu national*, [1975] 2 R.C.S. 248, p. 267-268. La doctrine est opposable tant à l'égard de la cause d'action ainsi décidée (on parle de préclusion fondée sur la demande, sur la cause d'action ou sur l'action) que des divers éléments constitutifs ou faits substantiels s'y rapportant nécessairement (on parle alors généralement de préclusion découlant d'une question déjà tranchée) : G. S. Holmested et G. D. Watson, *Ontario Civil Procedure* (feuilles mobiles), vol. 3 suppl., 21§17 et suiv. Un autre aspect de la politique établie par les tribunaux en vue d'assurer le caractère définitif des instances est la règle qui prohibe les contestations indirectes, c'est-à-dire la règle selon laquelle l'ordonnance rendue par un tribunal compétent ne doit pas être remise en cause dans des procédures subséquentes, sauf celles prévues par la loi dans le but exprès de contester l'ordonnance : *Wilson c. La Reine*, [1983] 2 R.C.S. 594; *R. c. Litchfield*, [1993] 4 R.C.S. 333; *R. c. Sarson*, [1996] 2 R.C.S. 223.

Initialement, ces règles ont été établies dans le contexte de procédures judiciaires antérieures. Leur champ d'application a depuis été élargi, avec les adaptations nécessaires, aux décisions de nature judiciaire ou quasi judiciaire rendues par les juridictions administratives — fonctionnaires ou tribunaux. Dans ce contexte, l'objectif spécifique poursuivi consiste à assurer l'équilibre entre le respect

In the Matter of a Plan of Compromise or Arrangement of Indalex Limited et al.

[Indexed as: Indalex Ltd. (Re)]

104 O.R. (3d) 641

2011 ONCA 265

Court of Appeal for Ontario,
MacPherson, Gillese and Juriansz JJ.A.
April 7, 2011

Debtors and creditors -- Companies' Creditors Arrangement Act -- Company obtaining order in CCAA proceedings permitting it to borrow funds pursuant to debtor-in-possession credit agreement -- Order creating super-priority charge in favour of debtor-in-possession lenders -- Super-priority charge not having priority over statutory deemed trust under Pension Benefits Act as deemed trust was not identified by court when charge was granted and affidavit evidence suggested such priority was unnecessary -- No finding of paramountcy made -- Valid provincial law continuing to operate -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 -- Pension Benefits Act, R.S.O. 1990, c. P.8.

Fiduciaries -- Pensions -- Employer which acts as administrator of its pension plans having fiduciary duty to plan members -- Company initiating proceedings under Companies' Creditors Arrangement Act and obtaining court order permitting it to borrow funds pursuant to debtor-in-possession credit agreement -- Order creating super-priority charge in favour of debtor-in-possession lenders -- Company aware that its pension plans were underfunded -- Company subject to its fiduciary

duties as administrator as well as its corporate obligations during CCAA proceedings -- Conflict of interest existing between company's duties as administrator and its corporate duties -- Company breaching its common law fiduciary duties and s. 22(4) of Pension Benefits Act -- Appropriate remedy being order for payment from proceeds of sale of company of amounts sufficient to satisfy deficiencies in plans in priority to claim of debtor-in-possession lenders -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 -- Pension Benefits Act, R.S.O. 1990, c. P.8, s. 22.

Pensions -- Winding up -- Deemed trust in s. 57(4) of Pension Benefits Act not limited to payment of amounts contemplated by s. 75(1)(a), but rather applying to all payments required by s. 75(1) -- Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 57(4), 75(1).

A Canadian company was the administrator of two registered pension plans, one for its salaried employees (the "Salaried Plan") and one for its executive employees (the "Executive Plan"). The Company's U.S. parent company sought Chapter 11 protection in the United States, and the Company initiated proceedings under the Companies' Creditors Arrangement Act ("CCAA"). At that time, the Salaried Plan was being wound up and both Plans were underfunded. The Company obtained a court order authorizing it to borrow funds pursuant to a debtor-in-possession ("DIP") credit agreement. The order created a super-priority charge in favour of the DIP lenders. The obligation to repay the DIP lenders was guaranteed by the U.S. parent. The Company moved for approval of the sale of its assets and for the distribution of the proceeds to the DIP lenders, which would result in there being nothing to fund the deficiencies in the Plans. Representatives of the Plans' members objected. The court approved the sale, but the Monitor retained in reserve an amount approximating the deficiencies. The sale [page642] proceeds were insufficient to pay the DIP lenders. The U.S. parent paid the shortfall. The representatives of the Plan members brought motions claiming that the reserve fund was subject to deemed trusts in favour of the Plans' beneficiaries and should be paid into the Plans in priority to the U.S. parent. They also claimed that during the

CCAA proceedings, the Company breached its fiduciary obligations to the Plans' beneficiaries. The CCAA judge dismissed the Executive Plan motion on the basis that since the wind up of the Executive Plan had not yet taken place, there were no deficiencies in payments on the date of closing of the sale and no basis for a deemed trust. He dismissed the Salaried Plan motion on the basis that, as s. 31 of R.R.O. 1990, Reg. 909 permitted the Company to make up the deficiency in the Plan over a period of years, the amount of the yearly payments did not become due until it was required to be paid. As there was no amount "due" under s. 57(4) of the Pension Benefits Act ("PBA") on the closing date of the sale, no deemed trust arose. The representatives of the Plans' members appealed.

Held, the appeal should be allowed.

The CCAA judge erred in his interpretation of s. 57(4) of the PBA. The words of s. 57(4), given their grammatical and ordinary meaning, contemplate that all amounts owing to the pension plan on wind up are subject to the deemed trust, even if those amounts are not yet due under the plan or regulations. Therefore, the deemed trust in s. 57(4) applies to all employer contributions that are required to be made pursuant to s. 75, and not just to amounts payable under s. 75(1)(a). The deficiency in the Salaried Plan had accrued as of the date of wind up and, pursuant to s. 57(4), was subject to a deemed trust on the closing date of the sale.

The Company breached its fiduciary obligations as administrator of the Plans during the CCAA proceedings. When managing its business, an employer wears its corporate hat. When acting as the administrator of its pension plans, it wears its fiduciary hat and must act in the best interests of the plan's members and beneficiaries. The Company could not ignore its obligations as administrator once it decided to seek CCAA protection. It breached its fiduciary obligations by doing nothing in the CCAA proceedings to fund the deficit in the underfunded Plans and taking active steps which undermined the possibility of additional funding to the Plans. It applied for CCAA protection without notice to the Plans' beneficiaries. It obtained an order that gave priority to the DIP lenders over

"statutory trusts" without notice to the beneficiaries. It sold assets without making any provision for the Plans. It knew the purchaser was not taking over the Plans. It moved to obtain orders approving the sale and distributing the proceeds to the DIP lenders, knowing that no payment would be made to the underfunded Plans. Further, there was a conflict of interest between the Company's corporate duty and its duty as administrator. Even if the Company was not in breach of its common law fiduciary obligations, its actions amounted to a breach of s. 22(4) of the PBA.

The deemed trust motions were not barred by the collateral attack rule. That rule was not applicable, and even if it were, this was not a case for its strict application.

The CCAA judge's order granting a super-priority charge did not mean that the super-priority charge had the effect of overriding the deemed trust. The deemed trust was not identified by the court at the time the charge was granted, and the affidavit evidence suggested that such a priority was unnecessary. As no finding of paramountcy was made, valid provincial laws continued to operate. The PBA deemed trust and the super-priority charge operated sequentially, with the deemed trust being satisfied first from the reserve fund. [page643]

Even if the conclusion that the deemed trust had priority over the secured credit was wrong, an order for payment from the reserve fund of amounts sufficient to satisfy deficiencies in the Plans was the appropriate remedy for the breaches of fiduciary obligation. That remedy was also appropriate for the Executive Plan, where it was not clear that a statutory deemed trust arose as the Plan had not been wound up at the time of sale.

Cases referred to

Century Services Inc. v. Canada (Attorney General), [2010] 3 S.C.R. 379, [2010] S.C.J. No. 60, 2010 SCC 60, 2011 D.T.C. 5006, 409 N.R. 201, 296 B.C.A.C. 1, 12 B.C.L.R. (5th) 1, 326 D.L.R. (4th) 577, EYB 2010-183759, 2011EXP-9, J.E. 2011-5, 2011 G.T.C. 2006, [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170; Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)

(1995), 18 C.C.P.B. 198 (Ont. Pen. Comm.); Ivaco Inc. (Re) (2006), 83 O.R. (3d) 108, [2006] O.J. No. 4152, 275 D.L.R. (4th) 132, 26 B.L.R. (4th) 43, 25 C.B.R. (5th) 176, 56 C.C.P.B. 1, 151 A.C.W.S. (3d) 1004 (C.A.), affg [2005] O.J. No. 3337, 12 C.B.R. (5th) 213, 47 C.C.P.B. 62 (S.C.J.); R. v. Domm (1996), 31 O.R. (3d) 540, [1996] O.J. No. 4300, 95 O.A.C. 262, 111 C.C.C. (3d) 449, 4 C.R. (5th) 61, 40 C.R.R. (2d) 289, 33 W.C.B. (2d) 108 (C.A.); R. v. Litchfield, [1993] 4 S.C.R. 333, [1993] S.C.J. No. 127, 161 N.R. 161, J.E. 93-1895, 14 Alta. L.R. (3d) 1, 145 A.R. 321, 86 C.C.C. (3d) 97, 25 C.R. (4th) 137, 21 W.C.B. (2d) 369; Soulos v. Korkontzilas (1997), 32 O.R. (3d) 716, [1997] 2 S.C.R. 217, [1997] S.C.J. No. 52, 146 D.L.R. (4th) 214, 212 N.R. 1, J.E. 97-1111, 100 O.A.C. 241, 46 C.B.R. (3d) 1, 17 E.T.R. (2d) 89, 9 R.P.R. (3d) 1, REJB 1997-00862, 71 A.C.W.S. (3d) 194; Toronto-Dominion Bank v. Usarco, [1991] O.J. No. 1314, 42 E.T.R. 235, 28 A.C.W.S. (3d) 392 (Gen. Div.), consd

Other cases referred to

Algoma Steel Inc. (Re), [2001] O.J. No. 1943, 147 O.A.C. 291, 25 C.B.R. (4th) 194, 105 A.C.W.S. (3d) 585 (C.A.); BCE Inc. v. 1976 Debentureholders, [2008] 3 S.C.R. 560, [2008] S.C.J. No. 37, 2008 SCC 69, 52 B.L.R. (4th) 1, EYB 2008-151755, J.E. 2009-43, 301 D.L.R. (4th) 80, 71 C.P.R. (4th) 303, 383 N.R. 119, 172 A.C.W.S. (3d) 915; Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42, 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, J.E. 2002-775, 166 B.C.A.C. 1, 100 B.C.L.R. (3d) 1, 18 C.P.R. (4th) 289, 93 C.R.R. (2d) 189, REJB 2002-30904, 113 A.C.W.S. (3d) 52; Bourdon v. Stelco Inc., [2005] 3 S.C.R. 279, [2005] S.C.J. No. 35, 2005 SCC 64, 259 D.L.R. (4th) 34, 341 N.R. 207, J.E. 2005-2067, 48 C.C.P.B. 167, 143 A.C.W.S. (3d) 569, EYB 2005-97371; British Columbia v. Henfrey Samson Belair Ltd., [1989] 2 S.C.R. 24, [1989] S.C.J. No. 78, 59 D.L.R. (4th) 726, 97 N.R. 61, [1989] 5 W.W.R. 577, J.E. 89-1098, 38 B.C.L.R. (2d) 145, 75 C.B.R. (N.S.) 1, 34 E.T.R. 1, 2 T.C.T. 4263; Burke v. Hudson's Bay Co., [2010] 2 S.C.R. 273, [2010] S.C.J. No. 34, 2010 SCC 34, 268 O.A.C. 1, 406 N.R. 109, 324 D.L.R. (4th) 498, 60 E.T.R. (3d) 1, 84 C.C.P.B. 1, 193 A.C.W.S. (3d) 1332, EYB 2010-180092, 2010EXP-3280, 2010EXPT-2234, J.E. 2010-1818, D.T.E. 2010T-674; Canadian Western Bank v. Alberta, [2007] 2 S.C.R. 3, [2007] S.C.J. No.

22, 2007 SCC 22, 281 D.L.R. (4th) 125, 362 N.R. 111, [2007] 8 W.W.R. 1, J.E. 2007-1068, 75 Alta. L.R. (4th) 1, 409 A.R. 207, [2007] R.R.A. 241, 49 C.C.L.I. (4th) 1, [2007] I.L.R. I-4622, 157 A.C.W.S. (3d) 299, EYB 2007-120167; Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534, [1991] S.C.J. No. 91, 85 D.L.R. (4th) 129, 131 N.R. 321, [1992] 1 W.W.R. 245, J.E. 92-271, 6 B.C.A.C. 1, 61 B.C.L.R. (2d) 1, 9 C.C.L.T. (2d) 1, 39 C.P.R. (3d) 449, 43 E.T.R. 201, 30 A.C.W.S. (3d) 199; Cusson v. Quan, [2009] 3 S.C.R. 712, [2009] S.C.J. No. 62, 2009 SCC 62, 258 O.A.C. 378, EYB 2009-167616, 2010EXP-89, J.E. 2010-36, 70 C.C.L.T. (3d) 1, 314 D.L.R. (4th) 55, 397 N.R. 94; Davey v. Woolley, Hames, Dale & Dingwall (1982), 35 O.R. (2d) 599, [1982] O.J. No. 3158, 133 D.L.R. (3d) 647, 13 A.C.W.S. (2d) 384 (C.A.); Garland v. Consumers' Gas Co., [2004] 1 S.C.R. 629, [2004] S.C.J. No. 21, 2004 SCC 25, 237 D.L.R. (4th) 385, 319 N.R. 38, J.E. 2004-931, 186 O.A.C. 128, 43 B.L.R. (3d) 163, 9 E.T.R. (3d) 163, 130 A.C.W.S. (3d) 32; [page644] Gencorp Canada Inc. v. Ontario (Superintendent of Pensions) (1998), 39 O.R. (3d) 38, [1998] O.J. No. 961, 158 D.L.R. (4th) 497, 114 O.A.C. 170, 37 C.C.E.L. (2d) 69, 78 A.C.W.S. (3d) 170 (C.A.); Hodgkinson v. Simms, [1994] 3 S.C.R. 377, [1994] S.C.J. No. 84, 117 D.L.R. (4th) 161, 171 N.R. 245, [1994] 9 W.W.R. 609, J.E. 94-1560, 49 B.C.A.C. 1, 97 B.C.L.R. (2d) 1, 16 B.L.R. (2d) 1, 6 C.C.L.S. 1, 22 C.C.L.T. (2d) 1, 57 C.P.R. (3d) 1, 95 D.T.C. 5135, 5 E.T.R. (2d) 1, 50 A.C.W.S. (3d) 469; InterTAN Canada Ltd. (Re), [2009] O.J. No. 293, 49 C.B.R. (5th) 232 (S.C.J.); Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, [1989] S.C.J. No. 83, 61 D.L.R. (4th) 14, 101 N.R. 239, J.E. 89-1204, 36 O.A.C. 57, 44 B.L.R. 1, 26 C.P.R. (3d) 97, 35 E.T.R. 1, 6 R.P.R. (2d) 1, 16 A.C.W.S. (3d) 345; Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services), [2004] 3 S.C.R. 152, [2004] S.C.J. No. 51, 2004 SCC 54, 242 D.L.R. (4th) 193, 324 N.R. 259, J.E. 2004-1546, 189 O.A.C. 201, 17 Admin. L.R. (4th) 1, 45 B.L.R. (3d) 161, 41 C.C.P.B. 106, 132 A.C.W.S. (3d) 579; Nortel Networks Corp. (Re) (2009), 99 O.R. (3d) 708, [2009] O.J. No. 4967, 2009 ONCA 833, 59 C.B.R. (5th) 23, 77 C.C.P.B. 161, [2010] CLLC 210-005, 256 O.A.C. 131 [Leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 531]; Ontario (Hydro-

Electric Power Commission) v. Albright (1922), 64 S.C.R. 306, [1922] S.C.J. No. 40, [1923] 2 D.L.R. 578; R. v. Wilson, [1983] 2 S.C.R. 594, [1983] S.C.J. No. 88, 4 D.L.R. (4th) 577, 51 N.R. 321, [1984] 1 W.W.R. 481, J.E. 84-70, 26 Man. R. (2d) 194, 9 C.C.C. (3d) 97, 37 C.R. (3d) 97, 11 W.C.B. 200

Statutes referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [as am.]

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 18.3(1) [rep. S.C. 2005, c. 47, s. 131], 37

Excise Tax Act, R.S.C. 1985, c. E-15, s. 222 [as am.], (3) [as am.]

Pension Benefits Act, R.S.O. 1990, c. P.8 [as am.], ss. 1 [as am.], (1) [as am.], 8 [as am.], 14, 22 [as am.], 22(4), 57, (4), (5), 68(1), (2), (4), 69(1) [as am.], 70(1), (4), 74 [as am.], 75 [as am.], (1) [as am.], (a), (b) [as am.], (2), 76

Personal Property Security Act, R.S.O. 1990, c. P.10, s. 30(7)

Supplemental Pension Plans Act, R.S.Q., c. R-15.1, s. 147 [as am.]

United States Bankruptcy Code, 11 U.S.C. tit. 11

Rules and regulations referred to

R.R.O. 1990, Reg. 909 (Pension Benefits Act), s. 31, (1), (2)

APPEAL from order of C. Campbell J., [2010] O.J. No. 974, 2010 ONSC 1114 (S.C.J.) dismissing motions for remedy for breach of deemed trust and breach of fiduciary duty.

Andrew J. Hatnay and Demetrios Yiokaris, for former executives, appellants.

Darrell L. Brown, for United Steelworkers, appellants.

Mark Bailey, for Superintendent of Financial Services.

Hugh O'Reilly and Adam Beatty, for Morneau Sobeco Limited Partnership, intervenor.

Fred Myers and Brian Empey, for Sun Indalex Finance, LLC.

Ashley Taylor and Lesley Mercer, for monitor, FTI Consulting Canada ULC. [page645]

Harvey Chaiton and George Benchetrit, for George L. Miller, the Chapter 7 trustee of the bankruptcy estates of the US Indalex Debtors.

The judgment of the court was delivered by

[1] GILLESE J.A.: -- A Canadian company is insolvent. Its pension plans are underfunded and in the process of being wound up. The company is the administrator of the pension plans.

[2] The company obtains protection under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended ("CCAA"). A court order enables it to borrow funds pursuant to a debtor-in-possession ("DIP") credit agreement. The order creates a "super-priority" charge in favour of the DIP lenders. The obligation to repay the DIP lenders is guaranteed by the company's U.S. parent company (the "Guarantee").

[3] The company is sold through the CCAA proceedings but the sale proceeds are insufficient to repay the DIP lenders. The U.S. parent company covers the shortfall, in accordance with its obligations under the Guarantee.

[4] The CCAA monitor holds some of the sale proceeds in a reserve fund. The pension plan beneficiaries claim the money based on the deemed trust provisions in the Pension Benefits Act, R.S.O. 1990, c. P.8 ("PBA"). The U.S. parent company claims the money based on its payment under the Guarantee.

[5] Must the money in the reserve fund be used to pay the deficiencies in the pension plans in preference to the secured creditor? What fiduciary obligations, if any, does the company have in respect of its underfunded pension plans during the CCAA proceeding? These appeals wrestle with these difficult questions.

Overview

[6] Indalex Limited was the sponsor and administrator of two registered pension plans: the Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies (the "Salaried Plan") and the Retirement Plan for Executive Employees of Indalex Limited and Associated Companies (the "Executive Plan") (collectively, the "Plans").

[7] On March 20, 2009, Indalex's parent company and its U.S.-based affiliates (collectively, "Indalex U.S.") sought Chapter 11 protection in the United States.

[8] On April 3, 2009, Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. ("Indalex" or the "applicants") obtained protection from their creditors under the CCAA. [page646] At that time, the Salaried Plan was in the process of being wound up. Both Plans were underfunded. FTI Consulting Canada ULC (the "Monitor") was appointed as monitor.

[9] On April 8, 2009, the court authorized Indalex to borrow funds pursuant to a DIP credit agreement. The court order gave the DIP lenders a super-priority charge on Indalex's property. Indalex U.S. guaranteed Indalex's obligation to repay the DIP lenders.

[10] On July 20, 2009, Indalex moved for approval of the sale of its assets on a going-concern basis. It also moved for approval to distribute the sale proceeds to the DIP lenders, with the result that there would be nothing to fund the deficiencies in the Plans. Without further payments, the underfunded status of the Plans will translate into significant cuts to the retirees' pension benefits.

[11] At the sale approval hearing, the United Steelworkers appeared on behalf of its members who had been employed by Indalex and are the beneficiaries of the Salaried Plan (the "USW"). In addition, a group of retired executives appeared on behalf of the beneficiaries of the Executive Plan (the "Former Executives").

[12] Both the USW and the Former Executives objected to the

planned distribution of the sale proceeds. They asked that an amount representing the total underfunding of the Plans (the "Deficiencies") be retained by the Monitor as undistributed proceeds, pending further court order. Their position was based on, among other things, the deemed trust provisions in the PBA that apply to unpaid amounts owing to a pension plan by an employer.

[13] The court approved the sale. However, as a result of the USW and Former Executives' reservation of rights, the Monitor retained an additional $6.75 million of the sale proceeds in reserve (the "Reserve Fund"), an amount approximating the Deficiencies. [See Note 1 below]

[14] The sale closed on July 31, 2009. The sale proceeds were insufficient to repay the DIP lenders. Indalex U.S. paid the shortfall of approximately US$10.75 million, pursuant to its obligations under the Guarantee. [page647]

[15] In accordance with a process designed by the CCAA court, the USW and the Former Executives brought motions returnable on August 28, 2009, based on their deemed trust claims. They claimed the Reserve Fund was subject to deemed trusts in favour of the Plans' beneficiaries and should be paid into the Plans in priority to Indalex U.S. They also claimed that during the CCAA proceedings, Indalex breached its fiduciary obligations to the Plans' beneficiaries.

[16] Indalex then brought a motion in which it sought to lift the stay and assign itself into bankruptcy (the "Indalex bankruptcy motion"). This motion was directed to be heard on August 28, 2009, along with the USW and Former Executives' motions.

[17] By orders dated February 18, 2010 (the "Orders under Appeal"), the CCAA judge dismissed the USW and Former Executives' motions on the basis that, at the date of sale, no deemed trust under the PBA had arisen in respect of either plan. He found it unnecessary to decide the Indalex bankruptcy motion.

[18] The USW and the Former Executives (together, the "appellants") appeal. They ask this court to order the Monitor to pay the Reserve Fund to the Plans.

[19] On November 5, 2009, the Superintendent of Financial Services ("Superintendent") appointed the actuarial firm of Morneau Sobeco Limited Partnership ("Morneau") as administrator of the Plans.

[20] Morneau was granted intervenor status. It supports the appellants.

[21] The Superintendent also appeared. He, too, supports the appellants.

[22] Sun Indalex, as the principal secured creditor of Indalex U.S., asks that the appeals be dismissed and the Reserve Fund be paid to it. As a result of its payment under the Guarantee, Indalex U.S. is subrogated to the rights of the DIP lenders. Its claim to the Reserve Fund is based on the super-priority charge.

[23] The Monitor appeared. It supports Sun Indalex and asks that the appeals be dismissed. The Monitor and Sun Indalex will be referred to collectively as the respondents.

[24] George L. Miller, the trustee of the bankruptcy estates of Indalex U.S., appointed under Chapter 7 of Title 11 of the United States Bankruptcy Code (the "U.S. Trustee"), was given leave to intervene. He joins with the Monitor and Sun Indalex in opposing these appeals.

[25] For the reasons that follow, I would allow the appeals and order the Monitor to pay, from the Reserve Fund, amounts sufficient to satisfy the deficiencies in the Plans. For ease of [page648] reference, the various statutory provisions to which I make reference can be found in the schedules at the end of these reasons.

Background

[26] Indalex Limited is a Canadian corporation. It is the

entity through which the Indalex group of companies operates in Canada. It is a direct wholly owned subsidiary of its U.S. parent, Indalex Holding Corp., which in turn is a wholly owned subsidiary of Indalex Finance.

[27] Together, the group of companies referred to as Indalex and Indalex U.S. were the second largest manufacturer of aluminum extrusions in the United States and Canada. Aluminum is a durable, light-weight metal that can be strengthened through the extrusion process, which involves pushing aluminum through a die and forming it into strips, which can then be customized for a wide array of end-user markets.

[28] Indalex Limited produced a portion of the raw material used in the extrusion process, called aluminum extrusion billets, through its casting division located in Toronto. It also processed the raw extrusion billets into extruded product at its Canadian extrusion plants, for sale to end-users. In 2008, Indalex Limited accounted for approximately 32 per cent of the Indalex group of companies total sales to third parties.

[29] Indalex Limited provided separate pension plans for its executives and salaried employees. The Plans were designed to pay pension benefits for the lives of the retirees and those of their designated beneficiaries. Indalex Limited was the sponsor and administrator of both Plans. The Plans were registered with the Financial Services Commission of Ontario ("FSCO") and the Canadian Revenue Agency.

The Salaried Plan

[30] The USW has several locals certified as bargaining agents on behalf of members employed with Indalex, including members who are beneficiaries of the Salaried Plan. It was certified to represent certain Indalex employees, seven of whom were members of the Salaried Plan and have deferred vested entitlements under that plan.

[31] The Salaried Plan contains a defined benefit and defined contribution component.

[32] Unlike the Executive Plan, the Salaried Plan was in the process of being wound up when Indalex began CCAA proceedings. The effective date of wind up is December 31, 2006. Special wind up payments were made in 2007 ($709,013), 2008 ($875,313) [page649] and 2009 ($601,000). As of December 31, 2008, the wind up deficiency was $1,795,600.

[33] All current service contributions have been made to the Salaried Plan.

[34] Article 4.02 of the Salaried Plan obligates Indalex to make sufficient contributions to the Salaried Plan. Article 14.03 of the Salaried Plan requires Indalex to remit "amounts due or that have accrued up to the effective date of the wind-up and which have not been paid into the Fund, as required by the Plan and Applicable Pension Legislation".

The Executive Plan

[35] The Executive Plan is a defined benefit plan. Effective September 1, 2005, Indalex closed the Executive Plan to new members.

[36] As of January 1, 2008, there were 18 members of the Executive Plan, none of whom were active employees.

[37] The Executive Plan is underfunded.

[38] As of January 1, 2008, the Executive Plan had an estimated funding deficiency, on an ongoing basis, of $2,535,100. On a solvency basis, the funding deficiency was $1,102,800 and on a wind up basis, the deficiency was $2,996,400. An actuarial review indicated that as of July 15, 2009, the wind up deficiency had increased to an estimated $3,200,000.

[39] In 2008, Indalex made total special payments of $897,000 to the Executive Plan. No further special payments were due to be made to the Executive Plan until 2011. All current service contributions had been made.

[40] Due to its underfunded status, the Former Executives' monthly pension benefits have already been cut by 30-40 per cent. Unless money is paid into the Executive Plan, these cuts will become permanent. The Former Executives have also lost their supplemental pension benefits which were unfunded and terminated by Indalex after it obtained CCAA protection. Between the two cuts, the Former Executives have lost between one-half and two-thirds of their pension benefits.

[41] On June 26, 2009, counsel for the Former Executives sent a letter to counsel to Indalex and the Monitor, advising that the Former Executives reserved all rights to the deemed trust under s. 57(4) of the PBA in the CCAA proceedings. There was no response or objection to that letter from Indalex, the Monitor or any other party.

[42] At the time the Orders under Appeal were made, the Executive Plan had not been wound up. However, a letter from [page650] counsel for the Monitor dated July 13, 2009 indicated that it was expected that the Executive Plan would be wound up.

[43] On March 10, 2010, the Superintendent issued a notice of proposal to wind up the Executive Plan effective as of September 30, 2009. The wind up process is currently underway.

Pension and corporate governance during the CCAA proceedings

[44] Keith Cooper, the senior managing director of FTI Consulting Inc., was a key advisor to the Indalex group of companies prior to and during the CCAA proceedings. On March 19, 2009, he was appointed the chief restructuring officer for all of the Indalex U.S.-based companies. However, he was responsible not only for Indalex U.S. but for the entire Indalex group of companies and subsidiaries, including the applicants. Mr. Cooper described his role as being to maximize recovery for Indalex as a whole.

[45] Mr. Cooper was the primary negotiator of the DIP credit agreement on behalf of Indalex. He does not recall discussing Indalex's pension obligations in respect of the Salaried and

Executive Plans during the negotiation of the DIP credit agreement. He was aware that the Plans were underfunded and that pensions would be reduced if the shortfalls were not met.

[46] FTI Consulting Inc., the company for which Mr. Cooper works, and the Monitor are affiliated entities. The Monitor (FTI Consulting Canada ULC) is a wholly owned subsidiary of FTI Consulting Inc.

[47] On July 31, 2009, all of the directors of Indalex resigned. On that same day, Indalex Holding Corp. (part of Indalex U.S.) became the management of Indalex. Thus, as of July 31, 2009, Indalex and Indalex U.S. formally had the same management.

[48] On August 12, 2009, a Unanimous Shareholder Declaration was executed in which Mr. Cooper was appointed to direct the affairs of all Indalex entities.

[49] On August 13, 2009, Indalex (which was now under the management of Indalex U.S.) announced its intention to bring a motion to bankrupt the Canadian company.

The CCAA Proceedings

The initial order, as amended (April 3 and 8, 2009)

[50] On April 3, 2009, pursuant to the order of Morawetz J., Indalex obtained protection from its creditors under the CCAA (the "Initial Order"). A stay of proceedings against Indalex was ordered. [page651]

[51] On April 8, 2009, the Initial Order was amended to authorize Indalex to borrow funds pursuant to a DIP credit agreement among Indalex, Indalex U.S. and a syndicate of lenders (the "DIP lenders"). JP Morgan Chase Bank, N.A. was the administrative agent (the "DIP Agent"). The DIP credit agreement contemplated that the DIP loan would be repaid from the proceeds derived from a going-concern sale of Indalex's assets on or before August 1, 2009.

[52] Indalex's obligation to repay the DIP borrowings was

guaranteed by Indalex U.S. The Guarantee was a condition to the extension of credit by the DIP lenders.

[53] Paragraph 45 of the Initial Order, as amended, is the super-priority charge. It provides that the DIP lenders' charge "shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise", other than the administration charge and the directors' charge, as those terms are defined in the Initial Order.

The Initial Order is further amended (June 12, 2009)

[54] On June 12, 2010, Morawetz J. heard and granted a motion by the applicants for approval of an amendment to the DIP credit agreement to increase the borrowings by about $5 million, from US$24.36 million to US$29.5 million. This resulted in an order dated June 12, 2009, further amending the Initial Order (the "June 12, 2009 order").

[55] Counsel for the Former Executives was served with motion material on June 11, 2009, at 8:27 p.m. In response to an e-mail from the Former Executives' counsel questioning the urgency of the motion, the Monitor's counsel responded that the motion was simply directed at obtaining more money under the DIP credit agreement.

[56] At the hearing of the motion on June 12, 2010, the Former Executives initially sought to reserve their rights to confirm that the motion was about an increase to the DIP and nothing more. When that was confirmed, the Former Executives withdrew their reservation and the motion proceeded later that afternoon.

The sale approval order (July 20, 2009)

[57] Indalex brought two motions that were heard on July 20, 2009 by Campbell J. (the "CCAA judge").

[58] First, Indalex sought approval of a sale of its assets, as a going concern, to SAPA Holdings AB ("SAPA"). Total

consideration for the sale of Indalex and Indalex U.S. was approximately [page652] US$151,183,000. The Canadian sale proceeds were to be paid to the Monitor.

[59] As a term of the sale, SAPA assumed no responsibility or liability for the Plans.

[60] Second, Indalex moved for approval of an interim distribution of the sale proceeds to the DIP lenders.

[61] Both the Former Executives and the USW objected to the planned distribution of the sale proceeds. They asserted statutory deemed trust claims in respect of the underfunded pension liabilities in the Plans, arguing that preference was to be given for amounts owing to the Plans pursuant to ss. 57 and 75 of the PBA. They also relied on s. 30(7) of the Ontario Personal Property Security Act, R.S.O. 1990, c. P.10 ("PPSA"), which expressly gives priority to the deemed trust in the PBA over secured creditors.

[62] The Former Executives and the USW further argued that Indalex had breached its fiduciary duty to the Plans' beneficiaries by failing to adequately meet its obligations under the Plans and by abdicating its responsibilities as administrator once CCAA proceedings had been undertaken.

[63] The court approved the sale in an order dated July 20, 2009 (the "Sale Approval order"). However, as a result of the USW and Former Executives' reservation of rights, the Monitor retained an additional $6.75 million of the sale proceeds in reserve, an amount approximating the Deficiencies.

[64] It was agreed that an expedited hearing process would be undertaken in respect of the USW and Former Executives' deemed trust claims and that the Reserve Fund held by the Monitor would be sufficient, if required, to satisfy the deemed trust claims.

The guarantee is called on

[65] On July 31, 2009, the sale to SAPA closed. The sale

proceeds available for distribution were insufficient to repay the DIP loan in full. The Monitor made a payment of US$17,041,391.80 to the DIP Agent. This resulted in a shortfall of US$10,751,247.22 in respect of the DIP borrowings. The DIP Agent called on the Guarantee for the amount of the shortfall, which Indalex U.S. paid.

The orders under appeal (August 28, 2009)

[66] The USW and Former Executives brought motions to determine their deemed trust claims. The motions were set for hearing on August 28, 2009. Indalex then filed its bankruptcy motion, in which it sought to file a voluntary assignment in bankruptcy. [page653]

[67] By orders dated February 18, 2010, the CCAA judge dismissed the USW and Former Executives' motions [[2010] O.J. No. 974, 2010 ONSC 1114].

[68] The CCAA judge found it unnecessary to deal with Indalex's bankruptcy motion.

The Reasons of the CCAA Judge

The Former Executives' motion

[69] The CCAA judge dismissed the Former Executives' motion on the basis that since the wind up of the Executive Plan had not yet taken place, there were no deficiencies in payments to that plan as of July 20, 2009. As there were no deficiencies in payments, there was no basis for a deemed trust.

The USW motion

[70] Because the Salaried Plan was in the process of being wound up, the CCAA judge dismissed the USW motion for different reasons.

[71] The CCAA judge saw the issue raised on the USW motion to be whether the PBA required Indalex to pay the wind up deficiency in the Salaried Plan as at the date of closing of the sale and transfer of assets, namely, July 20, 2009. In

resolving the issue, the CCAA judge considered ss. 57 and 75 of the PBA. He called attention to the words "accrued to the date of the wind up but not yet due" in s. 57(4).

[72] The CCAA judge also considered s. 31(1) and (2) of R.R.O. 1990, Reg. 909 (Pension Benefits Act) (the "Regulations"). He concluded that because s. 31 of the Regulations permitted Indalex to make up the deficiency in the Salaried Plan over a period of years, the amount of the yearly payments did not become due until it was required to be paid. Were it not for s. 31 of the Regulations, the CCAA judge stated that Indalex would have had an obligation under the PBA to pay in any deficiency as of the date of wind up.

[73] The CCAA judge concluded [at paras. 49-51]:

> I find that as of the date of closing and transfer of assets there were no amounts that were "due" or "accruing due" on July 20, 2010. On that date, Indalex was not required under the PBA or the Regulations thereunder to pay any amount into the [Salaried] Plan. There was an annual payment that would have become payable as at December 31, 2009 but for the stay provided for in the Initial Order under the CCAA.
>
> Since as of July 20, 2009, there was no amount due or payable, no deemed trust arose in respect of the remaining deficiency arising as at the date of wind-up. [page654]
>
> Since under the initial order priority was given to the DIP Lenders, they are entitled to be repaid the amounts currently held in escrow. Those entitled to windup deficiency remain as of that date unsecured creditors.

The Indalex bankruptcy motion

[74] Having found that the deemed trust claims failed, the CCAA judge considered that the question of Indalex's assignment into bankruptcy might be moot. He went on, in para. 55 of his reasons for decision, to state:

> In my view, a voluntary assignment under the BIA should not

be used to defeat a secured claim under valid Provincial legislation, unless the Provincial legislation is in direct conflict with the provisions of Federal Insolvency Legislation such as the CCAA or the BIA. For that reason I did not entertain the bankruptcy assignment motion first. (Emphasis added)

[75] He found no conflict between the federal and provincial legislative regimes and allowed the applicants to renew their request for bankruptcy relief in a further motion.

The Issues

[76] The central issue raised on these appeals is whether the CCAA judge erred in his interpretation of s. 57(4) of the PBA and, specifically, in finding that no deemed trust existed with respect to the Deficiencies as at July 20, 2009.

[77] The USW and the Former Executives ask the court to decide a second issue: whether during the CCAA proceedings Indalex breached the fiduciary obligations that it owed to the Plans' beneficiaries by virtue of being the Plans' administrator. [See Note 2 below]

[78] The U.S. Trustee's submission raises two additional issues. Does the collateral attack rule bar the appellants' deemed trust motions? Do the principles of cross-border insolvencies apply to these appeals?

[79] The final issue that arises is that of remedy: how is the Reserve Fund to be distributed?

[80] Given the centrality of the wind up process to these appeals, I will briefly outline the salient aspects of the wind up process before turning to a consideration of each of these issues.

Winding Up a Pension Plan

[81] To understand the wind up process, one must first understand how the pension plan operates while it is ongoing. [page655]

[82] A pension plan to which the employees contribute is called a contributory plan. In the case of contributory plans, the employer is obliged to remit the employee contributions, including payroll deductions, within a specified time frame. This aspect of an employer's obligations does not arise in these appeals.

[83] In addition to remitting the employee contributions, if any, while a defined benefit pension plan is ongoing, the employer must make two types of contributions to ensure that the plan is adequately funded and capable of paying the promised pension benefits.

(1) Current service or "normal cost" contributions -- the employer contributions necessary to pay for current service costs in respect of benefits that are currently accruing to members as a result of their ongoing participation in the plan as active employees. These must be made in monthly instalments within 30 days after the month to which they relate.

(2) Special payments -- a plan administrator must file an actuarial report annually in which the pension plan is valued on two different bases: a "going-concern" basis, where it is assumed the plan will continue to operate indefinitely; and a "solvency" basis, where it is assumed that the employer will discontinue its business and wind up its plan. If the actuarial report discloses a going-concern liability, the employer is required to make monthly special payments over a 15-year period to fund the unfunded liability. If the actuarial report discloses a solvency deficiency, the employer is required to make monthly special payments over a five-year period to fund the deficiency.

[84] It is important to understand that the solvency valuation is not the same thing as a wind up report. To repeat, the solvency valuation is prepared while the pension plan is ongoing. A solvency valuation is required while the plan is ongoing because it is crucial that there be adequate funds with which to pay pensions if the company becomes insolvent and the plan is wound up.

[85] The wind up of a pension plan is defined in the PBA as "the termination of the pension plan and the distribution of the assets of the pension fund" (s. 1(1)). At the effective date of wind up, the plan members cease to accrue further entitlements under the plan. Naturally, no new members may join the plan after the wind up date. The pension fund of a plan that is wound up continues to be subject to the PBA and the Regulations until all of the assets of the fund have been disbursed (s. 76). [page656]

[86] Winding up a pension plan must be distinguished from closing the plan, which simply means that no new entrants are permitted to join the plan.

[87] Under the PBA, there are two ways that a pension plan can be wound up. First, s. 68(1) recognizes that an employer [See Note 3 below] can voluntarily wind up the pension plan. Second, under s. 69(1), in certain circumstances, the Superintendent may order the wind up of the plan.

[88] The PBA contains a detailed statutory scheme that must be followed when a pension plan is to be wound up. This scheme imposes obligations on the employer and plan administrator, including the following:

-- the administrator has to give written notice of proposal to wind up to various people, including the Superintendent, and the notice must contain specified information (s. 68(2) and (4));

-- a wind up date must be chosen and the administrator must file a wind up report showing, among other things, the plan's assets and liabilities as at that date (s. 70(1));

-- no payments can be made out of the pension fund until the Superintendent has approved the wind up report (s. 70(4));

-- plan members with a certain combination of age and years of service or membership in the plan are entitled to additional benefits on wind up (grow-ins) (s. 74).

[89] Importantly, s. 75 requires an employer to make two different categories of payment on plan wind up. Sections 75(1)(a) and (b) read as follows:

Liability of employer on wind up

75(1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act [page657] and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39(3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

[90] Section 75(1)(a) requires the employer to make all payments that are due immediately or that have accrued and not been paid into the pension fund. Any unpaid current service costs and unpaid special payments are caught by this subsection. In other words, by virtue of this subsection, any payments that the employer had to make while the plan was ongoing must be paid. It will be recalled that while the plan was ongoing, some special payments could be made over time.

[91] Section 75(1)(b) requires the employer to pay additional amounts into the pension fund if there are insufficient assets

to cover the value of the pension benefits in the three categories set out in s. 75(1)(b).

[92] It will be apparent that on wind up, an employer will often be faced with having to make significant additional contributions under s. 75(1)(b), in addition to being required to bring all contributions up to date because of s. 75(1)(a). Section 75(2) stipulates that "the employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times". Section 31 of the Regulations prescribes the manner and timing for the s. 75 wind up payments. It provides that the amounts an employer is to contribute under s. 75 shall be by annual special payments, commencing at the effective date of the wind up, over not more than five years.

The PBA Deemed Trust

[93] The central issue in these appeals is whether the CCAA judge erred in his interpretation of s. 57(4) of the PBA. Section 57(4) reads as follows:

> 57(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

(Emphasis added) [page658]

[94] The modern approach to statutory construction dictates that in interpreting s. 57(4), the words must be read

> . . . in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [See Note 4 below]

[95] Section 57(4) deems an employer to hold in trust an amount equal to the contributions "accrued to the date of wind up but not yet due under the plan or regulations". The question is: what employer contributions are caught by s. 57(4) and, thus, are subject to the deemed trust?

[96] The introductory words of s. 57(4) refer to where a pension plan is "wound up". Therefore, to answer this question, one must refer to the wind up regime created by the PBA and Regulations, a summary of which is set out above.

[97] It will be recalled that when a pension plan is wound up, an actuarial calculation is made of the assets and liabilities, as of the wind up date. Because the plan liabilities relate to service that was provided up to the wind up date and not beyond, it is clear that all plan liabilities are accrued as of the wind up date. Put another way, no additional liability can accrue following the wind up because all events crystallize on the wind up date -- all pension benefit accruals by members cease and all amounts that an employer is required to pay into a pension plan are calculated as of the wind up date. For the same reason, the amounts that s. 75 requires an employer to contribute to the pension fund, on wind up, are accrued to the date of wind up. The required contributions are the amounts that an employer must make to the pension fund so that the accrued pension benefits of the plan members can be paid.

[98] It will be further recalled that s. 31 of the Regulations gives the employer up to five years in which to make all of the required s. 75 contributions. However, the fact that an employer is given time in which to pay the requisite contributions into the pension fund does not change the fact that the liabilities accrued by the wind up date.

[99] This point is reinforced when one distinguishes amounts that are "accrued" from amounts that are "not yet due". In Ontario (Hydro-Electric Power Commission) v. Albright (1922), 64 S.C.R. 306, [1922] S.C.J. No. 40, at para. 23, the Supreme Court of Canada explains that money is "due" when there is a [page659] legal obligation to pay it, whereas payments are "accrued" when the rights or obligations are constituted and the liability to pay exists, even if the payment does not need to be made until a later date (i.e., is not "due" until a later date).

[100] Thus, just as s. 57(4) contemplates, while the amounts that the employer must contribute to the pension fund pursuant to s. 75 "accrued to the date of wind up", because of s. 31 those contributions are "not yet due under the . . . regulations".

[101] There is nothing in the wording of s. 57(4) to suggest that its scope is confined to the amounts payable under only s. 75(1)(a), as the respondents contend. On the contrary, the words of s. 57(4), given their grammatical and ordinary meaning, contemplate that all amounts owing to the pension plan on wind up are subject to the deemed trust, even if those amounts are not yet due under the plan or regulations. Therefore, the deemed trust in s. 57(4) applies to all employer contributions that are required to be made pursuant to s. 75. In short, the words "employer contributions accrued to the date of wind up but not yet due" in s. 57(4) include all amounts owed by the employer on the wind up of its pension plan.

[102] This interpretation accords with a contextual analysis of s. 57(4).

[103] As these appeals demonstrate, during the five-year "grace" period permitted by s. 31 of the Regulations, the rights of plan beneficiaries are at risk. Section 57(4) and (5) provide some protection to the plan beneficiaries during that period. The employees' interest is in receiving their full pension entitlements. For that to happen, all s. 75 employer contributions must be made into the pension fund. The employer, on the other hand, has an interest in having a reasonable period of time within which to make the requisite s. 75 contributions. Section 31 of the Regulations gives the employer up to five years to make the contributions, during which time the deemed trust in s. 57(4) and the lien and charge in s. 57(5) provide a measure of protection for the employees over the amount of the unpaid employer contributions, contributions that had accrued to the date of wind up but [were] not yet due under the regulations.

[104] Further, this interpretation is consistent with the overall purpose of the PBA, which is to establish minimum

standards, [See Note 5 below] [page660] safeguard the rights of pension plan beneficiaries [See Note 6 below] and ensure the solvency of pension plans so that pension promises will be fulfilled. [See Note 7 below] As the Supreme Court of Canada said in Monsanto, at para. 38:

> The Act is public policy legislation that recognizes the vital importance of long-term income security. As a legislative intervention in the administration of voluntary pension plans, its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans.

(Citations omitted)

[105] Much reference has been made to the two cases in which s. 57(4) has been discussed: Ivaco Inc. (Re), [2005] O.J. No. 3337, 12 C.B.R. (5th) 213 (S.C.J.), affd (2006), 83 O.R. (3d) 108, [2006] O.J. No. 4152 (C.A.) and Toronto-Dominion Bank v. Usarco, [1991] O.J. No. 1314, 42 E.T.R. 235 (Gen. Div.). In my view, these decisions are of little assistance in deciding this issue.

[106] Factually, Ivaco and Usarco differ from the present case. In Ivaco and Usarco, the prospect of bankruptcy was firmly before the court, whereas in this case, at its highest, there is a motion to lift the stay and file for bankruptcy.

[107] Moreover, there are conflicting statements in Ivaco and Usarco regarding the applicability of the deemed trust to wind up deficiencies. In Usarco, a bankruptcy petition had been filed but no steps had been taken to proceed with the petition. The company was not under CCAA protection. In that context, Farley J., the motion judge, held that the deemed trust provision referred only to the regular contributions together with special contributions that were to have been made but had not been. [See Note 8 below] In Ivaco, the major financers and creditors wished to have the CCAA proceeding, which was functioning as a liquidation, transformed into a bankruptcy proceeding. The case was focused primarily on whether there was a reason to defeat

the bankruptcy petition. In Ivaco, Farley J. took a different view of the scope of the s. 57(4) deemed trust, stating that in a non-bankruptcy situation, the company's assets were subject to a deemed trust on account of unpaid contributions and wind up liabilities. [See Note 9 below] On appeal, although this court indicated that it thought that Farley J.'s [page661] statement in Usarco was correct, it found it unnecessary to decide the matter. Accordingly, these decisions are not determinative of the scope of the deemed trust created by s. 57(4) of the PBA.

[108] The CCAA judge concluded that because Indalex had made the going-concern and special payments to the Salaried Plan at the date of closing, there were no amounts due to the Salaried Plan. Therefore, there could be no deemed trust. Respectfully, I disagree. As I have explained, the deemed trust in s. 57(4) is not limited to the payment of amounts contemplated by s. 75(1)(a). It applies to all payments required by s. 75(1), including payments mandated by s. 75(1)(b).

[109] Accordingly, the deficiency in the Salaried Plan had accrued as of the date of wind up (December 31, 2006) and, pursuant to s. 57(4) of the PBA, was subject to a deemed trust. The CCAA judge erred in holding that no deemed trust existed with respect to that deficiency as at July 20, 2009. The consequences that flow from this conclusion are explored in the section below on how the Reserve Fund is to be distributed.

[110] Are the unpaid liability payments owing to the Executive Plan also subject to the s. 57(4) deemed trust? The Former Executives, Superintendent and Morneau all contend that they are. On the plain wording of s. 57(4), I find it difficult to accept this argument -- the introductory words of the provision speak to "where a pension plan is wound up". In other words, wind up of the pension plan appears to be a requirement for s. 57(4) to apply. If that is so, no deemed trust could arise unless and until a plan wind up occurred. As has been noted, the Executive Plan had not been wound up at the relevant time.

[111] Having said this, I am troubled by the notion that Indalex can rely on its own inaction to avoid the consequences

that flow from wind up. In its letter of July 13, 2009, counsel for the Monitor confirmed that the Executive Plan would be wound up. Indeed, the CCAA judge acknowledged that the material filed with the court showed an intention on the part of the applicants to wind up the plan. If the deemed trust does not extend to the Executive Plan, in the circumstances of this case, it appears that the result would be a triumph of form over substance.

[112] In the end, however, the question that drives these appeals is whether the Monitor should be directed to distribute the Reserve Fund to the Plans. As I explain below in the section on how the Reserve Fund should be distributed, in my view, such an order should be made. Consequently, it becomes unnecessary to decide whether the deemed trust applies to the deficiency in the Executive Plan and I decline to do so. It is a question that is best decided in a case where the result depends [page662] on it and a fuller record would enable the court to appreciate the broader implications of such a determination.

Did Indalex Breach its Fiduciary Obligation?

[113] The appellants say that Indalex, as administrator of the Plans, owed a fiduciary duty to the Plans' members and beneficiaries. Both appellants list a number of actions that Indalex took or failed to take during the CCAA proceedings that they say amounted to breaches of its fiduciary obligation. They contend that the appropriate remedy for those breaches is an order requiring the Reserve Fund to be paid into the Plans.

[114] The Monitor acknowledges that pension plan administrators have both a statutory and common law duty to act in the best interests of the plan beneficiaries and to avoid conflicts of interest, and that these duties are "fiduciary in nature". However, the Monitor contends that Indalex took all of the impugned actions in its role as employer and, therefore, could not have breached the fiduciary duties it owed to the Plans' beneficiaries as administrator. In any event, the Monitor adds, the issue is moot because any such breaches would merely give rise to an unsecured claim outside the ambit of the deemed trusts created by the PBA.

[115] Sun Indalex echoes the Monitor's latter argument and says that the allegations of breach of fiduciary duty are irrelevant in these appeals. Its submission on this issue is summarized in para. 79 of its factum:

> There is no provision in the PBA that creates a deemed trust in respect of any claim for damages based on an alleged breach of fiduciary duty by an employer and there is no basis in the PBA for conferring a priority with respect to such a claim. If a claim for breach of fiduciary duty on the part of Indalex exists, it is merely an unsecured claim outside the ambit of the deemed trusts created by the PBA that does not have priority over Sun's secured claim or the super-priority DIP Lenders Charge.

[116] For the reasons that follow, I accept the appellants' submission that Indalex breached its fiduciary obligations as administrator during the CCAA proceedings. I deal with the question of what flows from that finding when deciding the issue of remedy.

[117] It is clear that the administrator of a pension plan is subject to fiduciary obligations in respect of the plan members and beneficiaries. [See Note 10 below] These obligations arise both at common law and by virtue of s. 22 of the PBA. [page663]

[118] The common law governing fiduciary relationships is well known. A fiduciary relationship will be held to exist where, given all the surrounding circumstances, one person could reasonably have expected that the other person in the relationship would act in the former's best interests. [See Note 11 below] The key factual characteristics of a fiduciary relationship are the scope for the exercise of discretion or power; the ability to exercise that power unilaterally so as to affect the beneficiary's legal or practical interests; and a peculiar vulnerability on the part of the beneficiary to the exercise of that discretion or power. [See Note 12 below]

[119] It is readily apparent that these characteristics exist in the relationship between the pension plan administrator and

the plan members and beneficiaries. The administrator has the power to unilaterally make decisions that affect the interests of plan members and beneficiaries as a result of its responsibility for the administration of the plan and management of the fund. Those decisions affect the beneficiaries' interests. The plan members and beneficiaries reasonably rely on the administrator to ensure that the plan and fund are properly administered. And, as these appeals demonstrate, they are peculiarly vulnerable to the administrator's exercise of its powers. Thus, at common law, Indalex as the Plans' administrator owed a fiduciary duty to the Plans' members and beneficiaries to act in their best interests.

[120] Section 22 of the PBA also imposes a fiduciary duty on the administrator in the administration of the plan and fund. As well, it expressly prohibits the administrator from knowingly permitting its interest to conflict with its duties in respect of the pension fund. The relevant provisions in s. 22 read as follows:

Care, diligence and skill

22(1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

Special knowledge and skill

(2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess. [page664]

. . . . .

Conflict of interest

(4) An administrator . . . shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

[121] In Ontario, an employer is expressly permitted to act as the administrator of its pension plan: see ss. 1 and 8 of the PBA. [See Note 13 below] It is self-evident that the two roles can conflict from time to time. In Imperial Oil Ltd. v. Ontario (Superintendent of Pensions) (1995), 18 C.C.P.B. 198 (Ont. Pen. Comm.) ("Imperial Oil"), the Pension Commission of Ontario ("PCO") grappled with this statutorily sanctioned conflict in roles.

[122] In that case, the employer Imperial Oil was the administrator of two employee pension plans. Imperial Oil sought to file amendments to the pension plans with the PCO. Prior to the amendments, a plan member with ten or more years of service with Imperial Oil whose employment was terminated for efficiency reasons was entitled to an enhanced early retirement annuity (the "enhanced benefit"). The effect of the amendments was to deny such an employee the enhanced benefit unless the employee would have been able to retire within five years of termination. Put another way, after the amendments, in addition to the other requirements, an employee had to be 50 years of age or older at the time his or her employment was terminated for efficiency reasons in order to receive the enhanced benefit.

[123] The Superintendent accepted the amendments for registration.

[124] Some six months after the amendments were passed, Imperial Oil terminated the employment of a large number of employees for efficiency reasons. A number of the affected employees had ten or more years of service but, because they had not reached the age of 50, they were denied the enhanced benefit.

[125] A group of former employees (the "Entitlement 55 Group") objected to the registration of the amendments. They brought an application to the PCO, seeking a declaration that

the amendments were void and an order compelling Imperial Oil to administer the pension plans according to the terms of the plans in place before the amendments were passed. [page665]

[126] Among other things, the Entitlement 55 Group argued that when Imperial Oil amended the plans, it was acting in both its capacity as employer and its capacity as administrator of the plans. Thus, they contended, Imperial Oil placed itself in a conflict of interest situation prohibited by s. 22(4) of the PBA because in its role as employer it wished to reduce pension fund liabilities but in its role as administrator it had a duty to protect the interests of the beneficiaries who had reached the ten-year service qualification and thereby "qualified" for the enhanced benefit.

[127] The PCO dismissed the application. In so doing, it rejected the submission that Imperial Oil had contravened s. 22(4) by passing the amendments. It held that Imperial Oil had acted solely in its capacity as employer when it passed the amendments.

[128] The PCO acknowledged that the PBA allows an employer to wear "two hats" -- one as employer and the other as administrator. However, at para. 33 of its reasons, the PCO explained that an employer plays a role in respect of the pension plan that is distinct from its role as administrator:

> Its role as employer permits it to make the decision to create a pension plan, to amend it and to wind it up. Once the plan and fund are in place, it becomes an administrator for the purposes of management of the fund and administration of the plan. If we were to hold that an employer was an administrator for all purposes once a plan was established, of what use would a power of amendment be? An employer could never use the power to amend the plan in a way that was to its benefit, as opposed to the benefit of the employees. Section 14 presupposes this power is with an employer as it created parameters around the exercise of a power of amendment.

[129] The "two hats" analogy in Imperial Oil assists in

understanding the parameters of the dual roles of an employer who is also the administrator of its pension plan. The employer, when managing its business, wears its corporate hat. Although the employer qua corporation must treat all stakeholders fairly when their interests conflict, the directors' ultimate duty is to act in the best interests of the corporation: see BCE Inc. v. 1976 Debentureholders, [2008] 3 S.C.R. 560, [2008] S.C.J. No. 37, at paras. 81-84. On the other hand, when acting as the pension plan administrator, the employer wears its fiduciary hat and must act in the best interests of the plan's members and beneficiaries.

[130] The question raised by these appeals is whether, as the respondents contend, Indalex wore only its corporate hat during the CCAA proceedings. In my view, it did not. As I will explain, during the CCAA proceedings, in the unique circumstances of this case, Indalex wore both its corporate and its administrator's hats. [page666]

[131] I begin from the position that Indalex had the right to make the decision to commence CCAA proceedings wearing solely its corporate hat. That decision is not part of the administration of the pension plan or fund nor does it necessarily engage the rights of the beneficiaries of the pension plan. For example, an employer might sell its business under CCAA protection, with the purchaser agreeing to continue the pension plan. In that situation, there should be no effect on the payment of pension benefits. Similarly, if the pension plan were fully funded, CCAA proceedings should have no effect on pension entitlements.

[132] However, just because the initial decision to commence CCAA proceedings is solely a corporate one, that does not mean that all subsequent decisions made during the proceedings are also solely corporate ones. In the circumstances of this case, Indalex could not simply ignore its obligations as the Plans' administrator once it decided to seek CCAA protection. Shortly after initiating CCAA proceedings, Indalex moved to obtain DIP financing, in which it agreed to give the DIP lenders a super-priority charge. At the same time, Indalex knew that the Plans were underfunded and that unless more funds were put into

the Plans, pensions would have to be reduced. The decisions that Indalex was unilaterally making had the potential to affect the Plans beneficiaries' rights, at a time when they were particularly vulnerable. The peculiar vulnerability of pension plan beneficiaries was even greater than in the ordinary course because they were given no notice of the CCAA proceedings, had no real knowledge of what was transpiring and had no power to ensure that their interests were even considered -- much less protected -- during the DIP negotiations.

[133] In concluding that Indalex was subject to its fiduciary duties as administrator as well as its corporate obligations during the CCAA proceedings, two points need to be made.

[134] First, it is significant that Indalex is unclear as to what it thinks happened to its role as administrator during the CCAA proceedings. When cross-examined on this matter, Mr. Cooper gave various responses as to whom he believed filled that role: Indalex, a combination of him and the Monitor, and a combination of him and his staff. This confusion is understandable, given the number of roles that Mr. Cooper played in these proceedings. It will be recalled that prior to the commencement of the CCAA proceedings, he became the chief restructuring officer for Indalex U.S., a position which included responsibility for the Canadian group of Indalex companies. In this position, he served as Indalex's primary negotiator of the DIP credit agreement. [page667] But, at the same time, he worked for FTI Consulting Inc. The Monitor is a wholly owned subsidiary of FTI Consulting Inc. This blending of roles no doubt contributed to the apparent disregard for the obligations owed by the Plans' administrator.

[135] In any event, it is not apparent to me that Indalex could ignore its role as administrator or divest itself of those obligations without taking formal steps through the Superintendent, plan amendment, the courts, or some combination thereof, to transfer that role to a suitable person. However, I will not consider this particular question further because it was not squarely raised and argued by the parties and, in any event, even if Mr. Cooper became the administrator, through his

various roles, including as chief restructuring officer for Indalex U.S., he is so clearly allied in interest with Indalex that the following analysis remains applicable.

[136] Second, the respondents' submission that Indalex wore only its corporate hat during the proceedings is implicitly premised on the notion that an employer will wear its corporate hat or its administrator's hat, but never both. I do not accept this premise. Nor do I accept that the reasoning in Imperial Oil, which the respondents rely on, supports this submission.

[137] In Imperial Oil, the PCO had to decide whether certain acts taken in respect of a pension plan were those of the employer or the administrator. Because the provision of pension plans is voluntary in Canada, the employer has the right to decide questions of plan design, including whether to offer a pension plan and, if it does, whether to end it. In part because of the wording of s. 14 of the PBA and in part because the amendments at issue in Imperial Oil were a matter of plan design, the PCO concluded that the employer was found to be acting solely in its corporate role when it passed the amendments. There is nothing in Imperial Oil to suggest that an employer cannot find itself in a position where it is wearing both hats at the same time.

[138] I turn next to the question of breach.

[139] As previously noted, when Indalex commenced CCAA proceedings, it knew that the Plans were underfunded and that unless additional funds were put into the Plans, pensions would be reduced. Indalex did nothing in the CCAA proceedings to fund the deficit in the underfunded Plans. It took no steps to protect the vested rights of the Plans' beneficiaries to continue to receive their full pension entitlements. In fact, Indalex took active steps which undermined the possibility of additional funding to the Plans. It applied for CCAA protection without notice to the Plans' beneficiaries. It obtained a CCAA order that gave priority to the DIP lenders over "statutory trusts" without notice [page668] to the Plans' beneficiaries. It sold its assets without making any provision for the Plans. It knew the purchaser was not taking over the Plans. [See Note 14

below] It moved to obtain orders approving the sale and distributing the sale proceeds to the DIP lenders, knowing that no payment would be made to the underfunded Plans. And, Indalex U.S. directed Indalex to bring its bankruptcy motion with the intention of defeating the deemed trust claims and ensuring that the Reserve Fund was transferred to it. In short, Indalex did nothing to protect the best interests of the Plans' beneficiaries and, accordingly, was in breach of its fiduciary obligations as administrator.

[140] Further, in my view, Indalex was in a conflict of interest position. As has been mentioned, Indalex's corporate duty was to treat all stakeholders fairly when their interests conflicted, but its ultimate duty was to act in the best interests of the corporation. Indalex's duty as administrator was to act in the Plans' beneficiaries best interests. It is apparent that in the circumstances of this case, these duties were in conflict.

[141] The common law prohibition against conflict of interest is not confined to situations where the fiduciary's personal interest conflicts with those of the beneficiaries. It also precludes the fiduciary from placing itself in a position where it acts for two parties who are adverse in interest: Davey v. Woolley, Hames, Dale & Dingwall (1982), 35 O.R. (2d) 599, [1982] O.J. No. 3158 (C.A.), at para. 8. In Davey, a solicitor who acted for both sides of a business transaction was found to be in breach of his fiduciary obligations. Wilson J.A., writing for this court, explained that the conflict arose because the solicitor could not fulfill his duties in respect of both clients at the same time. At para. 18, she concluded that the solicitor was bound to refuse to act for the plaintiff in the circumstances.

[142] The prohibition against a fiduciary being in a position of conflicting duties governs the situation in which Indalex found itself in during the CCAA proceedings.

[143] Indalex was not at liberty to resolve the conflict in its duties by simply ignoring its role as administrator. A fiduciary relationship does not end simply because it becomes

impossible of performance. At the point where its duty to the corporation conflicted with its duties as administrator, it was incumbent on Indalex to take steps to address the conflict. [page669]

[144] Even if I am in error in concluding that Indalex was in breach of its common law fiduciary obligations, I would find that its actions amounted to a breach of s. 22(4) of the PBA. Section 22(4) prohibits an administrator from knowingly permitting its interest to conflict with its duties and powers in respect of the pension fund. Under s. 57(5) of the PBA, as administrator, Indalex had a lien and charge on its assets for the amount of the deemed trust. Any steps that it might have taken pursuant to s. 57(5), as administrator, would have been in respect of the pension fund. Thus, if nothing else, Indalex's actions during the CCAA proceedings demonstrate that it permitted its corporate interests to conflict with the administrator's duties and powers that flow from the lien and charge.

[145] Having found that Indalex breached its fiduciary obligations to the Plans' beneficiaries, the question becomes: what flows from such a finding? I address that question below when considering the issue of how to distribute the Reserve Fund. At that time, I will return to the arguments of the Monitor and Sun Indalex to the effect that such a finding is largely irrelevant in these proceedings.

Does the Collateral Attack Rule Bar the Deemed Trust Motions?

[146] The U.S. Trustee submits that even if the PBA creates a deemed trust for any wind up deficiencies in the Plans, the appeals should be dismissed because the underlying motions are an impermissible collateral attack on previous orders made in the CCAA proceedings. His argument runs as follows.

[147] The Initial Order, the June 12, 2009 order and the Sale Approval order (the "Court Orders") are all valid, enforceable court orders. The Court Orders gave super-priority rights to the DIP lenders and Indalex U.S. is subrogated to those rights. None of the Court Orders were appealed and no party sought to have them set aside or varied. As the appellants' motions seek

to alter the priorities established by the Court Orders, they should be barred because they are an impermissible collateral attack on those orders.

[148] I do not accept this submission for three reasons, the first two of which can be shortly stated.

[149] First, this submission is an attack on the underlying motions. As such, it ought to have been raised below. The Former Executives say that the collateral attack doctrine was raised for the first time on appeal. Certainly, if it was raised below, the CCAA judge makes no reference to it. As a general rule, it is not appropriate to raise an issue for the first time on appeal. The exceptions to this general rule are very limited and [page670] do not apply in this case: see Cusson v. Quan, [2009] 3 S.C.R. 712, [2009] S.C.J. No. 62, at paras. 36-37.

[150] Second, the USW and the Former Executives raised the matter of the deemed trusts in the CCAA proceedings. The CCAA judge designed a process by which their claims would be resolved. They followed that process. The USW and Former Executives can scarcely be faulted for complying with a court-designed process. Further, the Sale Approval order acknowledged the deemed trust issue in that it required the Monitor to hold funds in reserve that were sufficient to satisfy the deemed trust claims. That acknowledgment is inconsistent with a subsequent claim of impermissible collateral attack.

[151] Third, as I will now explain, an appreciation of the CCAA regime makes it apparent that the collateral attack rule does not apply in the circumstances of this case.

[152] The collateral attack rule rests on the need for court orders to be treated as binding and conclusive unless they are set aside on appeal or lawfully quashed. Court orders may not be attacked collaterally. That is, a court order may not be attacked in proceedings other than those whose specific object is the reversal, variation or nullification of the order. See R. v. Wilson, [1983] 2 S.C.R. 594, [1983] S.C.J. No. 88, at

para. 8.

[153] The fundamental policy behind the rule against collateral attacks is "to maintain the rule of law and to preserve the repute of the administration of justice": see R. v. Litchfield, [1993] 4 S.C.R. 333, [1993] S.C.J. No. 127, at para. 17. If a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it: see Garland v. Consumers' Gas Co., [2004] 1 S.C.R. 629, [2004] S.C.J. No. 21, at para. 72.

[154] The CCAA regime is designed to deal with all matters during an insolvent company's attempt to reorganize. The court-ordered stay of proceedings ensures that there is only one forum where parties can put forth their arguments and claims. By pre-empting other legal proceedings, the stay gives a corporation breathing space, which promotes the opportunity for reorganization.

[155] The CCAA regime is a flexible, judicially supervised reorganization process that allows for creative and effective decisions: see Century Services Inc. v. Canada (Attorney General), [2010] 3 S.C.R. 379, [2010] S.C.J. No. 60, at para. 21. The CCAA judge is accorded broad discretion because the proceedings are a fact-based exercise that requires ongoing monitoring [page671] and because there is often a need for the court to act quickly. There is an underlying assumption, however, that the CCAA proceedings will provide an opportunity for affected persons to participate in the proceedings.

[156] This assumption finds voice in para. 56 of the Initial Order, as amended, which permits any interested party to apply to the CCAA court to vary or amend the Initial Order (the "come-back clause"). That is precisely what the appellants did. As interested parties, they went to the CCAA court to ask that the super-priority charge be varied or amended so that their claims could be properly recognized.

[157] Moreover, I do not accept that the appellants failed to act promptly in asserting their claims. It was only when Indalex brought a motion for approval of the sale of its assets to SAPA and for a distribution of the sale proceeds to the DIP lenders that it became clear that Indalex intended to abandon the Plans in their underfunded states. The appellants immediately took steps to assert their claims in the very forum in which all of the Court Orders had been made, namely, the CCAA court.

[158] The U.S. Trustee's argument that the Court Orders were never appealed is not persuasive. In Algoma Steel Inc. (Re), [2001] O.J. No. 1943, 147 O.A.C. 291 (C.A.), at paras. 7-9, this court stated that it is premature to grant leave to appeal from an initial order -- brought on an urgent basis to deal with seemingly desperate circumstances -- when the order specifically opens the proceeding to all interested parties and invites dissatisfied parties to bring their concerns to the court on a timely basis using a come-back provision.

[159] As the Former Executives point out, had the appellants sought to advance their deemed trust claims by bringing a motion challenging the paragraph of the Initial Order that established the DIP super-priority charge, it is likely that they would have been met by a response that their motions were premature. Depending on the amount paid for the company and/or the arrangements made in respect of the Plans, the interests of the Plans' beneficiaries might not have been affected by a sale. Indeed, on July 2, 2009, when Indalex brought a motion to have the bidding procedures approved for the asset sale and the Former Executives objected because of concerns that the Plans were underfunded, the CCAA judge endorsed the record as follows: "The issues can be raised by the retirees on any application to approve a transaction -- but that is for another day."

[160] The appellants followed that direction. When Indalex moved to have the sale transaction approved and the jeopardy to [page672] the appellants' interests became apparent, they went to the CCAA court and raised the deemed trust issue. [See Note 15 below]

[161] Thus, as I have said, I do not view the deemed trust motions as collateral attacks on the Court Orders. The motions were raised in a timely manner in the same court in which the orders were made. They can scarcely be termed attempts to circumvent decisions rendered against the USW and the Former Executives when no decision had ever been rendered in which their claims had been squarely raised and addressed. The process the USW and the Former Executives followed is exactly that which is contemplated in CCAA proceedings and, specifically, the come-back clause.

[162] Even if the collateral attack rule were applicable, however, this is not a case for its strict application.

[163] In Litchfield, the Supreme Court of Canada recognized that there will be situations in which the collateral attack rule should not be strictly applied. In that case, a physician had been charged with a number of counts of sexual assault on his patients. On motion, a judge (not the trial judge) ordered that the counts be severed and divided and three different trials be held. After one trial, the physician was acquitted. The Crown appealed. One of the grounds of appeal related to the pre-trial severance order. The question arose as to whether the Crown's challenge to the validity of the severance order violated the collateral attack rule.

[164] At paras. 16-19 of Litchfield, Iacobucci J., writing for the majority, explains that "some flexibility" is needed in the application of the rule against collateral attacks. Strictly applied, the rule would prevent the trial judge from reviewing the severance order because the trial was not a proceeding whose specific object was the reversal, variation or nullification of the severance order. However, Iacobucci J. noted, the rule is not intended to immunize court orders from review. He reiterated the powerful rationale behind the rule: to maintain the rule of law and preserve the repute of the administration of justice. This promotes certainty and finality, key aspects of the orderly and functional administration of justice. However, he concluded that flexibility was warranted because permitting a collateral

attack [page673] on the severance order did not offend the underlying rationale for the rule.

[165] Similarly, in R. v. Domm (1996), 31 O.R. (3d) 540, [1996] O.J. No. 4300 (C.A.), at para. 31, Doherty J.A., writing for this court, states that if a collateral attack can be taken without harm to the interests of the rule of law and the repute of the administration of justice, the rule should be relaxed. At para. 36 of Domm, he says that the rule must yield where a person has "no other effective means" of challenging the order in question.

[166] I acknowledge that certainty and finality are necessary to the proper functioning of the legal system. And, I recognize that permitting the appellants' motions to proceed has generated some degree of uncertainty as to the priorities established by the Court Orders. However, in the circumstances of this case, there was no other effective means by which the appellants could assert their claims to a deemed trust. As has been mentioned, it was only when Indalex brought a motion for approval of the sale of its assets to SAPA and for a distribution of the sale proceeds to the DIP lenders that it became clear that Indalex intended to abandon the Plans in their underfunded states. The appellants immediately took steps to assert their claims in the very forum in which all of the Court Orders had been made, namely, the CCAA court. By permitting their motions to be heard, the CCAA judge did not damage the repute of the administration of justice. On the contrary, he strengthened it. He enabled the sale to proceed while ensuring that the competing claims to the Reserve Fund would be decided on the merits and expeditiously.

[167] Nor can it be said, for the reasons already given about the nature of CCAA proceedings, that the deemed trust motions jeopardize the rule of law. Given the nature of a CCAA proceeding, the court must often make orders on an urgent and expedited basis, with little or no notice to creditors and other interested parties. Its processes are sufficiently flexible that it can accommodate situations such as the one that arose here. A strict application of the rule would preclude the appellants from having the opportunity to

meaningfully challenge the super-priority charge in the Initial Order, as amended. In my view, that result would be a fundamental flaw in the CCAA process, one in which procedure triumphed over substance. As Iacobucci J. said in Litchfield, at para. 18, such a result cannot be accepted.

[168] Accordingly, in my view, while the collateral attack rule does not apply, even if it did, there are compelling reasons in this case to relax its strict application. [page674]

Do the Principles of Cross-Border Insolvencies Apply?

[169] The U.S. Trustee also submits that the principles of cross-border insolvencies should be applied when deciding these appeals. He contends that notwithstanding that separate proceedings were commenced in Canada and the U.S., those principles apply because the applicants were direct and indirect subsidiaries of certain of the U.S. debtors, who commenced proceedings under Chapter 11 of Title 11 of the United States Bankruptcy Code in March 2009. Further, the U.S. Trustee contends that if the appellants' claims were to succeed, it would seriously undermine the basic principles underlying cross-border insolvencies and the confidence of foreign creditors and courts in the Canadian insolvency system.

[170] While this argument provides context for the U.S. Trustee's collateral attack submission, I do not see it as disclosing any legal grounds relevant to these appeals. By order dated May 12, 2009, Morawetz J. approved a cross-border protocol in these proceedings that stipulates that the U.S. and Canadian courts retain exclusive jurisdiction over the proceedings in their respective jurisdictions. Furthermore, there is no evidence to support the U.S. Trustee's claim that allowing these appeals would impair future lending practices by U.S. companies. Finally, nothing has been raised which supports the notion that upholding valid provincial law in the circumstances of these appeals will undermine the principles of cross-border insolvencies.

How is the Reserve Fund to be Distributed?

The Salaried Plan

[171] Having concluded that a deemed trust exists with respect to the deficiency in the Salaried Plan as at July 20, 2009, the question becomes whether the Monitor should be ordered to pay the amount of that deficiency, from the Reserve Fund, into the Salaried Plan.

[172] The USW argues, on behalf of the beneficiaries of the Salaried Plan, that the deemed trust ranks in priority to all secured creditors and, therefore, the order should be made. Its argument rests on s. 30(7) of the PPSA, which reads as follows:

> 30(7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the Employment Standards Act or under the Pension Benefits Act. (Emphasis added) [page675]

[173] The USW contends that as s. 30(7) gives priority to the PBA deemed trust and no finding of paramountcy was made in these proceedings, it must be given effect.

[174] The respondents argue that the super-priority charge has priority over any deemed trusts and, therefore, the Reserve Fund should be paid to Sun Indalex, as the principal secured creditor of Indalex U.S. They point to well-established law that authorizes the court to grant super-priority to DIP lenders in CCAA proceedings and argue that without such a charge, DIP lenders will no longer provide financing to companies under CCAA protection. Without DIP funding they say, many companies under CCAA protection will be unable to continue in business until a compromise or arrangement has been worked out. Consequently, companies will file for bankruptcy where deemed trusts have no priority. This, they say, will frustrate the very purpose of the CCAA, which is to facilitate the making of compromises or arrangements between insolvent debtor companies and their creditors.

[175] There is a great deal of force to the respondents' submissions. Indeed, in general, I agree with them. It is important that the courts not address the interests of pension plan beneficiaries in a manner that thwarts or even discourages

DIP funding in future CCAA proceedings. Nonetheless, in the circumstances of this case, it is my view that the Monitor should be ordered to pay the amount of the deficiency, from the Reserve Fund, into the Salaried Plan.

[176] The CCAA court has the authority to grant a super-priority charge to DIP lenders in CCAA proceedings. [See Note 16 below] I fully accept that the CCAA judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation, including the PBA. I also accept that without such a charge, DIP lenders may be unwilling to provide financing to companies under CCAA protection. However, this does not mean that the super-priority charge in question has the effect of overriding the deemed trust. To decide whether it does, one must turn to the doctrine of paramountcy.

[177] Valid provincial laws continue to apply in federally regulated bankruptcy and insolvency proceedings absent an express finding of federal paramountcy. The onus is on the party relying on the doctrine of paramountcy to demonstrate that the federal [page676] and provincial laws are incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law: see Canadian Western Bank v. Alberta, [2007] 2 S.C.R. 3, [2007] S.C.J. No. 22, at para. 75, and Nortel Networks Corp. (Re) (2009), 99 O.R. (3d) 708, [2009] O.J. No. 4967 (C.A.), at para. 38, leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 531.

[178] In this case, there is nothing in the record to suggest that the issue of paramountcy was invoked on April 8, 2009, when Morawetz J. amended the Initial Order to include the super-priority charge. The documents before the court at that time did not alert the court to the issue or suggest that the PBA deemed trust would have to be overridden in order for Indalex to proceed with its DIP financing efforts while under CCAA protection. To the contrary, the affidavit of Timothy Stubbs, the then CEO of Indalex, sworn April 3, 2009, was the primary source of information before the court. In para. 74 of his affidavit, Mr. Stubbs deposes that Indalex intended to

comply with all applicable laws, including "regulatory deemed trust requirements".

[179] While the super-priority charge provides that it ranks in priority over trusts, "statutory or otherwise", I do not read it as taking priority over the deemed trust in this case because the deemed trust was not identified by the court at the time the charge was granted and the affidavit evidence suggested such a priority was unnecessary. As no finding of paramountcy was made, valid provincial laws continue to operate: the super-priority charge does not override the PBA deemed trust. The two operate sequentially, with the deemed trust being satisfied first from the Reserve Fund.

[180] Does this conclusion thwart the purpose of the CCAA regime, which is to facilitate the restructuring of failing businesses to avoid bankruptcy and liquidation? It does not appear that would have happened in the present case. The granting of a stay in a CCAA proceeding provides a company with breathing space so that it can restructure. In this case, the stay of proceedings gave Indalex the breathing space it needed to effect a sale of its business. Recall that this was a "liquidating CCAA" from the outset. There was no restructuring of the company. There was no plan of compromise or arrangement prepared and presented to creditors. Within days of obtaining CCAA protection, Indalex began a marketing process to sell itself. Very shortly thereafter, it sold its business as a going-concern. There is nothing in the record to suggest that giving the deemed trust [page677] priority would have frustrated Indalex's efforts to sell itself as a going-concern business.

[181] What of the contention that recognition of the deemed trust will cause DIP lenders to be unwilling to advance funds in CCAA proceedings? It is important to recognize that the conclusion I have reached does not mean that a finding of paramountcy will never be made. That determination must be made on a case-by-case basis. There may well be situations in which paramountcy is invoked and the record satisfies the CCAA judge that application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy. But,

this depends on the applicant clearly raising the issue of paramountcy, which will alert affected parties to the risks to their interests and put them in a position where they can take steps to protect their rights. That, however, is not this case.

[182] Nor am I persuaded by the argument that if the deemed trust is given effect in the unique circumstances of this case, companies will file for bankruptcy instead of moving for CCAA protection. This argument suggests that companies will act based on the desire to avoid their pension obligations. That motivation does not conform with the obligations that directors owe to the corporation. The obligation to act in the best interests of the corporation suggests that companies will choose the route that maximizes recovery for creditors. As the respondents point out, Indalex sought a going-concern sale for exactly that reason. In addition, by selling its business as a going concern, Indalex preserved value for suppliers and customers who can continue to do business with the purchaser and preserved approximately 950 jobs for its former employees. Surely, the desire to maximize recovery for their creditors -- along with those other considerations -- would have prevailed had Indalex known it would have to satisfy the deemed trust when considering whether to pursue bankruptcy or CCAA proceedings. In this regard, it is worth recalling that consideration for the sale exceeded $151 million, all DIP lenders were repaid in full, the Reserve Fund consists of undistributed proceeds and the total deficiencies in the Plans appear to be approximately $6.75 million.

[183] As for the suggestion that Indalex will pursue its bankruptcy motion in order to defeat the deemed trust, I would simply echo the comments of the CCAA judge that a voluntary assignment into bankruptcy should not be used to defeat a secured claim under valid provincial legislation. I would add this additional consideration: it is inappropriate for a CCAA applicant with a fiduciary duty to pension plan beneficiaries to seek to avoid those obligations to the benefit of a related party [page678] by invoking bankruptcy proceedings when no other creditor seeks to do so.

[184] There is also the matter of Indalex U.S.'s apparent

reliance on the super-priority charge when it gave the Guarantee. As explained more fully above, Indalex U.S. was fully aware of Indalex's obligations to the Plans when it entered into the Guarantee. Again as explained more fully above, there were a number of different steps that Indalex could have taken to deal with these obligations. It chose not to. This is not a case in which the secured creditor is an arm's length third party taken by surprise by the claims of the Plans' beneficiaries.

[185] A final consideration that must be addressed at this stage arises from the recent decision of the Supreme Court of Canada in Century Services, which was released after the oral hearing of the appeals. The parties were invited to make written submissions on the impact of Century Services, if any, on these appeals. I am grateful for the excellence of those submissions, which mirrors the quality of the original submissions.

[186] Century Services deals with conflicting provisions in two pieces of federal legislation: s. 222(3) of the Excise Tax Act, R.S.C. 1985, c. E-15, which gives the federal Crown a deemed trust for unpaid GST, and s. 18.3(1) (now s. 37) of the CCAA, which expressly excludes deemed trusts in favour of the Crown from applying in CCAA proceedings. Deschamps J., for the majority, conducted a comprehensive analysis of the two conflicting sections and held that s. 18.3(1) of the CCAA prevails. In sum, Century Services stands for the proposition that s. 18.3(1) of the CCAA excludes the deemed trust for unpaid GST created by s. 222 of the Excise Tax Act from applying in a CCAA proceeding.

[187] It will be readily apparent that Century Services is distinguishable from the present case in a number of ways. Three significant differences between it and the present appeals are worthy of note.

[188] First, in Century Services, reorganization efforts had failed and the company sought leave to make an assignment into bankruptcy. Liquidation on a piecemeal basis through bankruptcy was inevitable. The CCAA proceedings in the present case, on

the other hand, were successful -- they resulted in the sale of Indalex's assets and the continuation of the business, albeit through another entity. It is not a situation in which transition to the bankruptcy regime was inevitable because efforts under the CCAA had failed.

[189] Second, Century Services deals with competing provisions in two federal statutes. The conflict between the two provisions was patent: one or the other had to prevail. They could not [page679] be read together. Section 18.3(1) was found to prevail, in part because of its wording, which expressly excludes a deemed trust in favour of the Crown. The present appeals involve a consideration of the doctrine of federal paramountcy and whether a deemed trust under provincial legislation applies to a charge granted in a CCAA proceeding. Significantly, unlike the situation in Century Services, there is nothing in the CCAA that expressly excludes the provincial deemed trust for unpaid pension contributions from applying in CCAA proceedings. In these appeals, exclusion of the provincial deemed trust is dependent on the CCAA judge engaging in a factual examination and a determination that preservation of pension rights through the deemed trust would frustrate the purpose of the CCAA proceeding. Moreover, it is difficult to see how a finding of paramountcy would have been made on the record at the time the super-priority charge was made, given the evidence that Indalex intended to comply with all regulatory deemed trust requirements. [See Note 17 below]

[190] Third, no issue of fiduciary duty arose in Century Services. In the present case, as discussed previously and again below, the impact of fiduciary duties during the CCAA proceeding plays a significant role.

[191] The respondents contend that Century Services is crucial in the disposition of these appeals because it stands for the proposition that federal priorities under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA") apply in CCAA proceedings. If Century Services stood for that proposition, I would agree. In a series of cases, the Supreme Court of Canada has repeatedly said that a province cannot, by legislating a deemed trust, alter the scheme of priorities

under the BIA: see, for example, British Columbia v. Henfrey Samson Belair Ltd., [1989] 2 S.C.R. 24, [1989] S.C.J. No. 78.

[192] However, in my view, Century Services does not stand for that unqualified proposition. In Century Services, Deschamps J. explains that the CCAA and BIA are to be read in an integrated fashion but she is at pains to say that the BIA scheme of liquidation and distribution is the backdrop for what happens if a CCAA reorganization is unsuccessful. [See Note 18 below] Here, as I have noted, the CCAA proceedings were successful.

[193] Moreover, Deschamps J. repeatedly distinguishes the two regimes on the basis that the BIA is "characterized by a [page680] rules-based approach", [See Note 19 below] whereas the CCAA "offers a more flexible mechanism with greater judicial discretion". [See Note 20 below] Permitting the PBA deemed trust to survive, absent an express finding of paramountcy, is consistent with both those key features of the CCAA proceedings -- greater flexibility and greater judicial discretion on the part of the CCAA court. This flexibility and discretion on the part of the CCAA court enables it to meaningfully assess the baseline considerations of appropriateness, good faith and due diligence, referred to by Deschamps J., at para. 70 of Century Services.

[194] The respondents point to paras. 47, 48 and 76 of Century Services, in which Deschamps J. notes the "strange asymmetry" that would occur if the ETA Crown priority were interpreted differently in CCAA proceedings than in BIA proceedings. She says this would encourage forum shopping in cases where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims. No "strange asymmetry" would occur in cases such as the present appeals. If the CCAA judge found that recognition of the PBA deemed trust would frustrate the purpose of the CCAA proceeding and paramountcy had been invoked, the CCAA judge would be free to make a super-priority charge that overrode the deemed trust. This approach leaves the CCAA court with greater flexibility and the ability to be "cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees". [See Note 21 below]

[195] In para. 70 of her reasons, Deschamps J. exhorts the CCAA courts to be "mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit" (emphasis added). The Plans' beneficiaries are stakeholders. And, once the deemed trust claims are recognized, they are not to be treated as mere unsecured creditors. If, as the respondents contend based on Century Services, the deemed trusts are automatically overridden, there will be no incentive for companies that are similarly situated to Indalex to attempt to deal with their underfunded pension plans. There will be no incentive to treat pension plan beneficiaries "as advantageously and fairly as the circumstances permit". The incentive will be to do as Indalex did -- go to court [page681] without notice to the affected pension plan beneficiaries and negotiate as if the pension obligations did not exist.

[196] Justice Deschamps also says that no "gap" should exist between the BIA and the CCAA and approves of Laskin J.A.'s reasoning to that effect, at paras. 62-63 of Ivaco. [See Note 22 below] She explains that the gap is a situation "which would allow the enforcement of property interests at the conclusion of CCAA proceedings that would be lost in bankruptcy". When the facts of the present case are considered carefully, it can be seen that a gap of this sort will not occur should the appeals be allowed. As I see it, the deemed trusts continued to exist during the CCAA proceedings although no steps could be taken to enforce them during the proceedings because of the stay. By the time of the Sale Approval order, the CCAA court had become aware of the deemed trust claims. It dealt with the deemed trust claims as part of the CCAA proceedings by deciding whether the undistributed sales proceeds held by the Monitor should go to Indalex U.S. or to the Plans' beneficiaries. Thus, rather than being a situation in which property interests that would be lost in bankruptcy were enforced at the conclusion of the CCAA proceedings, the property interests were dealt with as part of the CCAA proceedings.

[197] However, even if I am wrong in concluding that the

deemed trust has priority over the secured creditor in this case, I would make the order on the basis that it is the appropriate remedy for the breaches of fiduciary obligation.

[198] It is important to keep in mind that the contest over the Reserve Fund is not a fight between the DIP lenders and the pensioners. The DIP lenders have been paid in full. The dispute is between the pensioners and Sun Indalex, the principal secured creditor of Indalex U.S. It is in that context that the court must consider the competing equities.

[199] The CCAA was not designed to allow a company to avoid its pension obligations. To give effect to Indalex U.S.'s claim would be to sanction Indalex's breaches of fiduciary obligation. In the circumstances of this case, such a result would work an injustice. The equities are not equal. The Plans' beneficiaries were vulnerable to the exercise of power by Indalex. They were not part of the negotiations for the DIP financing nor were they involved in the sale negotiations. They had no opportunity to protect their interests and, as a result of Indalex's actions, there was no one who fulfilled the administrator's role. Indalex, on the other hand, was fully aware of the Plans' underfunding and the [page682] result to the pensioners of a failure to inject additional funds. It was Indalex who advised the CCAA court that it intended to comply with "regulatory deemed trust requirements". To permit Sun Indalex to recover on behalf of Indalex U.S. would be to effectively permit the party who breached its fiduciary obligations to take the benefit of those breaches, to the detriment of those to whom the fiduciary obligations were owed.

[200] I do not accept the respondents' argument that a finding that Indalex breached its fiduciary obligation is irrelevant because it would merely give rise to an unsecured claim and there is no basis for conferring a priority for such a claim. This view fundamentally misunderstands the rights of the pension plan beneficiaries. Even if there is no deemed trust, the Plans' beneficiaries are not mere unsecured creditors. They are unsecured creditors to whom Indalex owed a fiduciary duty by virtue of its role as the Plans' administrator. There is a significant difference, in my view,

between being a mere unsecured creditor and being an unsecured creditor to whom a fiduciary duty is owed.

[201] Further, the Supreme Court has repeatedly stated that equitable remedies are sufficiently flexible that they can be molded to meet the requirements of fairness and justice: see, for example, Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534, [1991] S.C.J. No. 91, at para. 86, and Soulos v. Korkontzilas, (1997), 32 O.R. (3d) 716, [1997] 2 S.C.R. 217, [1997] S.C.J. No. 52, at para. 34.

[202] In Soulos, at para. 36, McLachlin J. (as she then was), writing for the majority, held that constructive trusts may be imposed where "good conscience requires" it. She went on to identify two different types of cases in which constructive trusts may be ordered: (1) those in which property is obtained by a wrongful act of the defendant, notably breach of fiduciary duty or breach of the duty of loyalty; and (2) those in which there may not have been a wrongful act, but where there has been unjust enrichment. While the second type of case -- one in which there is unjust enrichment -- is not relevant to these appeals, the first is.

[203] At para. 45 of Soulos, McLachin J. sets out four conditions that should "generally be satisfied" if a constructive trust based on wrongful conduct is to be ordered:

> (1) the defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his or her hands;
>
> (2) the assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff; [page683]
>
> (3) the plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and

(4) there must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

[204] As I have already explained, in the circumstances of this case, Indalex's fiduciary obligations as administrator were engaged in relation to the CCAA proceedings and it is those proceedings that gave rise to the asset (i.e., the Reserve Fund) (condition 1). The assets that would flow to Indalex U.S., absent the constructive trust, are directly connected to the process in which Indalex committed its breaches of fiduciary obligation (condition 2). Without the proprietary remedy, the Plans' beneficiaries have no meaningful remedy. Moreover, there must be some incentive to require employers who are also the administrators of their pension plans to remain faithful to their duties (condition 3). And, because Indalex U.S. is not an arm's length innocent third party, imposing a constructive trust in favour of the Plans' beneficiaries is not unjust (condition 4).

The Executive Plan

[205] As I explained above, it is not clear to me that a deemed trust arose in respect of the underfunded amounts in the Executive Plan because it had not been wound up at the time of sale. However, based on the breaches of fiduciary duty, the court is entitled to consider the equities of the parties competing for the Reserve Fund. For the reasons given in respect of the Salaried Plan in respect of those equities, I would make the same order in respect of the Executive Plan, namely, that the Monitor pay the deficiency from the Reserve Fund to the Executive Plan in priority to those entitled under the super-priority charge.

[206] In light of this conclusion, I find it unnecessary to deal with the Former Executives' submission that the doctrine of equitable subordination applies to remedy Indalex's breaches of fiduciary duty. In any event, I would decline to decide that issue as it was not argued below. It offends the general rule

that appellate courts are not to entertain new issues on appeal.

Disposition

[207] Accordingly, I would allow the appeals and declare that the claims of the USW and the Former Executives take priority over the claim asserted by Indalex U.S./Sun Indalex. I would order the Monitor to pay from the Reserve Fund into each of the Salaried Plan and the Executive Plan an amount sufficient to [page684] satisfy the deficiencies in each plan. I understand that the Reserve Fund is sufficient to satisfy the Deficiencies but if this proves problematic, the parties may return to the court for direction on that matter.

[208] If the parties are unable to agree on costs, they may make brief written submissions on that matter. The appellants, Morneau and the Superintendent shall file their submissions within 15 days of the date of release of these reasons. The respondents shall have a further seven days within which to file their submissions.

Appeal allowed.

Schedule "A"

Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 1(1), 8, 14(1), 22, 57(1)-(5), 70(1), 74(1), 75(1), (2), 76

Definitions

1(1) In this Act, . . .

"administrator" means the person or persons that administer the pension plan;

. . . . .

"wind up" means the termination of a pension plan and the distribution of the assets of the pension fund;

. . . . .

Administrator

Requirement

8(0.1) A pension plan must be administered by a person or entity described in subsection (1).

Prohibition

(0.2) No person or entity other than a person or entity described in subsection (1) shall administer a pension plan.

Administrator

(1) A pension plan is not eligible for registration unless it is administered by an administrator who is,

(a) the employer or, if there is more than one employer, one or more of the employers;

(b) a pension committee composed of one or more representatives of,

(i) the employer or employers, or any person, other than the employer or employers, required to make contributions under the pension plan, and

(ii) members of the pension plan; [page685]

(c) a pension committee composed of representatives of members of the pension plan;

(d) the insurance company that provides the pension benefits under the pension plan, if all the pension benefits under the pension plan are guaranteed by the insurance company;

(e) if the pension plan is a multi-employer pension plan established pursuant to a collective agreement or a trust agreement, a board of trustees appointed pursuant to the pension plan or a trust agreement establishing the pension plan of whom at least one-half are representatives of members of the multi-employer pension plan, and a majority of such representatives of the members shall be Canadian citizens or landed immigrants;

(f) a corporation, board, agency or commission made responsible by an Act of the Legislature for the administration of the pension plan;

(g) a person appointed as administrator by the Superintendent under section 71; or

(h) such other person or entity as may be prescribed.

. . . . .

Additional members

(2) A pension committee, or a board of trustees, that is the administrator of a pension plan may include a representative or representatives of persons who are receiving pensions under the pension plan.

Interpretation

(3) For the purposes of clause (1)(b), "employer" includes the following persons and entities:

1. Affiliates within the meaning of the Business Corporations Act of the employer.
2. Such other persons or entities, or classes of persons or entities, as may be prescribed.

. . . . .

Reduction of benefits

14(1) An amendment to a pension plan is void if the amendment purports to reduce,

(a) the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment;

(b) the amount or the commuted value of a pension or a deferred pension accrued under the pension plan; or

(c) the amount or the commuted value of an ancillary benefit for which a member or former member has met all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit. [page686]

. . . . .

Care, diligence and skill

22(1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and

investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

Special knowledge and skill

(2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.

Member of pension committee, etc.

(3) Subsection (2) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.

Conflict of interest

(4) An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

Employment of agent

(5) Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.

Trustee of pension fund

(6) No person other than a prescribed person shall be a

trustee of a pension fund.

Responsibility for agent

(7) An administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.

Employee or agent

(8) An employee or agent of an administrator is also subject to the standards that apply to the administrator under subsections (1), (2) and (4).

. . . . .

Trust property

57(1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as [page687] the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

Money withheld

(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee.

Accrued contributions

(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

Wind Up

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

Lien and charge

(5) The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under subsections (1), (3) and (4).

. . . . .

Wind up report

70(1) The administrator of a pension plan that is to be wound up in whole or in part shall file a wind up report that sets out,

(a) the assets and liabilities of the pension plan;

(b) the benefits to be provided under the pension plan to members, former members and other persons;

(c) the methods of allocating and distributing the assets of the pension plan and determining the priorities for payment of benefits; and

(d) such other information as is prescribed.

. . . . .

Combination of age and years of employment

74(1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the

pension benefit; [page688]

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

. . . . .

Liability of employer on wind up

75(1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39(3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated

as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

Payment

(2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times.

. . . . .

Pension fund continues subject to Act and regulations

76. The pension fund of a pension plan that is wound up continues to be subject to this Act and the regulations until all the assets of the pension fund have been disbursed.

[page689]

Schedule "B"

R.R.O. 1990, Reg. 909 (Pension Benefits Act), s. 31(1), (2) and (3)

31(1) The liability to be funded under section 75 of the Act shall be funded by annual special payments commencing at the effective date of the wind up and made by the employer to the pension fund.

(2) The special payments under subsection (1) for each year shall be at least equal to the greater of,

(a) the amount required in the year to fund the employer's liabilities under section 75 of the Act in equal payments, payable annually in advance, over not more than five years; and

(b) the minimum special payments required for the year in which the plan is wound up, as determined in the reports filed or submitted under sections 3, 4, 5.3, 13 and 14, multiplied by the ratio of the basic Ontario liabilities of the plan to the total of the liabilities and increased liabilities of the plan as determined under clauses 30(2)(b) and (c).

(3) The special payments referred to in subsections (1) and (2) shall continue until the liability is funded.

Notes

Note 1: The Monitor retained the Reserve Fund as part of the undistributed proceeds. The undistributed proceeds also include amounts for the payment of cure costs, other costs associated with the completion of the SAPA transaction, legal and professional fees and amounts owing under the DIP charge.

Note 2: The appellants had raised this issue below but it had not been dealt with by the CCAA judge.

Note 3: Or, in the case of a multi-employer plan, the administrator.

Note 4: Bell ExpressVu Limited Partnership v. Rex., [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 26.

Note 5: Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services), [2004] 3 S.C.R. 152, [2004] S.C.J. No. 51, at para. 13, relying on Gencorp Canada Inc. v. Ontario (Superintendent of Pensions) (1998), 39 O.R. (3d) 38, [1998] O.J. No. 961, 158 D.L.R. (4th) 497 (C.A.), at p. 503 D.L.R.

Note 6: Ibid.

Note 7: Bourdon v. Stelco Inc., [2005] 3 S.C.R. 279, [2005] S.C.J. No. 35, at para. 24.

Note 8: At para. 26.

Note 9: At para. 11.

Note 10: Burke v. Hudson's Bay Co., [2010] 2 S.C.R. 273, [2010] S.C.J. No. 34, at paras. 39-41.

Note 11: Hodgkinson v. Simms, [1994] 3 S.C.R. 377, [1994] S.C.J. No. 84, at para. 32.

Note 12: Ibid., at para. 30; Lac Minerals Ltd. v.

International Corona Resources Ltd., [1989] 2 S.C.R. 574, [1989] S.C.J. No. 83, at p. 646 S.C.R.

Note 13: In contrast, Quebec legislation requires that plan administration be entrusted to a pension committee of at least three persons, including a representative of each of the active and inactive members of the plan and an independent member. See Supplemental Pension Plans Act, R.S.Q., c. R-15.1, s. 147.

Note 14: On advice of counsel, Mr. Cooper refused to answer questions about what, if any, steps were taken to have the purchaser take over the Plans.

Note 15: To the extent that the U.S. Trustee suggests that the Former Executives raised the deemed trust issue at the motion heard on June 12, 2010, I reject this submission. As explained in the background portion of these reasons, the Former Executives' reservation of rights on June 12, 2010 was to obtain time to confirm that the motion related solely to an increase in the DIP loan amount.

Note 16: See, for example, InterTAN Canada Ltd. (Re), [2009] O.J. No 293, 49 C.B.R. (5th) 232 (S.C.J.). And, the granting of super-priority charges is referred to with approval in Century Services, at para. 62.

Note 17: See para. 178 of these reasons.

Note 18: See, for example, para. 23.

Note 19: At para. 13, for example.

Note 20: See, for example, para. 14.

Note 21: Century Services, at para. 60.

Note 22: At para. 78.

Sally Behn, Susan Behn, Richard Behn, Greg Behn, Rupert Behn, Lovey Behn, Mary Behn and George Behn *Appellants*

v.

Moulton Contracting Ltd. and Her Majesty The Queen in Right of the Province of British Columbia *Respondents*

and

Attorney General of Canada, Chief Liz Logan, on behalf of herself and all other members of the Fort Nelson First Nation and the said Fort Nelson First Nation, Grand Council of the Crees (Eeyou Istchee)/Cree Regional Authority, Chief Sally Sam, Maiyoo Keyoh Society, Council of Forest Industries, Alberta Forest Products Association and Moose Cree First Nation *Interveners*

Sally Behn, Susan Behn, Richard Behn, Greg Behn, Rupert Behn, Lovey Behn, Mary Behn et George Behn *Appelants*

c.

Moulton Contracting Ltd. et Sa Majesté la Reine du chef de la province de la Colombie-Britannique *Intimées*

et

Procureur général du Canada, Chef Liz Logan, en son nom et au nom de tous les autres membres de la Première Nation de Fort Nelson et ladite Première Nation de Fort Nelson, Grand Conseil des Cris (Eeyou Istchee)/Administration régionale crie, Chef Sally Sam, Société Maiyoo Keyoh, Council of Forest Industries, Alberta Forest Products Association et Première Nation Moose Cree *Intervenants*

INDEXED AS: BEHN *v.* MOULTON CONTRACTING LTD.

2013 SCC 26

File No.: 34404.

2012: December 11; 2013: May 9.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

RÉPERTORIÉ : BEHN *c.* MOULTON CONTRACTING LTD.

2013 CSC 26

N° du greffe : 34404.

2012 : 11 décembre; 2013 : 9 mai.

Présents : La juge en chef McLachlin et les juges LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Civil procedure — Standing — Aboriginal law — Treaty rights — Duty to consult — Individual members of Aboriginal community asserting in defence to tort action against them that issuance of logging licences breached duty to consult and treaty rights — Whether individual members have standing to assert collective rights in defence.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Procédure civile — Qualité pour agir — Droit des autochtones — Droits issus de traités — Obligation de consultation — Membres individuels d'une collectivité autochtone alléguant, en défense à une action en responsabilité délictuelle intentée contre eux, la délivrance de permis d'exploitation forestière sans que soit respectée l'obligation de consultation et en violation de leurs droits issus du traité — Les membres individuels ont-ils qualité pour faire valoir en défense des droits collectifs?

at p. 1667, as "oppressive treatment". In addition to proceedings that are oppressive or vexatious and that violate the principles of justice, McLachlin J. (as she then was) said in her dissent in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007, that the doctrine of abuse of process evokes the "public interest in a fair and just trial process and the proper administration of justice". Arbour J. observed in *C.U.P.E.* that the doctrine is not limited to criminal law, but applies in a variety of legal contexts: para. 36.

[40] The doctrine of abuse of process is characterized by its flexibility. Unlike the concepts of *res judicata* and issue estoppel, abuse of process is unencumbered by specific requirements. In *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), Goudge J.A., who was dissenting, but whose reasons this Court subsequently approved (2002 SCC 63, [2002] 3 S.C.R. 307), stated at paras. 55-56 that the doctrine of abuse of process

engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 [(C.A.)], at p. 358 . . . .

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. See *Solomon v. Smith*, *supra*. It is on that basis that Nordheimer J. found that this third party claim ought to be terminated as an abuse of process. [Emphasis added.]

[41] As can be seen from the case law, the administration of justice and fairness are at the heart of the doctrine of abuse of process. In *Canam Enterprises* and in *C.U.P.E.*, the doctrine was used

sont contraires à l'intérêt de la justice », et dans *R. c. Conway*, [1989] 1 R.C.S. 1659, p. 1667, comme consistant en un « traitement [. . .] oppressif ». En plus de mentionner des procédures oppressives ou vexatoires qui violent les principes fondamentaux de la justice, la juge McLachlin (maintenant Juge en chef) a précisé dans des motifs dissidents dans *R. c. Scott*, [1990] 3 R.C.S. 979, p. 1007, que la doctrine de l'abus de procédure fait appel à « l'intérêt du public à un régime de procès justes et équitables et à la bonne administration de la justice ». De plus, la juge Arbour a fait observer dans *S.C.F.P.* que la doctrine ne se limite pas au droit criminel, mais s'applique dans des contextes juridiques divers : par. 36.

[40] La doctrine de l'abus de procédure se caractérise par sa souplesse. Contrairement aux notions de chose jugée et de préclusion découlant d'une question déjà tranchée, la doctrine de l'abus de procédure ne s'encombre pas d'exigences particulières. Dans *Canam Enterprises Inc. c. Coles* (2000), 51 O.R. (3d) 481 (C.A.), le juge Goudge, dans des motifs dissidents approuvés par la suite par notre Cour (2002 CSC 63, [2002] 3 R.C.S. 307), a indiqué aux par. 55-56 que la doctrine de l'abus de procédure

[TRADUCTION] met en jeu le pouvoir inhérent du tribunal d'empêcher que ses procédures soient utilisées abusivement, d'une manière qui serait manifestement injuste envers une partie au litige, ou qui aurait d'une autre façon pour effet de discréditer l'administration de la justice. Cette doctrine souple ne s'encombre pas d'exigences particulières telles que la notion d'irrecevabilité. Voir *House of Spring Gardens Ltd. c. Waite*, [1990] 3 W.L.R. 347 [(C.A.)], p. 358 . . .

La doctrine de l'abus de procédure a notamment été appliquée lorsque le tribunal s'est dit convaincu que le litige a essentiellement pour but de rouvrir une question qu'il a déjà tranchée. Voir *Solomon c. Smith*, précité. C'est en se fondant sur l'abus de procédure que le juge Nordheimer a décidé de mettre un terme à cette demande de mise en cause. [Je souligne.]

[41] Comme il ressort de la jurisprudence, l'administration de la justice et la notion d'équité se trouvent au cœur de la doctrine de l'abus de procédure. Dans les arrêts *Canam Enterprises* et *S.C.F.P.*, cette

In the Court of Appeal of Alberta

Citation: McLelland v McLelland, 2021 ABCA 102

Date: 20210317
Docket: 1901-0352AC
Registry: Calgary

Between:

Shannon Leigh McLelland

Respondent

- and -

Colleen Anne McLelland

Appellant

The Court:

The Honourable Mr. Justice Brian O'Ferrall
The Honourable Mr. Justice Thomas W. Wakeling
The Honourable Madam Justice Michelle Crighton

Memorandum of Judgment of the Honourable Mr. Justice Wakeling and the Honourable Madam Justice Crighton

Dissenting Memorandum of Judgment of the Honourable Mr. Justice O'Ferrall

Appeal from the Order by
The Honourable Mr. Justice C.M. Jones
Dated the 7th day of October, 2019
Filed on the 14th day of November, 2019
(Docket: 1801 11711)

Memorandum of Judgment

The Majority:

[1] This appeal concerns what are alleged by the respondent to be gratuitous transfers of three condominium properties located in Calgary, Alberta by Brian Alexander McLelland (the "deceased") to two of his children shortly before his death on August 31, 2016. All three of the deceased's children are adults and all live in the Lower Mainland of British Columbia as did the deceased when he died.

[2] The deceased left a Last Will and Testament dated September 28, 1993 along with two codicils dated January 30, 1995 and one dated August 11, 2000. The deceased's Will left the residue of his estate – having a gross value of slightly more than $2.5 million - equally between his three children: the appellant Colleen Anne McLelland ("Colleen"), the respondent Shannon Leigh McLelland ("Shannon"), and their brother Brian Michael McLelland ("Brian"). The August 11, 2000 codicil appoints TD Canada Trust Company ("Canada Trust"), as it then was, as the Executor of the deceased's estate. As the parties are related, it is helpful to refer to them by first name. In doing so, we intend no disrespect.

[3] Sadly, relations between Colleen and Shannon are acrimonious. Indeed, Shannon was convicted on July 11, 2019 on one count of criminal harassment stemming from hostile and disturbing communications to Colleen and their mother relating to administration of the estate. As discussed below, Shannon's conviction and her poor relationship with Colleen form part of the basis for Colleen challenging Shannon's appointment as administrator *ad litem* for the estate.

[4] The deceased's Will was probated in British Columbia and the Administration of the Estate was granted to Canada Trust on December 15, 2016. Shannon received a statement of the deceased's assets and liabilities in December 2016 from Canada Trust. The stated value of the Estate was less than Shannon expected based on prior discussions she had with the deceased. As such, Shannon raised concerns with Canada Trust about a number of issues, including the fact that the Calgary condominiums were not listed as an Estate asset.

[5] In that regard, the deceased had purchased three condominiums in Calgary, Alberta in 2003 municipally described as Units 105, 204 and 205, 1808 18 St SW Calgary, Alberta (collectively the "Calgary condominiums").

[6] On June 30, 2005, the deceased executed a Power of Attorney under which Colleen was appointed as Attorney. The Power of Attorney was activated in December 2013. Colleen has deposed that all steps taken by her as Attorney for the deceased were at his express direction.

[7] On August 26, 2016, the deceased signed three Deeds of Gift and Transfers of Land with respect to the Calgary condominiums, transferring two of the condominiums to Colleen and one condominium to Brian. While those transfers were executed before legal counsel, that legal counsel was not the deceased's regular lawyer. Colleen deposed that her father's estate planning was arranged through his long-time accounting firm and that a member of that firm met with the deceased to obtain instructions regarding the deceased's Estate planning needs. The affidavits of transferee filed with the Land Titles Office show that the two condominiums received by Colleen were worth $385,000, and the condominium received by Brian was worth $185,000.

[8] Shannon was advised by Canada Trust in January 2017 that the Calgary condominiums had been transferred by the deceased "very shortly before his death", and that they had determined that the transfers were a completed gift. In response, Shannon pressured Canada Trust to bring an action on behalf of the Estate to impugn the *inter vivos* gifts. Canada Trust declined and advised Shannon that it was beyond its mandate to pursue that issue further and encouraged her to get her own counsel.

[9] Shannon did not challenge Canada Trust's position in the BC probate. Instead, she filed a Notice of Civil Claim in the Supreme Court of British Columbia, seeking re-distribution of the Estate under s 60 of the *Wills, Estates and Succession Act*, SBC 2009, c 13 (the "BC Action"). The transfers of the Calgary condominiums were included in the claim as an example of the inequitable distribution of the Estate by the deceased and alleges that the deceased made inadequate provision for her in his Will.

[10] Colleen filed a Response to Civil Claim in British Columbia on August 10, 2017 and Shannon took no further steps in the British Columbia action thereafter. Instead, on August 17, 2018, she commenced a statement of claim in the Court of Queen's Bench of Alberta, naming Brian and Colleen as defendants (the "Alberta Action"). The Alberta Action was subsequently amended on August 23, 2018. The Alberta Action seeks remedies for undue influence, lack of testator capacity, resulting or constructive trust and unjust enrichment and seeks, *inter alia*, the transference of the Calgary condominiums back to the Estate to be administered in accordance with the deceased's Will and Testament, an accounting by Colleen and Brian, and damages in lieu of the return of the Calgary condominiums.

[11] As part of the Alberta Action, Shannon sought to be appointed as a litigation representative to bring the Alberta Action on behalf of the Estate and for funds out of the Estate to allow her to do that. That application was heard on October 7, 2019.

[12] The case management judge refused to strike the claim as an abuse of process, named Shannon as the administrator *ad litem* to continue with carriage of the Alberta Action and directed the executor to put funds at Shannon's disposal to advance this claim.

[13] In the result, the appellant argues the case management judge erred in several respects:

a) erred in law by appointing Shannon as the Administrator of the Estate of Brian Alexander McLelland, which is an estate that is being administered in British Columbia, and for which the Grant of Probate issued in British Columbia and has not been resealed in Alberta;

b) erred in law by appointing Shannon as the Administrator, pursuant to the Surrogate Rules and issuing a limited grant, when the within action is not a surrogate matter and the Estate is being administered in British Columbia, and for which the Grant of Probate has not been resealed in Alberta;

c) erred in law by finding that the Court of Queen's Bench of Alberta had jurisdiction to order that the Personal Representative of the Estate make payments to Shannon, as the Personal Representative as the administrator of a British Columbia Estate, for which a Grant of Probate has been issued in British Columbia and which has not been resealed in Alberta; and

d) erred by failing to properly consider the evidence of Shannon's history of criminal harassment against Colleen and the evidence demonstrating that Shannon is unfit to fulfill the duties of an Administrator, as her interests are in direct conflict with Colleen's interests.

[14] Shannon filed a factum responding to Colleen's appeal in which she argues the case management judge did not err in law and further that he did not make palpable and overriding errors of fact in his careful review of all of the evidence before him.

[15] Sometime before the scheduled date for the hearing of the appeal, Shannon's counsel applied to withdraw as counsel of record. That application was granted. Shannon did not apply to adjourn the appeal and confirmed her intention to appear by Web Ex. She refused to provide registry, either directly or through withdrawing counsel, with any contact information beyond an email address. On the date scheduled for the hearing, Shannon failed to attend. After confirming that she had made no effort to contact registry or opposing counsel to advise of any difficulties she may have had, the panel, relied on Rule 14.32(3) of the *Alberta Rules of Court,* Alta Reg, 124/2010 and proceeded to hear the appeal in Shannon's absence.

[16] On our review of the record, including Shannon's factum, the case management judge erred in concluding the Alberta action did not rise to the level of an abuse of process such that appellate intervention is warranted.

[17] Rule 3.68(2)(d) allows the court to strike all or part of a claim where that claim constitutes an abuse of process. An abuse of process is a compendious principle that the courts use to control misuses of the judicial system: ***Reece v Edmonton (City),*** 2011 ABCA 238 at para 15, [2011] AJ

No 876 (QL). It is of the very nature of a court's ability to "function as a court of law": ***R v Cunningham***, 2010 SCC 10 at para 19, [2010] 1 SCR 331. It is necessarily a flexible doctrine that is not confined to the criteria that may be essential to the applications of specific examples of it, such as issue estoppel or collateral attack: ***Toronto (City) v CUPE Local 79***, 2003 SCC 63 at paras 35-37, [2003] 3 SCR 77; ***Behn v Moulton Contracting Ltd***, 2013 SCC 26 at paras 40-41, [2013] 2 SCR 227. As noted by Lord Diplock in ***Hunter v Chief Constable of the West Midlands Police***, [1982] AC 529 at p 536C: "It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court *has a duty (I disavow the word discretion) to exercise this salutary power*. [Emphasis added]"

(See also ***Fairclough Homes Ltd v Summers***, [2012] UKSC 26 at paras 35 and 44, [2012] 4 All ER 317 citing Lord Diplock in ***Birkett v James***, [1977] 2 All ER 801 and ***Hunter***.)

[18] Because a chambers judge's determination whether there is or is not of an abuse of process is a discretionary finding based on specific facts, the case management judge's review is entitled to deference and should not be overturned absent palpable and overriding error in his assessment of the facts: ***Enron Canada Corp v Husky Oil Operations Limited***, 2007 ABCA 27 at para 13, 401 AR 291; ***Turner v Bell Mobility Inc***, 2016 ABCA 21 at para 4, 612 AR 53***, Zoocheck Canada Inc v Alberta (Minister of Agriculture and Forestry),*** 2019 ABCA 208 at para 18, [2019] AJ No 666 (QL). As stated by Brown and Rowe JJ ***in Canada (Attorney General) v Fontaine***, 2017 SCC 47 at para 36, [2017] 2 SCR 205:

> [36] ..... As regards the exercise of discretion, "[a]ppellate intervention is warranted only if the judge has clearly misdirected himself or herself on the facts or the law, proceeded arbitrarily, or if the decision is so clearly wrong as to amount to an injustice*" **(P. (W.) v. Alberta,*** 2014 ABCA 404, 378 D.L.R. (4th) 629, at para. 15; ***Balogun v. Pandher***, 2010 ABCA 40, 474 A.R. 258, at para. 7). .....

Even assuming, without deciding and contrary to Lord Diplock, that a "discretion" is involved, such discretion does not get deference if the judge has "clearly misdirected" herself, or if the decision is "so clearly wrong as to amount to an injustice."

[19] In this respect, using the abuse of process doctrine to control sidewind litigation which undermines existing decisions or which trespasses on extant litigation elsewhere is based on authority of foundational provenance. It is recognized both in Canada and by Courts of nations sharing our free and democratic traditions. For example, Lord Sumption dissenting about the tort of abuse of court process in ***Willers v Joyce & Anor (Re: Gubay (deceased) No 1)*** [2016] UKSC 43 at para 179, [2016] 3 WLR 477: "The reluctance of the courts to accept rules of law justifying secondary or satellite litigation is born of long-standing judicial experience of the incidents of litigation and the ways of litigants. That experience is as relevant today as it has ever been." Lord Sumption was talking about experience of at least a century and a half. He also observed

Court of King's Bench of Alberta

Citation: De'Medici v Wawanesa Mutual Insurance Company, 2023 ABKB 210

Date: 20230412
Docket: 2208 00318
Registry: Medicine Hat

Between:

Jurisprudence De'Medici

Plaintiff

- and -

Wawanesa Mutual Insurance Company and Western Financial Group and Desjardins and Hi-Alta Capital Inc and Tracey Arcand and Danielle Belanger

Defendants

Memorandum of Decision
of Associate Chief Justice
K.G. Nielsen

I. Introduction

[1] Counsel for the Defendants, Western Financial Group, Hi-Alta Capital Inc, Tracey Arcand, and Danielle Belanger, asks the Court to dismiss this proceeding under Civil Practice Note 7 ["CPN7"], because the Plaintiff has a pattern of vexatious behaviour displayed in the course of his litigation history.

[2] Recently, the Court has seen a significant increase in the number of written requests for CPN7 procedures, especially from counsel. These written requests also include an increasing amount of detail, often with written argument and unsworn evidence. Counsel are also sending in numerous supporting documents and are expecting the Court to sort out what they relate to. In this case, specifically, counsel for the Defendants has provided the Court with a 10-page written request that includes a detailed history of previous Actions commenced by the Plaintiff and

application, or a proceeding per r 3.68(1)(d). The Court may also order that a claim or defence may be struck per r 3.68(1)(a) or that the commencement document or pleading be set aside per r 3.68(1)(b).

B. Substantive Tests for Rule 3.68

[18] Although CPN7 sets out a summary procedure for dealing with commencement documents or pleadings, in substance it involves the application of r 3.68. This means that the substantive tests for deciding whether a commencement document or pleading is frivolous, vexatious, or otherwise an abuse of process apply, with only minor modifications to account for the summary procedure set out in the Practice Note. Those modifications will be discussed in the following section.

[19] The three conditions captured under CPN7 each have their own substantive legal requirements, although they are interconnected and often overlap. To start, a frivolous pleading is a pleading that is "so palpably bad that no real argument is needed to show how bad it is": William A Stevenson & Jean E Côté, *Alberta Civil Procedure Handbook* (Edmonton: Juriliber, 2021) at 3-137; see also ***Sturgeon Lake Indian Band v Canada (AG)***, 2016 ABQB 384 at para 275; ***Arabi v Alberta***, 2014 ABQB 295 at para 37; ***Onischuk v Alberta***, 2013 ABQB 89 at para 31; ***McMeekin v Alberta (AG)***, 2012 ABQB 144 at para 29; ***Wong v Leung***, 2011 ABQB 687 at para 27. In other words, it is a pleading that is obviously going to fail and does not require much consideration to arrive at that conclusion.

[20] Next, a pleading is an abuse of process if it is "unfair to the point that [it is] contrary to the interests of justice" and "oppressive or vexatious and [violates] the principles of justice": ***Behn v Moulton Contracting Ltd***, 2013 SCC 26 at para 39 [***Behn***]; see also ***PricewaterhouseCoopers Inc v Perpetual Energy Inc***, 2022 ABCA 111 at paras 77-78. According to the Supreme Court, the doctrine of abuse of process is fundamentally flexible, and it has no specific requirements. This is because it exists to prevent the misuse of Court procedure in a way that would be manifestly unfair or bring the administration of justice into disrepute: ***Behn*** at para 40; see also ***McLelland v McLelland***, 2021 ABCA 102 at para 17, citing ***Reece v Edmonton (City of)***, 2011 ABCA 238 at para 15. So, there are recognized categories of abuse of process, but the list of what exactly constitutes an abuse of process is not closed to allow the Court to adapt to new circumstances that threaten the administration of justice.

[21] Finally, there is no precise definition of what constitutes a vexatious pleading. However, in ***Al-Ghamdi v Alberta***, 2017 ABQB 684, aff'd 2020 ABCA 81 at paras 18-19, this Court explained that the concept of vexatious litigation is related to an abuse of process and frivolous litigation: at para 123. Importantly, even though r 3.68(2)(c) no longer mentions vexatious litigation, the Court has continued to use rules 3.68(2)(c) and (d) to strike out vexatious litigation, because it is effectively the same thing as impropriety and an abuse of process: *ibid*. In other words, vexatious litigation is one form of abuse of process, and it may also be frivolous depending on the exact form it takes.

[22] From a practical perspective, in ***Chutskoff v Bonora***, 2014 ABQB 389 at paras 91-92, Michalyshyn J provided examples of what constitutes vexatious litigation, including:

- Collateral attacks, either trying to relitigate an issue or to trying to circumvent a Court Order;

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *West Coast Logistics Ltd. (Re),* 2017 BCSC 1503

Date: 20170825
Docket: B160890
Estate No.: 11-2177611
Registry: Vancouver

In Bankruptcy and Insolvency

In the Matter of the Notice of Intention to make a proposal of West Coast Logistics Ltd.

Before: District Registrar Nielsen

Reasons for Decision

Counsel for West Coast Logistics:	H. Ferris
Counsel for Prudential Transportation Ltd.:	G. Dabbs
Counsel for The Bowra Group Inc.	Not Present
Place and Date of Hearing:	Vancouver, B.C. August 9, 2017
Place and Date of Judgment:	Vancouver, B.C. August 25, 2017

Table of Contents

INTRODUCTION

[1] This is an application by West Coast Logistics Ltd. (West Coast) for an order pursuant to s. 115.1 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985 c. B-3 (the *BIA*) directing the proposal trustee to disallow and/or not considered the vote of Prudential Transportation Limited (Prudential) in tabulating the votes of the creditors as to the acceptance of the proposal filed by West Coast on April 13, 2017 (the proposal) for the purpose of s. 54(2)(d) of the *BIA*, without prejudice to any argument Prudential may make at any application for court approval of the proposal pursuant to the provision of s. 59(2) of the *BIA*, or to receive a distribution under the proposal.

[2] West Coast alleges Prudential's vote is being cast for an improper purpose and it will suffer substantial prejudice as a result. Prudential submits it is entitled to determine what is in its best interest, and to vote accordingly.

BACKGROUND

[3] West Coast provides warehousing services at a leased location in New Westminster, British Columbia. Goods are shipped into West Coast's facilities by truck, rail, and boat, before being shipped elsewhere. West Coast has 15 full-time employees and approximately 30 major clients.

[4] In the spring and summer of 2016, West Coast suffered decreased sales as a result of it becoming embroiled in a legal dispute with their landlord, and a neighbouring tenant who operated a facility which converted refuse into organic power.

[5] On October 17, 2016, West Coast caused a notice of intention to make a proposal to be filed with the office of the Superintendent of Bankruptcy, with Bowra Group Inc. as the appointed proposal trustee. As at November 11, 2016, West Coast's secured liability was $260,000, and unsecured liabilities were estimated at $550,000.

[32] In *Laserworks,* supra, at para. 73, the NSCA states in part:

> . . .
>
> While the voting rights conferred by Part XV of the **Insolvency Act** are not akin to a "right of property attaching to a share", they are rights conferred without reservation. There is no requirement for class voting; there is instead a general right conferred equally V on all creditors. The rationale of the principle does not apply. It is well settled that the motive (short of fraud) of a petitioning creditor, no matter how reprehensible, is irrelevant to his right to obtain an order of adjudication: **King v. Henderson** [1898] AC 720, **Re King, ex parte Commercial Bank of Australia Ltd.** (No. 2) [1920] VLR 490. The motive of a creditor voting on a proposal, really the other side of the coin to a petition for adjudication, can be no different. That is not to say that there may be no remedy in an extreme case, such as fraud or mistake. But certainly where, as here, there are perfectly legitimate reasons for opposing the proposal, a creditor is not to be denied that right \ because he may have some other motive as well. . .

[33] This approach was qualified in *Blackburn*, supra, where Mr. Justice Sewell states at para. 44:

> 44 As I have already stated, I think that the policy approach taken in *Laserworks* is preferable to that of the US authorities. As the above quoted passages make clear, the Court in *Laserworks* recognized that creditors are entitled to vote their claims in what they as creditors perceived to be their own economic interests as long as their actions are not unlawful or do not result in a substantial injustice.

[34] In this case, legitimate commercial reasons for opposing the proposal are not immediately apparent in the evidence. The appraisal evidence and the trustee's opinion are that bankruptcy will yield a nil recovery for unsecured creditors. Prudential will receive nothing as will the other unsecured creditors as a consequence of Prudential's no vote. The actions of Prudential when viewed in this light do not make commercial sense.

[35] It may be that Prudential hopes to extract further concessions within the bankruptcy in order to ensure West Coast has put the optimum offer on the table. While playing hardball during negotiations is entirely legitimate, conduct amounting to an abuse of process or other tortious or near tortious character is not. In my view, the evidence supports the conclusion that Prudential has crossed the line.

Court of Queen's Bench of Alberta

Citation: Canada North Group Inc (*Companies' Creditors Arrangement Act*), 2020 ABQB 12

Date: 20200107
Docket: 1703 12327
Registry: Edmonton

Between:

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

And in the Matter of a Plan of Arrangement of
Canada North Group Inc, Canada North Camps Inc,
CampCorp Structures Ltd, DJ Catering Ltd,
816956 Alberta Ltd and 1371047 Alberta Ltd

Corrected judgment: A corrigendum was issued on January 9, 2020; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision on Costs
of the
Honourable Mr. Justice S.D. Hillier

Introduction

[1] Ernst & Young LLP (the "**Monitor**") and Canadian Western Bank ("**CWB**") apply to settle costs arising out of proceedings in which I dismissed claims of property ownership and priority by the respondent corporations (jointly identified as "**726**"). I issued my reasons on May 14, 2019 with a reservation to determine costs if the parties could not agree within 60 days: ***Canada North Group Inc (Companies' Creditors Arrangement Act),*** 2019 ABQB 307.

[2] Counsel provided both written briefs and oral submissions. I have also considered the Monitor's 26th Report as a review of steps taken and fees incurred relevant to the claim for recovery of costs against 726.

[3] The previous decision sets out the relevant facts in considerable detail. Therefore, I do not propose to deal at any length with the background circumstances. While each cost decision can be informative as to the exercise of judicial discretion, the facts here are well understood by the parties.

[4] In brief, Canada North Camps Inc. ("**CNC**") sought protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [***CCAA***] that was initially granted on July 5, 2017. Copies of the application and supporting affidavit were served on 726 at its office in the United States as an unsecured creditor.

[5] The affidavit in support of the appointment of a Monitor and Chief Restructuring Officer refers to corporate assets including "machinery and equipment located at the various camps, yards and manufacturing facilities." No exclusions were made for Bonnyville or the other three camps in which 726 had assets of interest. Confidential affidavits list the values for much of this inventory which the Chief Restructuring Officer would propose to sell, including property to which 726 claimed an interest one year later. No one appeared for 726, nor was any request made by 726 to review that list of inventory either initially or at the extension hearing.

[6] A similar list of inventory was presented in a confidential affidavit in October 2017, where 726 was represented in court but again made no request to review. Instead, 726 obtained a specific expansion of the *CCAA* stay to forestall summary proceedings by Kingdom Properties Ltd. against it in QB Action No. 1703 23860.

[7] Somehow, 726 also obtained a Master's Order on January 18, 2018 for removal of assets in the same Kingdom Properties action without notice to the Monitor or CWB. Nor did 726 seek approval of this court to bring that application. In turn, nothing on the file indicates that the Master was made aware of the *CCAA* proceedings. For ease of reference, I will use the term **Contested Camp Assets** to refer to the equipment located at the four locations collectively.

[8] At the specific request of CWB as the prime lender, the Court issued an order September 6, 2018, directing all affected parties to file disputed ownership and security claims. The clear objective was to identify and then determine competing claims in order to complete liquidation without further delay.

[9] The steps taken and adjournment requests have been fully canvassed in my May 2019 judgment and reiterated in the written briefs filed for this application. I emphasize that I have considered the full chronology and will simply highlight those steps which have most impacted my decision on costs.

Framework

[10] The starting point on *CCAA* insolvency matters is that, as a matter of practice, as distinct from substantive law, each party will often bear its own costs. The Court does, however, consider cost awards where appropriate: ***Jackpine Forest Products Ltd, Re,*** 2004 BCSC 20; ***Calpine Canada Energy Ltd, Re,*** 2008 ABQB 537 [***Re Calpine***]; ***Return on Innovation Capital Ltd v Gandi Innovations Ltd,*** 2011 ONSC 7465 [***Return on Innovation***].

[11] Circumstances justifying a costs award may arise in a variety of ways, including unusual applications, unreasonable positions, unnecessary steps, or misconduct which impacts the timing or costs associated with winding up the estate.

[12] Where costs are warranted, the courts tend to look at three types or categories of costs awards:

(a) Solicitor and own client where the successful party receives full indemnity for their legal fees and proper disbursements;
(b) Solicitor-client costs where the successful party receives reasonable legal fees and disbursements which amounts to less than full indemnification; and
(c) Party-party costs working from Schedule C of the Rules from 1998, with potential enhancements including one or more of the following:

(i) A multiplier against the applicable column;
(ii) An inflationary adjustment;
(iii) An extra lump sum amount;
(iv) A modifier based on a percentage of actual legal costs.

R&R Consilium Inc v Talbot, 2019 ABQB 275 at para 41 [***R&R***], citing ***Trizec Equities Ltd v Ellis-Don Management Services Ltd.,*** 1999 ABQB 801 at para 19 [***Trizec***].

[13] Since the Court has broad discretion, there are also instances where different types or categories for compensation have been used for differing steps of the proceedings, sometimes referred to as a "hybrid" approach: ***Weatherford Canada Partnership v Addie*** 2018 ABQB 571 [***Weatherford***], aff'd 2019 ABCA 92.

[14] I will not list all the factors which have been identified in the case law as informing the nature and magnitude of enhancement. In addition to ***Weatherford***, the key factors were recently listed in ***McAllister v Calgary (City)***, 2018 ABQB 999.

[15] The individual circumstances of each case best inform the exercise of judicial discretion. Here, we are not yet dealing with the overall issue of costs allocation under the *CCAA* proceedings as a whole. However, some of the positions taken during the proceedings are relevant to both entitlement and quantum of costs arising from this ownership and priority dispute regarding the Contested Camp Assets.

Positions of the Parties

[16] The Monitor relies on a series of decisions, including in particular Athabasca Minerals v Syncrude Canada Ltd, 2018 ABQB 551 [Athabasca Minerals] and R&R. It seeks $92,390.67 on a "hybrid" basis as follows:

(a) Solicitor and own client costs for the adjournment application in January 2019 in the amount of $24,866.10, including GST; and
(b) Partial recovery of 50% on all other costs for the Contested Camp Assets claim in the amount of $67,524.55, including GST.

[17] The amount sought represents just over 62% of the Monitor's solicitor and own client bill of costs, including other charges, disbursements and GST.

[18] The Monitor argues that the January adjournment application was entirely unnecessary, having regard to this Court's September directions for filing claims, the adjournment of

ALBERTA

RULES OF COURT

Alberta King's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952

E-mail: kings-printer@gov.ab.ca
Shop on-line at kings-printer.alberta.ca

(b) the record of proceedings described in subrule (3) or, if the transcript is not available at the time of filing, confirmation that the transcript of the proceedings has been ordered, and

(c) any further written argument.

(5) The respondent to the appeal must, within 10 days after service of the notice of appeal, file and serve on the appellant any written argument the respondent wishes to make.

Decision of judge

10.27(1) After hearing an appeal from a review officer's decision, the judge may, by order, do one or more of the following:

(a) confirm, vary or revoke the decision;

(b) revoke the decision and substitute a decision;

(c) revoke all or part of the decision and refer the matter back to the review officer or to another review officer;

(d) make any other order the judge considers appropriate.

(2) If the amount of lawyer's charges payable pursuant to the decision of the review officer has been paid and, after payment, is reduced on appeal, the lawyer may be ordered to return the excess and, if the lawyer fails to do so, the lawyer, in addition to being liable for that amount, may be found guilty of a civil contempt.

AR 124/2010 s10.27;163/2010

Division 2
Recoverable Costs of Litigation

Subdivision 1
General Rule, Considerations and Court Authority

Definition of "party"

10.28 In this Division, "party" includes a person filing or participating in an application or proceeding who is or may be entitled to or subject to a costs award.

Information note

Party is defined in the Appendix *[Definitions]* as a party to an action. There are other Court proceedings that are not "actions" and so the definition of *party* is expanded to allow a costs award against anyone participating in an application or proceeding that is not an action started by statement of claim or originating application.

General rule for payment of litigation costs

10.29(1) A successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party, and the unsuccessful party must pay the costs forthwith, notwithstanding the final determination of the application, proceeding or action, subject to

(a) the Court's general discretion under rule 10.31 *[Court-ordered costs award]*,

(b) the assessment officer's discretion under rule 10.41 *[Assessment officer's decision]*,

(c) particular rules governing who is to pay costs in particular circumstances,

(d) an enactment governing who is to pay costs in particular circumstances, and

(e) subrule (2).

(2) If an application or proceeding is heard without notice to a party, the Court may

(a) make a costs award with respect to the application or proceeding, or

(b) defer making a decision on who is liable to pay the costs of the application or proceeding until every party is served with notice of the date, time and place at which the Court will consider who is liable to pay the costs.

When costs award may be made

10.30(1) Unless the Court otherwise orders or these rules otherwise provide, a costs award may be made

(a) in respect of an application or proceeding of which a party had notice, after the application has been decided,

(b) in respect of a settlement of an action, application or proceeding, or any part of any of them, in which it is agreed that one party will pay costs without determining the amount, and

(c) in respect of trials and all other matters in an action, after judgment or a final order has been entered.

(2) If the Court does not make a costs award or an order for an assessment officer to assess the costs payable when an application or proceeding is decided or when judgment is pronounced or a final order is made, either party may request from an assessment officer an appointment date for an assessment of costs under rule 10.37 *[Appointment for assessment]*.

Court-ordered costs award

10.31(1) After considering the matters described in rule 10.33 *[Court considerations in making a costs award]*, the Court may order one party to pay to another party, as a costs award, one or a combination of the following:

(a) the reasonable and proper costs that a party incurred to file an application, to take proceedings or to carry on an action, or that a party incurred to participate in an application, proceeding or action, or

(b) any amount that the Court considers to be appropriate in the circumstances, including, without limitation,

(i) an indemnity to a party for that party's lawyer's charges, or

(ii) a lump sum instead of or in addition to assessed costs.

(2) Reasonable and proper costs under subrule (1)(a)

(a) include the reasonable and proper costs that a party incurred to bring an action;

(b) unless the Court otherwise orders, include costs incurred by a party

(i) in an assessment of costs before the Court, or

(ii) in an assessment of costs before an assessment officer;

(c) do not include costs related to a dispute resolution process described in rule 4.16 *[Dispute resolution processes]* or a judicial dispute resolution process under an arrangement described in rule 4.18 *[Judicial dispute resolution arrangement]* unless a party engages in serious misconduct in the course of the dispute resolution process or judicial dispute resolution process;

(d) do not include, unless the Court otherwise orders, the fees and other charges of an expert for an investigation or inquiry or the fees and other charges of an expert for assisting in the conduct of a summary trial or a trial.

(3) In making a costs award under subrule (1)(a), the Court may order any one or more of the following:

(a) one party to pay to another all or part of the reasonable and proper costs with or without reference to Schedule C *[Tariff of Recoverable Fees]*;

(b) one party to pay to another an amount equal to a multiple, proportion or fraction of an amount set out in any column of the tariff in Division 2 of Schedule C *[Tariff of Recoverable Fees]* or an amount based on one column of the tariff, and to pay to another party or parties an amount based on amounts set out in the same or another column;

(c) one party to pay to another party all or part of the reasonable and proper costs with respect to a particular issue, application or proceeding or part of an action;

(d) one party to pay to another a percentage of assessed costs, or assessed costs up to or from a particular point in an action.

(4) The Court may adjust the amount payable by way of deduction or set-off if the party that is liable to pay a costs award is also entitled to receive an amount under a costs award.

(5) In appropriate circumstances, the Court may order, in a costs award, payment to a self-represented litigant of an amount or part of an amount equivalent to the fees specified in Schedule C *[Tariff of Recoverable Fees]*.

(6) The Court's discretion under this rule is subject to any specific requirement of these rules about who is to pay costs and what costs are to be paid.

Costs in class proceeding

10.32 In a proceeding under the *Class Proceedings Act* or in a representative action, the Court, in determining whether a costs award should be made against the unsuccessful representative party, may take into account one or more of the following factors, in addition to any other factors the Court considers appropriate:

(a) the public interest;

(b) whether the action involved a novel point of law;

(c) whether the proceeding or action was a test case;

(d) access to justice considerations.

Court considerations in making costs award

10.33(1) In making a costs award, the Court may consider all or any of the following:

(a) the result of the action and the degree of success of each party;

(b) the amount claimed and the amount recovered;

(c) the importance of the issues;

(d) the complexity of the action;

(e) the apportionment of liability;

(f) the conduct of a party that tended to shorten the action;

(g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

(2) In deciding whether to impose, deny or vary an amount in a costs award, the Court may consider all or any of the following:

(a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;

(b) a party's denial of or refusal to admit anything that should have been admitted;

(c) whether a party started separate actions for claims that should have been filed in one action or whether a party unnecessarily separated that party's defence from that of another party;

(d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake;

(e) an irregularity in a commencement document, pleading, affidavit, notice, prescribed form or document;

(f) a contravention of or non-compliance with these rules or an order;

(g) whether a party has engaged in misconduct;

(h) any offer of settlement made, regardless of whether or not the offer of settlement complies with Part 4 *[Managing Litigation]*, Division 5 *[Settlement Using Court Process]*.

AR 124/2010 s10.33;36/2020

Information note

The Court has complete discretion over what to order in a costs award unless a specific rule limits that discretion.

The typical starting point will be to decide what are the reasonable and proper costs incurred in carrying on litigation: see rule 10.31 *[Court-ordered costs award]*. Rule 10.33(1) *[Court considerations in making a costs award]* sets out a list of matters the Court may consider related to the litigation (degree of success, amount involved, complexity and so on) and under subrule (2) the Court may consider matters related to the conduct of the parties, including unnecessary steps or delay, misconduct, and contravention of the rules or contravention of Court orders. If the conduct of a party is found to be inappropriate, the Court can impose, deny or vary an amount that otherwise would have been allowed in the costs award.

Note that some rules have immediate costs consequences; for example, rule 5.12 *[Penalty for not serving affidavit of records]* contains a specific sanction for not serving an affidavit of records in accordance with the rules.

Court-ordered assessment of costs

10.34(1) The Court may order an assessment of costs by an assessment officer and may give directions to the assessment officer about the assessment.

(2) The Court must keep a record on the court file of a direction

(a) given to an assessment officer,

(b) requested by a party and refused by the Court, or

(c) requested by a party that the Court declines to make but leaves to an assessment officer's discretion.

Court of Queen's Bench of Alberta

Citation: Vizor v 383501 Alberta Ltd (Val Brig Equipment Sales), 2022 ABQB 245

Date: 20220406
Docket: 1903 07391
Registry: Edmonton

Between:

William Vizor and Dow Jones Hauling Ltd

Plaintiffs

- and -

383501 Alberta Ltd operating as Val Brig Equipment Sales and Lawrence Berube

Defendants

Ruling on Costs
of the
Honourable Madam Justice Tamara L. Friesen

Introduction

[1] The underlying action arose from a failed conditional sale of a 2012 Mack Truck by the Defendant/Plaintiff by Counterclaim, 383501 Alberta Ltd. operating as Val Brig Equipment Sales ("VBES") to Dow Jones Hauling Ltd. ("DJH"). The sale was secured by a Promissory Note for the purchase price granted by the principal of DJH, William Vizor ("Mr. Vizor"), and a General Security Agreement granted jointly and severally by DJH and Mr. Vizor ("the Vizor Parties").

[2] The Plaintiffs appealed four separate but related orders of Master Schlosser, QC, the first being an order granting summary judgment against the Plaintiffs on the Defendants'

[15] In addition, section 17 of the GSA indicates that DJH and Mr. Vizor jointly and severally agreed to pay all costs, charges and expenses reasonably incurred by VBES, including legal fees on solicitor and own client full indemnity basis, in respect of:

> a. preparing, registering, protecting or enforcing the GSA;
>
> b. taking custody of, preserving, maintaining, repairing, processing, preparing for disposition, and disposing of the collateral (i.e. all property of the Vizor Parties); and
>
> c. enforcing or collecting the indebtedness owing by the Vizor Parties.

Law

[16] Authority to award costs falls under rs 10.28 – 10.33 of the *Alberta Rules of Court*, Alta Reg 124/2010 ("*Rules of Court*"). In general, costs should be fair, just, efficient and cost-effective. One of the primary purposes for awarding costs is to offset the fiscal impact of a person being forced to appear in court without a valid legal reason. Other considerations listed in r 10.33(1) which apply in the present case include:

1. The result of the action and the degree of success of each party;
2. The amount claimed and the amount recovered;
3. The conduct of a party that tended to shorten the action; and
4. Any other relevant matter that might be appropriate.

[17] Rule 10.33(2) describes additional considerations that the Court may consider on an application to award, deny or vary a costs award including: conduct of the party that was unnecessary or caused unnecessary delay at any stage of the action, and whether either party has engaged in misconduct.

[18] In most cases, costs are awarded "in the cause" on a "party and party" basis according to the steps taken. That said, under r 10.29, the default is actually costs "forthwith": see ***PricewaterhouseCoopers v Perpetual Energy***, 2021 ABCA 92 at para 6.

[19] Our Court of Appeal in ***Weatherford Canada v Artemis***, 2019 ABCA 92 [***Weatherford***] observed that:

> Party and party costs balance two competing interests: the unfairness of requiring a successful party whose conduct is not blameworthy to bear any costs and the chilling effect on parties bringing or defending claims if the unsuccessful party is required to bear all the costs… The result of this balance is the concept of partial indemnification through party and party costs to the successful party.

[20] The ordering of costs in any case is, of course, discretionary. In certain instances, the Court may exercise its discretion and order elevated or enhanced costs, which either fully, or more fully indemnify one of the parties. In ***McCargar v Metis Nation of Alberta Association***, 2017 ABQB 692 (reviewed on other grounds 2018 ABCA 144), Justice Topolniski helpfully reviewed various cases from this Court on the issue of elevated or enhanced costs, concluding that such awards are exceptional. "Exceptional" has been described in the applicable