COURT FILE NUMBER:	2401-05179	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 A PLAN OF COMPROMISE OR ARRANGEMENT OF ALPHABOW ENERGY LTD.	
APPLICANT:	KIKINO METIS SETTLEMENT	
DOCUMENT:	**BENCH BRIEF OF HIS MAJESTY THE KING IN RIGHT OF ALBERTA**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	Alberta Justice Constitutional and Aboriginal Law Suite 1670, 639 – 5th Avenue SW Calgary, AB T2P 0M9 Telephone: (403) 466-7314 Fax: (403) 476-4598 Email: nicholas.lo@gov.ab.ca	

JUDICIAL CENTRE OF CALGARY
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CLERK OF THE COURT

Written Submissions of His Majesty the King in Right of Alberta for a Commercial List Chambers Application, scheduled January 16, 2026, before the Honourable Justice M.H. Bourque

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PART I – INTRODUCTION

1. This is the Bench Brief of His Majesty the King in Right of Alberta ("**Alberta**"). Alberta is not a named party to the Kikino Metis Settlement's ("**Kikino**") Application to Lift the Stay of Proceedings (imposed by the Amended and Restated CCAA Initial Order, filed April 26, 2024, and subsequently extended by further Orders) (Kikino's "**Application**"). Alberta was given notice of this Application as a creditor of AlphaBow Energy Ltd. ("**AlphaBow**"). [1]

2. In response to the Application, Alberta:

   a. Takes no position with respect to Kikino's Application as it pertains to the lifting of the stay of proceedings;

   b. Asserts that the relief sought by Kikino beyond lifting the stay is incompatible with the principles of administrative law and the *Metis Settlements Act*, RSA 2000, c M-14 (the "***MSA***") in that the relief sought is premature and fetters the independent decision-making ability of the Metis Settlements Act Tribunal (the "**MSAT**") deciding a proceeding brought under s. 121;

   c. In the alternative and in any event, contests Kikino's argument that any debt claim arising from operation of s. 121(3) of the *MSA* is or should be deemed to be a subrogation of Alberta to Kikino's claim(s); and

   d. Asserts that the notice of constitutional question:

      i. Is premature given legislature's intention to delegate specified matters to the MSAT as an administrative decision maker of first instance; and

      ii. In any event:

         1. Fails to meet the onus of proof of federal purpose so as to invoke paramountcy of the *CCAA* over s. 121 of the *MSA*; and

[1] AlphaBow Energy Ltd. – Preliminary List of Creditors

2. Misapprehends the purpose of the *CCAA* as “allowing an insolvent debtor to restructure its affairs and to compromise all debts which predate the granting of an initial order under the *CCAA*”.

PART II – RELIEF BEYOND LIFTING THE STAY IS INCOMPATIBLE WITH THE MSA AND ADMINISTRATIVE LAW PRINCIPLES

A. Principles of Administrative Law

3. Administrative bodies are presumed to be empowered to fulfill their own mandates and “interpret the law as applicable to all issues that come before it” with minimal judicial interference.[2] In MSAT’s case, its empowering statute, the *MSA*, directs that the MSAT *must* hear appeals and perform any function given to it under the *MSA*, which includes the MSAT’s function as the Land Access Panel or Existing Leases Land Access Panel.[3]

4. Kikino seeks relief that operation of s. 121 of the MSA should result in “[deeming] any debt claim due and owing to the Crown in the Right of Alberta as a subrogation of Kikino’s claim for Lease Arrears [as defined in Kikino’s Bench Brief of November 3, 2025] within the *CCAA* Proceedings.” This relief undermines the statutory delegation of powers by pre-emptively narrowing MSAT’s decision-making ability by seeking a court-imposed restraint on the possible outcomes that MSAT could arrive at before MSAT makes its decision. This is prejudicial, akin to judicial review before the administrative tribunal’s decision is made, and offends the presumption of legislative delegation of authority generally and specifically under s. 189(1)(a) of the *MSA*. [4]

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[2] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 24 – **Tab 1**
[3] *Metis Settlements Act*, RSA 2000, c M-14 at s. 189(1)(a) – **Tab 2**
[4] *Ibid*

B. MSAT's Powers Under Section 121

5. Sections 121(2) and (3) of the *MSA* delegates fact-finding and decision-making discretion to the MSAT that should be exercised free of judicial interference at first instance:

a. Pursuant to s. 121(2), the MSAT is empowered to receive and consider evidence and upon such receipt and consideration, MSAT "*may* direct the President of Treasury Board and Minister of Finance to pay…" [emphasis added]; and

b. Pursuant to s. 121(3), "*[i]f* the President of Treasury Board and Minister of Finance pays money to a person under this section, the amount paid constitutes a debt owing by the *existing mineral lease holder or the operator* to the Crown in right of Alberta." [emphasis added].[5]

6. That is, the MSAT is empowered to do the following in its sole discretion at first instance:

a. Receive and consider evidence as to whether an existing mineral lease holder or operator failed to pay;

b. Determine whether the President of Treasury Board and Minister of Finance ("**TBF**") will pay; and

c. If TBF is directed to pay an amount:

    i. Determine the amount to be paid; and

    ii. Determine who the "existing mineral lease holder or operator" debtor is.

7. There are no reported decisions of this Honourable Court of King's Bench regarding s. 121 of the MSA (or its predecessors). However, s. 36 of the *Surface Rights Act*, RSA 2000, c S-27 (the "***SRA***") operates analogously to s. 121 of the *MSA*: if the operator fails to pay pursuant to the scheme prescribed under s. 36, "the Tribunal may direct the [Minister of Environment and Protected Areas] to pay out of the General Revenue Fund the amount of money to [the person

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[5] *Metis Settlements Act*, RSA 2000, c M-14 at s. 121 – **Tab 2**

entitled to payment]" and such payment, if made by the Minister, "constitute[s] a debt owing by the operator to the Crown".[6],[7],[8],[9]

8. The Land and Property Rights Tribunal's scope of discretion under s. 36 of the *SRA* has been judicially considered to include the discretion to refuse or decrease the amount payable by the Minister, particularly where the "surface owner's claim is unjustified, is patently absurd, or provides an unjust enrichment".[10],[11] The MSAT has cited these cases and recognizes that it also holds a discretion to vary the amount payable or decline ordering TBF to pay.[12]

9. If Kikino obtains an order subrogating TBF to Kikino's claim in the *CCAA* proceedings, then the MSAT's discretion is fettered in terms of determining:

a. Whether AlphaBow is an existing mineral lease holder or operator;

b. Whether TBF should pay;

c. If TBF is directed to pay, the amount to be paid; and

d. Who the "existing mineral lease holder or operator" is for the purposes of indebtedness to the Crown, should payment be made by TBF.

10. MSAT's decision-making process would also be generally tainted with the foreknowledge that any decision it makes, will be subject to subrogation of TBF to Kikino's interests in the *CCAA* proceedings, which may affect MSAT's decision in a way that would not occur but for this prejudicial interference.

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[6] *Surface Rights Act*, RSA 2000, c S-24 at s. 36 – **Tab 3**
[7] *Ibid* at s. 1(f) – **Tab 3**
[8] *Government Organization Act*, RSA 2000, G-10 at s. 16 – **Tab 4**
[9] *Designation and Transfer of Responsibility Regulation*, Alta Reg 11/2023 at s. 9(1)(p) - **Tab 5**
[10] *Devon Canada Corporation v Surface Rights Board*, 2003 ABQB 7 at para 29 – **Tab 6**
[11] *Bateman v Alberta (Surface Rights Board)*, 2023 ABKB 640 at paras 70, 71, and 73 – **Tab 7**
[12] *Paddle Prairie Metis Settlement v Long Run Exploration et al*, MSAT Order 499 at para 56 – **Tab 8**

11. Should the stay be lifted, it should be done without any pre-emptive direction on the relief the MSAT can direct, so as to preserve the intended statutory delegation of administrative powers including MSAT's ability to interpret its own empowering legislation at first instance.

PART III – PROPER STATUTORY INTPRETATION DOES NOT RESULT IN SUBROGATION

12. In the alternative and in any event, the principles of statutory interpretation militate against the deemed subrogation relief that Kikino seeks.

13. The exercise of statutory interpretation requires reading the words of an act to be read in its entire context and in their grammatical and ordinary sense, harmoniously with the scheme and objects of the act and the intention of legislature.[13]

14. Section 121 of the *MSA* reads as follows:

> **Recovery of compensation**
>
> **121(1)** If an existing mineral lease holder or operator fails to pay money
>
> (a) under a surface lease, or
>
> (b) ordered to be paid by the Existing Leases Land Access Panel or the Land Access Panel,
>
> within 30 days of the date it is due, the person entitled to receive the money may submit to the Land Access Panel evidence of the failure to pay.
>
> **(2)** On receipt of satisfactory evidence of failure of the existing mineral lease holder or operator to pay, the Land Access Panel may direct the President of Treasury Board and Minister of Finance to pay out of the General Revenue Fund the amount of money to which the person is entitled.
>
> **(3)** If the President of Treasury Board and Minister of Finance pays money to a person under this section, the amount paid constitutes a debt owing by the existing mineral lease holder or the operator to the Crown in right of Alberta.
>
> **(4)** If a surface lease and a development agreement are combined in one document, this section applies only to that part of the document concerning the surface lease.

15. Alberta's position is that the debt contemplated in s. 121(3) of the *MSA* cannot be interpreted to be a subrogated debt or claim for two reasons:

[13] *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21 citing *Driedger on the Construction of Statutes* – **Tab 9**

a. The plain reading of s. 121(3) contemplates a statutory debt owing from the existing mineral lease holder or operator to the Crown in right of Alberta that arises *after* such amount is determined and paid by TBF; and

b. The deliberate absence of the words "subrogate", "subrogates", or "subrogated" from s. 121(3) of the *MSA* indicates an intention that such debt is not of a subrogated nature, particularly when other provincially legislated schemes where TBF's rights of recovery, after making a payment in respect of an obligation, are explicitly "subrogated".

16. There is no jurisprudence or Hansard records contemplating the object of s. 121 of the *MSA* specifically. Rather, the general object of the *MSA* has been judicially considered to be "an ameliorative program…by setting up a land base that would strengthen an independent Metis identity, culture and desire for self-governance." The *MSA* "sets out detailed provisions for the establishment of a Metis land base and governance of the land base by Metis members."[14] It would be a reasonable interpretation that this broad object include provision for compensation for land access for resource extraction, thus resulting in the scheme under s. 121. However, there is no evidence that provides insight on the legislative intent of the words of s. 121 insofar as the resulting process between the mineral lease holder or operator and the Crown.

A. Statutory Interpretation of Section 121(3) of the *MSA*

17. Legislature's use of the word "if" and phrase "amount paid" as opposed to the word "subrogate" directs that the debt referred to in s. 121(3) does not exist until the amount is determined and paid by TBF. That is, (i) the word "if" is the clearest declaration of conditionality, and (ii) "amount paid" is an indication that such debt does not arise until the "amount" is determined and such "amount" is "paid" by TBF.

18. "Subrogation", on the other hand, is the distinct concept of "substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted

[14] *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 at para 65 – **Tab 10**

succeeds to the rights of the other in relation to the debt or claim, and its rights remedies or securities".[15]

19. Subrogation would place TBF in Kikino's shoes, implying that the debt owing from AlphaBow to Kikino *continues* and that TBF would be constrained to Kikino's legal rights, remedies, and limitations regarding the same, including Kikino's acts and elections within the *CCAA* proceedings. Section 121(3) contemplates a "debt owing by the existing mineral lease holder or the operator" "if" such amount is paid. It follows that such debt cannot exist nor be a "debt owing" until the "amount" is determined and paid.

B. Legislature Deliberately Omitted "Subrogate"

20. Omissions of certain words in legislation signal the deliberate intention to do so, particularly where those words are used in similar legislation. Such omissions can have "considerable significance" in statutory interpretation.[16]

21. The absence of "subrogation" or "subrogate" from s. 121(3) of the *MSA* is indicative of Legislature's intention, especially in light of similar legislative recovery schemes that expressly describe TBF's rights as "subrogated" following payment. The following statutes are examples of such instances:

a. Section 48 of the *Rural Utilities Act*, RSA 2000, c R-21 (the "***Rural Utilities Act***"); and

b. Section 8 of the *Feeder Associations Guarantee Act*, SA 2009, c F-11.1 (the "***Feeder Associations Guarantee Act***").

[15] *Agapi v Youngpine*, 1994 CanLII 9250 (AB KB) at paras 17 and 18, citing Black's Law Dictionary and the Law of Subrogation – **Tab 11**
[16] *R v BWP*; *R v BVN*, 2006 SCC 27 at paras 23, 24, 34 – **Tab 12**

22. The *Rural Utilities Act*:

a. Permits the incorporation of "rural utility associations" for the object of supplying basic utilities to rural areas[17];

b. Permits rural utility associations to borrow with the TBF to act as guarantor on the repayment of such sums, subject to legislated conditions[18]; and

c. Directs, where defaults of those borrowings occur and the TBF is called on to make payments in respect of a guarantee, the TBF is expressly subrogated against and to the rights of the borrowing association[19].

23. The *Feeder Associations Guarantee Act* provides for a similar legislative scheme with express contemplation of subrogation following payment by the TBF. The *Feeder Associations Guarantee Act*:

a. Permits the Lieutenant Governor in Council to authorize the TBF to give guarantees on behalf of the Government with respect to loans made to feeder associations [20]; and

b. Where the TBF has made a payment to a lender in respect of a default by a feeder association, directs that the TBF "is subrogated to the amount of that payment [to the rights and actions of:

i. The lender in relation to the feeder association; and

ii. The feeder association in relation to its members].[21]"

24. From the foregoing provisions of the *Rural Utilities Act* and the *Feeder Associations Guarantee Act*, it is evident that Legislature will expressly identify subrogation regimes where it

[17] *Rural Utilities Act*, RSA 2000, c R-21 at s. 3 – **Tab 13**
[18] *Ibid* at s. 32 – **Tab 13**
[19] *Ibid* at s. 48 – **Tab 13**
[20] *Feeder Associations Guarantee Act*, SA 2009, c F-11.1 at s. 2 – **Tab 14**
[21] *Ibid* at s. 8 – **Tab 14**

is intended. The decision to omit subrogation language is a sign that s. 121(3) of the MSA was not intended to operate as a subrogation scheme and to approve of Kikino's position would create a legal remedy not contemplated by the MSA.

PART III – CONSTITUTIONAL QUESTION

A. The Constitutional Challenge is Premature

25. Per the above arguments regarding premature and prejudicial fettering of MSAT's ability to hear the matter at first instance, the same prematurity also bars consideration of paramountcy between the *CCAA* and the *MSA* at this time. It is possible that MSAT's decision, if made, could raise a constitutional issue, but the order of operations must permit MSAT to make a decision first free of pre-emptive judicial direction.

B. Insufficient Proof of Federal Purpose

26. In the alternative and in any event, Kikino has failed to adduce sufficient proof of federal purpose, as required under the paramountcy analysis framework.

27. The onus and burden on the party seeking to invoke paramountcy is high and requires the moving party to provide "clear proof" of the federal purpose and then prove that the provincial legislation is incompatible with the federal purpose. [22] Kikino has not led any records nor evidence as to the federal purpose other than the bare assertion of the same within its Brief.

28. Kikino has not provided any affidavit or Hansard evidence as to the federal purpose or the operational conflict. The absence of sufficient evidence in support of the assertion of a federal purpose is fatal to a paramountcy claim. Notably, case law and secondary sources in the absence of records of parliamentary debates and reports have been determined at the Supreme Court of Canada level to be insufficient evidence of federal purpose.[23]

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[22] *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53 at paras 40 to 45 **– Tab 15**
[23] I*bid* **– Tab 15**

C. Kikino Has Misapprehended the Purpose of the *CCAA*

29. Review of parliamentary debates and Supreme Court of Canada jurisprudence around the time of its enactment reveals that the *CCAA* was enacted in response to the commercial realities of the Great Depression and primarily for the purpose of creating a method for an insolvent company to enter into court-supervised compromises or arrangements with its creditors "without utterly destroying the company…without loss of good-will and without forcing the improvident sale of its assets."[24] Most importantly, there is no indication that the *CCAA* was enacted for the purpose of "allowing an insolvent debtor to restructure its affairs and to compromise all debts which predate the granting of an initial order under the CCAA", as argued by Kikino.

30. Federal Hansard includes the following discussions regarding the purpose of the *CCAA*:

a. At the time of its first reading:

i. "There [was] no mode or method under our laws whereby the creditors of a company may be brought into court and permitted by amicable agreement between themselves to arrange for a settlement or compromise of the debts of the company in such a way as to permit the company effectively to continue its business by reorganization…"; and [25]

ii. Reference was made to the commercial realities of 1933 necessitating "some legal method of making arrangements between creditors and companies…because of the prevailing commercial and industrial depression, and it was thought by the government that [Canada] should adopt some method whereby compromises might be carried into effect under the supervision of the courts without utterly destroying the company

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[24] *House of Commons Debate*, 17th Parl, 4th Sess (April 20, 1933) at 4090 and 4091 (Hon. C. H. Cahan – **Tab 16**

[25] *Ibid*

or its organization, without the loss of good-will and without forcing the improvident sale of its assets";[26]

b. At its third reading, the Honourable C.H. Cahan explained the purpose of the Bill: "The gist of the whole bill…that any class of creditors of an insolvent or a bankrupt company may by a three-fourths vote among themselves agree to a compromise between the company and that class of its creditors"; [27]

c. An amendment in 1953 to address shortcomings of the original *CCAA* in relation to trade creditors was preceded by parliamentary discussion: "the Companies' Creditors Arrangement Act was passed in 1933. At that time the Bankruptcy Act did not contain adequate provisions for an arrangement between a corporate debtor and its creditors by which the corporate debtor, by getting an extension on its liabilities, could liquidate them, avoid bankruptcy and retain its identity."[28]

31. Judicial consideration by the Supreme Court of Canada in 1934 noted the "aim of the Act" to be "to enable arrangements to be made, in view of the insolvent condition of the company, under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy."[29]

32. Per the foregoing, the clear legislative intent behind the *CCAA* was to permit an insolvent corporate debtor to enter court-supervised arrangements to avoid bankruptcy or preserve the corporation as a going concern while compromises or arrangements could be canvassed with creditors. There is no evidence or information to suggest that the purpose of the *CCAA* is to

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[26] *Ibid* at 4091
[27] *House of Commons Debate*, 17th Parl, 4th Sess (May 9, 1933) at 4722 and 4723 (Hon. C. H. Cahan – **Tab 16**
[28] *House of Commons Debate*, 21st Parl, 7th Sess (January 23, 1953) at 1269 (Hon. S.S. Garson – **Tab 17**
[29] *Reference* re *Constitutional Validity of the Companies' Creditors Arrangement Act (Dom)*, 1934 CanLII 72 (SCC) at 661 – **Tab 18**

compromise or extinguish “all debts which predate the granting of an initial order under the CCAA”, as asserted by Kikino.[30]

33. Contemporary jurisprudence considering the purpose of the *CCAA* does not suggest that the purpose of the *CCAA* has evolved to include the compromise or extinguishment of all debts predating the initial order that Kikino proposes. Rather the focus is still on preserving the *status quo* and operating capacity of the business via stay of creditor actions “while the debtor plans the compromise or arrangement to be presented to creditors”, all under court supervision.[31],[32]

34. Moreover, there are no provisions of the *CCAA* analogous to the certification of discharge provisions of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 which release discharged bankrupts from claims provable in bankruptcy and are paramount to provincial laws that attempt to maintain such debts post-discharge.[33], [34]

PART IV – RELIEF SOUGHT

35. Alberta asks that this Honourable Court:

a. Decline to hear any issues raised by Kikino beyond lifting the stay of proceedings;

b. Further or in the alternative, determine that s. 121(3) of the *MSA* does not and cannot support an interpretation resulting in a subrogation of TBF to Kikino’s rights;

c. Decline to hear the constitutional question of paramountcy between the *CCAA* and s. 121(3) of the *MSA*; and

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[30] Kikino’s Brief at para 68
[31] *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at paras 57 to 60 – **Tab 19**
[32] *Re Razor Energy Corp*, 2024 ABKB 553 at para 3 – **Tab 20**
[33] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 at s. 178(2) – **Tab 21**
[34] *407 ETR Concession Co v Canada (Superintendent of Bankruptcy)*, 2015 SCC 52 at paras 24 and 25 – **Tab 22**

d. Further or in the alternative, determine that operation of the *CCAA* is not frustrated by operation of s. 121 of the *MSA*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of January, 2026.

HIS MAJESTY THE KING IN RIGHT OF ALBERTA

Nicholas Lo
Alberta Justice, Constitutional and Aboriginal Law

PART V – LIST OF AUTHORITIES

TAB	Authority
1.	*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65
2.	Sections 121 and 189 – *Metis Settlements Act*, RSA 2000, c M-14
3.	Section 36 – *Surface Rights Act*, RSA 2000, c S-24
4.	Section 16 – *Government Organization Act*, RSA 2000, G-10
5.	Section 9(1)(p) – *Designation and Transfer of Responsibility Regulation*, Alta Reg 11/2023
6.	*Devon Canada Corporation v Surface Rights Board*, 2003 ABQB 7
7.	*Bateman v Alberta (Surface Rights Board)*, 2023 ABKB 640
8.	*Paddle Prairie Metis Settlement v Long Run Exploration et al*, MSAT Order 499
9.	*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27
10.	*Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37
11.	*Agapi v Youngpine*, 1994 CanLII 9250 (AB KB)
12.	*R v BWP*; *R v BVN*, 2006 SCC 27
13.	Sections 3, 32, and 48 – *Rural Utilities Act*, RSA 2000, c R-21
14.	Sections 2 and 8 – *Feeder Associations Guarantee Act*, SA 2009, c F-11.1
15.	*Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53
16.	*House of Commons Debate*, 17th Parl, 4th Sess (April 20, 1933 and May 9, 1933)
17.	*House of Commons Debate*, 21st Parl, 7th Sess (January 23, 1953)
18.	*Reference* re *Constitutional Validity of the Companies' Creditors Arrangement Act (Dom)*, 1934 CanLII 72 (SCC)
19.	*Century Services Inc v Canada (Attorney General)*, 2010 SCC 60
20.	*Re Razor Energy Corp*, 2024 ABKB 553

21.	Section 178 – *Bankruptcy and Insolvency Act*, RSC 1985, c B-3
22.	*407 ETR Concession Co v Canada (Superintendent of Bankruptcy)*, 2015 SCC 52

Minister of Citizenship and Immigration *Appellant*

v.

Alexander Vavilov *Respondent*

and

**Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Canadian Council for Refugees,
Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program,
Ontario Securities Commission,
British Columbia Securities Commission,
Alberta Securities Commission,
Ecojustice Canada Society,
Workplace Safety and Insurance Appeals Tribunal (Ontario),
Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut),
Workers' Compensation Appeals Tribunal (Nova Scotia),
Appeals Commission for Alberta Workers' Compensation,
Workers' Compensation Appeals Tribunal (New Brunswick),
British Columbia International Commercial Arbitration Centre Foundation,
Council of Canadian Administrative Tribunals,
National Academy of Arbitrators,
Ontario Labour-Management Arbitrators' Association,
Conférence des arbitres du Québec,
Canadian Labour Congress,
National Association of Pharmacy Regulatory Authorities,
Queen's Prison Law Clinic,
Advocates for the Rule of Law,
Parkdale Community Legal Services,
Cambridge Comparative Administrative Law Forum,**

Ministre de la Citoyenneté et de l'Immigration *Appelant*

c.

Alexander Vavilov *Intimé*

et

**Procureur général de l'Ontario,
procureure générale du Québec,
procureur général de la Colombie-Britannique,
procureur général de la Saskatchewan,
Conseil canadien pour les réfugiés,
Centre ontarien de défense des droits des locataires - Programme d'avocats de service en droit du logement,
Commission des valeurs mobilières de l'Ontario,
British Columbia Securities Commission,
Alberta Securities Commission,
Ecojustice Canada Society,
Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail (Ontario),
Workers' Compensation Appeals Tribunal (Territoires du Nord-Ouest et Nunavut),
Tribunal d'appel des décisions de la Commission des accidents du travail de la Nouvelle-Écosse,
Appeals Commission for Alberta Workers' Compensation,
Tribunal d'appel des accidents au travail (Nouveau-Brunswick),
British Columbia International Commercial Arbitration Centre Foundation,
Conseil des tribunaux administratifs canadiens,
National Academy of Arbitrators,
Ontario Labour-Management Arbitrators' Association,
Conférence des arbitres du Québec,
Congrès du travail du Canada,
Association nationale des organismes de réglementation de la pharmacie,
Queen's Prison Law Clinic,
Advocates for the Rule of Law,**

Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Canadian Bar Association, Canadian Association of Refugee Lawyers, Community & Legal Aid Services Programme, Association québécoise des avocats et avocates en droit de l'immigration and First Nations Child & Family Caring Society of Canada *Interveners*

Indexed as: Canada (Minister of Citizenship and Immigration) *v.* Vavilov

2019 SCC 65

File No.: 37748.

2018: December 4, 5, 6; 2019: December 19.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law — Judicial review — Standard of review — Proper approach to judicial review of administrative decisions — Proper approach to reasonableness review.

Citizenship — Canadian citizens — Registrar of Citizenship cancelling certificate of Canadian citizenship issued to Canadian-born son of parents later revealed to be Russian spies — Decision of Registrar based on interpretation of statutory exception to general rule that person born in Canada is Canadian citizen — Exception stating that Canadian-born child is not citizen if either parent was representative or employee in Canada of foreign government at time of child's birth — Whether Registrar's decision to cancel certificate of citizenship was reasonable — Citizenship Act, R.S.C. 1985, c. C-29, s. 3(2)(a).

Parkdale Community Legal Services, Cambridge Comparative Administrative Law Forum, Clinique d'intérêt public et de politique d'internet du Canada Samuelson-Glushko, Association du Barreau canadien, Association canadienne des avocats et avocates en droit des réfugiés, Community & Legal Aid Services Programme, Association québécoise des avocats et avocates en droit de l'immigration et Société de soutien à l'enfance et à la famille des Premières Nations du Canada *Intervenants*

Répertorié : Canada (Ministre de la Citoyenneté et de l'Immigration) *c.* Vavilov

2019 CSC 65

N^{o} du greffe : 37748.

2018 : 4, 5, 6 décembre; 2019 : 19 décembre.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe et Martin.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit administratif — Contrôle judiciaire — Norme de contrôle — Démarche appropriée pour le contrôle judiciaire des décisions administratives — Démarche appropriée pour l'application de la norme de la décision raisonnable.

Citoyenneté — Citoyens canadiens — Annulation par la greffière de la citoyenneté du certificat de citoyenneté canadienne délivré au fils né au Canada de parents qui se sont plus tard révélés être des espions russes — Décision rendue par la greffière sur son interprétation de l'exception prévue par la loi à l'égard de la règle générale suivant laquelle les personnes nées au Canada ont la citoyenneté canadienne — Exception précisant qu'un enfant né au Canada n'est pas citoyen canadien si, au moment de sa naissance, son père ou sa mère était représentant ou au service au Canada d'un gouvernement étranger — La décision de la greffière d'annuler le certificat de citoyenneté était-elle raisonnable? — Loi sur la citoyenneté, L.R.C. 1985, c. C-29, art. 3(2)a).

V was born in Toronto in 1994. At the time of his birth, his parents were posing as Canadians under assumed names. In reality, they were foreign nationals working on assignment for the Russian foreign intelligence service. V did not know that his parents were not who they claimed to be. He believed that he was a Canadian citizen by birth, he lived and identified as a Canadian, and he held a Canadian passport. In 2010, V's parents were arrested in the United States and charged with espionage. They pled guilty and were returned to Russia. Following their arrest, V's attempts to renew his Canadian passport proved unsuccessful. However, in 2013, he was issued a certificate of Canadian citizenship.

Then, in 2014, the Canadian Registrar of Citizenship cancelled V's certificate on the basis of her interpretation of s. 3(2)(a) of the *Citizenship Act*. This provision exempts children of "a diplomatic or consular officer or other representative or employee in Canada of a foreign government" from the general rule that individuals born in Canada acquire Canadian citizenship by birth. The Registrar concluded that because V's parents were employees or representatives of Russia at the time of V's birth, the exception to the rule of citizenship by birth in s. 3(2)(a), as she interpreted it, applied to V, who therefore was not, and had never been, entitled to citizenship. V's application for judicial review of the Registrar's decision was dismissed by the Federal Court. The Court of Appeal allowed V's appeal and quashed the Registrar's decision because it was unreasonable. The Minister of Citizenship and Immigration appeals.

Held: The appeal should be dismissed.

Per Wagner C.J. and Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ.: The Registrar's decision to cancel V's certificate of citizenship was unreasonable, and the Court of Appeal's decision to quash it should be upheld. It was not reasonable for the Registrar to interpret s. 3(2)(a) of the *Citizenship Act* as applying to children of individuals who have not been granted diplomatic privileges and immunities at the time of the children's birth.

More generally, this appeal and its companion cases (*Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, [2019] 4 S.C.R. 845) provide an opportunity to consider and clarify the law applicable to the judicial review of administrative decisions as addressed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and subsequent cases. The submissions presented to the Court

V est né à Toronto en 1994. Au moment de sa naissance, ses parents se font passer pour des Canadiens en utilisant des noms d'emprunt. En fait, ils sont des étrangers en mission pour le service des renseignements étrangers de la Russie. V ne sait pas que ses parents ne sont pas ceux qu'ils prétendent être. Il croit être citoyen canadien de naissance, il vit et s'identifie comme un Canadien, et il détient un passeport canadien. En 2010, les parents de V sont arrêtés aux États-Unis et accusés d'espionnage. Ils plaident coupables et sont renvoyés en Russie. Après leur arrestation, V tente en vain de renouveler son passeport canadien. On lui décerne toutefois en 2013 un certificat de citoyenneté canadienne.

Puis, en 2014, la greffière de la citoyenneté canadienne annule le certificat de V en se fondant sur son interprétation de l'al. 3(2)a) de la *Loi sur la citoyenneté*. Cette disposition exempte les enfants d'un « agent diplomatique ou consulaire, représentant à un autre titre ou au service au Canada d'un gouvernement étranger » de l'application de la règle générale selon laquelle les personnes nées au Canada ont la citoyenneté canadienne de naissance. La greffière conclut que, comme les parents de V étaient des employés ou représentants de la Russie au moment de la naissance de V, et selon l'interprétation qu'elle donne de l'exception prévue à l'al. 3(2)a) à l'égard de la règle de citoyenneté par la naissance, cette exception s'applique à V, qui n'a donc pas droit à la citoyenneté et n'y a jamais eu droit. La demande de contrôle judiciaire présentée par V à l'encontre de la décision de la greffière est rejetée par la Cour fédérale. La Cour d'appel accueille l'appel interjeté par V et casse la décision de la greffière parce qu'elle était déraisonnable. Le ministre de la Citoyenneté et de l'Immigration se pourvoit en appel.

Arrêt : Le pourvoi est rejeté.

Le juge en chef Wagner et les juges Moldaver, Gascon, Côté, Brown, Rowe et Martin : La décision de la greffière d'annuler le certificat de citoyenneté de V était déraisonnable, et il y a lieu de confirmer l'arrêt par lequel la Cour d'appel fédérale l'a cassée. La greffière ne pouvait raisonnablement interpréter l'al. 3(2)a) de la *Loi sur la citoyenneté* comme s'appliquant à un enfant dont les parents, au moment de sa naissance, ne s'étaient pas vu accorder des privilèges et immunités diplomatiques.

De façon plus générale, le présent pourvoi et les pourvois connexes (*Bell Canada c. Canada (Procureur général)*, 2019 CSC 66, [2019] 4 R.C.S. 845) donnent l'occasion d'analyser et de clarifier le droit applicable au contrôle judiciaire des décisions administratives tel que traité dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, et les arrêts subséquents. Les have highlighted two aspects of the current framework which need clarification. The first aspect is the analysis for determining the standard of review. The second aspect is the need for better guidance from this Court on the proper application of the reasonableness standard.

observations présentées à la Cour ont mis en relief deux aspects du cadre d'analyse actuel qu'il est nécessaire de clarifier. Le premier aspect concerne l'analyse visant à déterminer la norme de contrôle applicable. Le deuxième aspect concerne la nécessité d'indications plus précises de la Cour sur l'application appropriée de la norme de contrôle de la décision raisonnable.

It has become clear that *Dunsmuir*'s promise of simplicity and predictability has not been fully realized. Certain aspects of the current standard of review framework are unclear and unduly complex. The former contextual analysis has proven to be unwieldy and offers limited practical guidance for courts attempting to determine the standard of review. The practical effect is that courts struggle in conducting the analysis, and debates surrounding the appropriate standard and its application continue to overshadow the review on the merits, thereby undermining access to justice. A reconsideration of the Court's approach is therefore necessary in order to bring greater coherence and predictability to this area of law. A revised framework to determine the standard of review where a court reviews the merits of an administrative decision is needed.

Il est devenu évident que la promesse de simplicité et de prévisibilité formulée à cet égard dans l'arrêt *Dunsmuir* ne s'est pas pleinement réalisée. Certains aspects du cadre d'analyse actuel de la norme de contrôle ne sont pas clairs et sont indûment complexes. L'ancienne analyse contextuelle s'est révélée complexe et d'utilité limitée pour donner une orientation pratique aux cours de justice qui tentent de déterminer la norme de contrôle applicable. Ce manque de clarté a pour effet pratique que les cours de justice ont parfois de la difficulté à effectuer l'analyse relative à la norme de contrôle, et des débats entourant la norme appropriée et son application continuent d'éclipser le contrôle sur le fond, ce qui mine l'accès à la justice. Il est donc nécessaire de revoir l'approche de la Cour afin d'apporter une cohérence et une prévisibilité accrues à ce domaine du droit. Un cadre d'analyse révisé servant à déterminer la norme de contrôle applicable lorsqu'une cour de justice se penche sur le fond d'une décision administrative s'impose.

In setting out a revised framework, this decision departs from the Court's existing jurisprudence on standard of review in certain respects. Any reconsideration of past precedents can be justified only by compelling circumstances and requires carefully weighing the impact on legal certainty and predictability against the costs of continuing to follow a flawed approach. Although adhering to the established jurisprudence will generally promote certainty and predictability, in some instances doing so will create or perpetuate uncertainty. In such circumstances, following a prior decision would be contrary to the underlying values of clarity and certainty in the law.

En exposant un cadre d'analyse révisé, la présente décision s'écarte à certains égards de la jurisprudence actuelle de la Cour sur la norme de contrôle. Seules des circonstances convaincantes peuvent justifier un réexamen des précédents antérieurs et il faut soupeser soigneusement l'incidence de ce réexamen sur la certitude et la prévisibilité juridiques par rapport aux coûts liés au fait de continuer à souscrire à une approche erronée. Si le respect de la jurisprudence établie favorise généralement la certitude et la prévisibilité, dans certains cas, ce respect crée ou perpétue l'incertitude du droit. Dans ces circonstances, en suivant l'arrêt antérieur, on se trouve à aller à l'encontre des valeurs fondamentales de la clarté et de la certitude du droit.

The revised standard of review analysis begins with a presumption that reasonableness is the applicable standard in all cases. Where a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to fulfill its mandate and interpret the law applicable to all issues that come before it. Where a legislature has not explicitly provided that a court is to have a more involved role in reviewing the decisions of that decision maker, it can safely

Le cadre d'analyse révisé de la norme de contrôle repose sur la présomption voulant que la norme de la décision raisonnable soit la norme applicable dans tous les cas. Si le législateur a constitué un décideur administratif dans le but précis d'administrer un régime législatif, il faut présumer que le législateur a également voulu que ce décideur soit en mesure d'accomplir son mandat et d'interpréter la loi qui s'applique à toutes les questions qui lui sont soumises. Si le législateur n'a pas prescrit expressément que les cours de justice ont un rôle plus actif à jouer dans be assumed that the legislature intended a minimum of judicial interference. Respect for these institutional design choices requires a reviewing court to adopt a posture of restraint. Thus, whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness. As a result, it is no longer necessary for courts to engage in a contextual inquiry in order to identify the appropriate standard. Conclusively closing the door on the application of a contextual analysis to determine the applicable standard streamlines and simplifies the standard of review framework. As well, with the presumptive application of the reasonableness standard, the relative expertise of administrative decision makers is no longer relevant to a determination of the standard of review. It is simply folded into the new starting point. Relative expertise remains, however, a relevant consideration in conducting reasonableness review.

le contrôle des décisions de ce décideur, on peut aisément présumer que le législateur a voulu que celui-ci puisse fonctionner en faisant le moins possible l'objet d'une intervention judiciaire. Le respect de ces choix d'organisation institutionnelle oblige la cour de révision à adopter une attitude de retenue. Donc, chaque fois qu'une cour examine une décision administrative, elle doit partir de la présomption que la norme de contrôle applicable à l'égard de tous les aspects de cette décision est celle de la décision raisonnable. En conséquence, les cours de justice ne sont plus tenues de recourir à une analyse contextuelle pour établir la norme de contrôle appropriée. Fermer de manière définitive la porte au recours à l'analyse contextuelle pour déterminer la norme de contrôle applicable a pour effet d'alléger et de simplifier le cadre d'analyse applicable à la norme de contrôle. De plus, étant donné la présomption d'application de la norme de la décision raisonnable, l'expertise relative des décideurs administratifs n'est plus pertinente pour déterminer la norme de contrôle applicable. Elle est tout simplement incorporée au nouveau point de départ. L'expertise relative demeure cependant pertinente lors de l'exercice du contrôle judiciaire selon la norme de la décision raisonnable.

The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard to apply. This will be the case where it has explicitly prescribed the applicable standard of review. Any framework rooted in legislative intent must respect clear statutory language. The legislature may also direct that derogation from the presumption is appropriate by providing for a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision. Where a legislature has provided a statutory appeal mechanism, it has subjected the administrative regime to appellate oversight and it expects the court to scrutinize such administrative decisions on an appellate basis. The applicable standard is therefore to be determined with reference to the nature of the question and to the jurisprudence on appellate standards of review. Where, for example, a court hears an appeal from an administrative decision, it would apply the standard of correctness to questions of law, including on statutory interpretation and the scope of a decision maker's authority. Where the scope of the statutory appeal includes questions of fact or questions of mixed fact and law, the standard is palpable and overriding error for such questions.

La présomption d'application de la norme de la décision raisonnable peut être réfutée dans deux types de situations. La première est celle où le législateur a indiqué qu'il souhaite l'application d'une norme différente. C'est le cas lorsque le législateur a prescrit expressément la norme de contrôle applicable. Tout cadre d'analyse fondé sur l'intention du législateur doit respecter les dispositions législatives claires. Le législateur peut également indiquer qu'une dérogation à la présomption est de mise en prévoyant un mécanisme d'appel à l'encontre d'une décision administrative devant une cour de justice, indiquant ainsi son intention que les cours de justice recourent, en matière de contrôle, aux normes applicables en appel. Lorsqu'il prévoit dans la loi un mécanisme d'appel, le législateur assujettit le régime administratif à une compétence d'appel et indique qu'il s'attend à ce que la cour vérifie attentivement une telle décision administrative par voie d'appel. La norme de contrôle applicable doit donc être déterminée eu égard à la nature de la question et à la jurisprudence sur les normes de contrôle applicables en appel. Par exemple, lorsqu'une cour de justice entend l'appel d'une décision administrative, elle appliquera la norme de la décision correcte aux questions de droit, touchant notamment à l'interprétation législative et à la portée de la compétence du décideur. Si l'appel prévu par la loi porte notamment sur des questions de fait ou des questions mixtes de fait et de droit, la norme de contrôle applicable à ces questions sera celle de l'erreur manifeste et déterminante.

Giving effect to statutory appeal mechanisms in this way departs from the Court's recent jurisprudence. This shift is necessary in order to bring coherence and conceptual balance to the standard of review analysis and is justified by weighing the values of certainty and correctness. First, there has been significant and valid judicial and academic criticism of the Court's recent approach to statutory appeal rights and of the inconsistency inherent in a standard of review framework based on legislative intent that otherwise declines to give meaning to an express statutory right of appeal. Second, there is no satisfactory justification for the recent trend in the Court's jurisprudence to give no effect to statutory rights of appeal in the standard of review analysis, absent exceptional wording. More generally, there is no convincing reason to presume that legislatures mean something entirely different when they use the word "appeal" in an administrative law statute. Accepting that the legislature intends an appellate standard of review to be applied also helps to explain why many statutes provide for both appeal and judicial review mechanisms, thereby indicating two roles for reviewing courts. Finally, because the presumption of reasonableness review is no longer premised upon notions of relative expertise and is now based on respect for the legislature's institutional design choice, departing from the presumption of reasonableness review in the context of a statutory appeal respects this legislative choice.

Donner un tel sens aux mécanismes d'appel prévus par la loi s'écarte de la jurisprudence récente de la Cour. Ce virage s'impose afin d'apporter uniformité et équilibre conceptuel à l'analyse relative à la norme de contrôle et il se justifie par la mise en balance des valeurs de la certitude et de la justesse. D'abord, d'importantes et valables critiques judiciaires et doctrinales ont été formulées au sujet de la conception que la Cour s'est faite des droits d'appel prévus par la loi et de l'incohérence inhérente à un cadre d'analyse de la norme de contrôle fondé sur l'intention du législateur qui refuse par ailleurs de donner un sens à un droit d'appel conféré expressément par la loi. Ensuite, rien ne justifie de façon satisfaisante la tendance récente de la Cour de ne pas tenir compte des droits d'appels conférés par la loi sauf en présence d'un libellé exceptionnel. De façon plus générale, il n'y a aucune raison convaincante de présumer que le législateur voulait que le mot « appel » revête un sens tout à fait différent dans une loi à caractère administratif. Accepter que le législateur souhaite le recours à une norme de contrôle applicable en appel permet également d'expliquer pourquoi bon nombre de textes législatifs prévoient à la fois des mécanismes d'appel et de contrôle judiciaire, conférant ainsi deux rôles possibles aux cours de révision. Enfin, puisque la présomption d'application de la norme de la décision raisonnable en cas de contrôle judiciaire n'est plus fondée sur la notion d'expertise relative et repose maintenant sur le respect du choix d'organisation institutionnelle de la part du législateur, la dérogation à la présomption de contrôle selon la décision raisonnable dans le cas d'un appel prévu par la loi respecte ce choix du législateur.

The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of legal questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. First, questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters require a final and determinate answer from the courts. Second, the rule of law requires courts to have the final word with regard to general questions of law that are of central importance to the legal system as a whole because they require uniform and consistent answers. Third, the rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another since the rule of law cannot

La deuxième situation où la présomption d'application de la norme de la décision raisonnable est réfutée est celle où la primauté du droit commande l'application de la norme de la décision correcte. C'est le cas pour certaines catégories de questions de droit, soit les questions constitutionnelles, les questions de droit générales d'importance capitale pour le système juridique dans son ensemble et les questions liées aux délimitations des compétences respectives d'organismes administratifs. Premièrement, les questions touchant au partage des compétences entre le Parlement et les provinces, au rapport entre le législateur et les autres organes de l'État, et à la portée des droits ancestraux et issus de traités reconnus à l'art. 35 de la *Loi constitutionnelle de 1982*, et d'autres questions de droit constitutionnel nécessitent une réponse décisive et définitive des cours de justice. Deuxièmement, la primauté du droit exige que les cours de justice tranchent de manière définitive les questions de droit générales qui sont d'importance capitale pour le système juridique dans son ensemble parce qu'elles requièrent des réponses uniformes et cohérentes. Troisièmement, la primauté du droit tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies. The application of the correctness standard for such questions therefore respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary.

commande l'intervention des cours de justice lorsqu'un organisme administratif interprète l'étendue de ses pouvoirs d'une manière qui est incompatible avec la compétence d'un autre organisme administratif, car la primauté du droit ne saurait tolérer des ordonnances et des procédures qui entraînent un véritable conflit opérationnel entre deux organismes administratifs. L'application de la norme de la décision correcte à l'égard de ces questions s'accorde donc avec le rôle unique du pouvoir judiciaire dans l'interprétation de la Constitution, et fait en sorte que les cours de justice puissent avoir le dernier mot sur des questions à l'égard desquelles la primauté du droit exige une cohérence et une réponse décisive et définitive s'impose.

The general rule of reasonableness review, when coupled with these limited exceptions, offers a comprehensive approach to determining the applicable standard of review. The possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case is not definitively foreclosed. However, any new basis for correctness review would be exceptional and would need to be consistent with this framework and the overarching principles set out in this decision. Any new correctness category based on legislative intent would require a signal of legislative intent as strong and compelling as a legislated standard of review or a statutory appeal mechanism. Similarly, a new correctness category based on the rule of law would be justified only where failure to apply correctness review would undermine the rule of law and jeopardize the proper functioning of the justice system in a manner analogous to the three situations described in this decision.

Conjuguée à ces exceptions limitées, la règle générale qui prévoit l'application de la norme de la décision raisonnable met en place une méthode complète pour déterminer la norme de contrôle applicable. On ne ferme pas définitivement la porte à la possibilité qu'une autre catégorie puisse ultérieurement être reconnue comme appelant une dérogation à la présomption de contrôle selon la norme de la décision raisonnable. Cependant, la reconnaissance de tout nouveau fondement pour l'application de la norme de la décision correcte devrait revêtir un caractère exceptionnel et devrait respecter ce cadre d'analyse et les principes prépondérants énoncés dans la présente décision. Toute nouvelle catégorie de questions qui commandent l'application de la norme de la décision correcte sur le fondement de l'intention du législateur devrait comporter une indication de cette volonté tout aussi solide et convaincante qu'une norme de contrôle établie par voie législative ou un mécanisme d'appel prévu par la loi. De la même manière, la reconnaissance d'une nouvelle catégorie de questions appelant la norme de la décision correcte sur le fondement de la primauté du droit ne serait justifiée que dans le cas où le défaut d'appliquer la norme de la décision correcte risquerait d'ébranler la primauté du droit et mettrait en péril le bon fonctionnement du système de justice d'une façon analogue aux trois situations décrites dans la présente décision.

For example, the Court is not persuaded that it should recognize a distinct correctness category for legal questions on which there is persistent discord within an administrative body. A lack of unanimity within an administrative tribunal is the price to pay for decision-making freedom and independence. While discord can lead to legal incoherence, a more robust form of reasonableness review is capable of guarding against such threats to the rule of law. As well, jurisdictional questions should no longer be recognized as a distinct category subject to correctness review; there are no clear markers to distinguish such questions from other questions related to interpreting an administrative

Par exemple, la Cour n'est pas convaincue qu'elle devrait reconnaître l'existence d'une catégorie distincte de questions de droit qui appellent la norme de la décision correcte dans le cas où ces questions sèment constamment la discorde au sein d'un organisme administratif. L'absence d'unanimité parmi les membres d'un tribunal administratif est le prix à payer pour la liberté et l'indépendance décisionnelle. Bien que la discorde puisse mener à l'incohérence du droit, un cadre d'application plus rigoureux de la norme de la décision raisonnable permet de se prémunir face à ces menaces à la primauté du droit. En outre, les questions de compétence ne devraient plus decision maker's enabling statute. A proper application of the reasonableness standard will enable courts to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment on jurisdictional issues and without having to apply the correctness standard.

Going forward, a court seeking to determine what standard of review is appropriate should look to this decision first in order to determine how the general framework applies. Doing so may require the court to resolve subsidiary questions on which past precedents will often continue to provide helpful guidance and will continue to apply essentially without modification, such as cases concerning general questions of law of central importance to the legal system as a whole or those relating to jurisdictional boundaries between administrative bodies. On other issues, such as the effect of statutory appeal mechanisms, true questions of jurisdiction or the former contextual analysis, certain cases will necessarily have less precedential force.

There is also a need for better guidance from the Court on the proper application of the reasonableness standard, what that standard entails and how it should be applied in practice. Reasonableness review is meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. Its starting point lies in the principle of judicial restraint and in demonstrating respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering decision makers from accountability. While courts must recognize the legitimacy and authority of administrative decision makers and adopt a posture of respect, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be justified. In conducting reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale, to ensure that the decision as a whole is transparent, intelligible and justified. Judicial review is concerned with both the outcome of the decision and the reasoning process that led to that outcome. To accept otherwise would undermine, rather than demonstrate respect

être reconnues comme une catégorie distincte devant faire l'objet d'un contrôle selon la norme de la décision correcte; il n'existe aucune balise claire qui permet de distinguer ces questions de celles touchant à l'interprétation de sa loi habilitante par un décideur administratif. En appliquant adéquatement la norme de la décision raisonnable, les cours de justice sont en mesure de veiller à ce que les organismes administratifs agissent dans les limites des pouvoirs qui leur sont conférés sans qu'il soit nécessaire de procéder à un examen préliminaire des questions de compétence et sans avoir à recourir à la norme de la décision correcte.

À l'avenir, la cour de justice qui cherche à arrêter la norme de contrôle applicable devrait d'abord s'en remettre à la présente décision pour savoir comment s'applique le cadre général. Il est ainsi possible que la cour soit appelée à trancher des questions subsidiaires à l'égard desquelles la jurisprudence continue de donner des indications utiles et continue de s'appliquer essentiellement telle quelle, comme les affaires portant sur des questions de droit générales d'importance capitale pour le système de justice dans son ensemble ou sur des questions liées aux délimitations des compétences respectives d'organismes administratifs. Pour d'autres catégories de questions, certains arrêts, dont ceux portant sur l'effet des mécanismes d'appel prévus par la loi, sur des questions touchant véritablement à la compétence ou sur l'ancienne analyse contextuelle, auront forcément une valeur de précédent moindre.

En outre, la Cour doit donner des indications plus précises sur l'application appropriée de la norme de contrôle de la décision raisonnable, ce que signifie cette norme et comment elle devrait être appliquée en pratique. Le contrôle selon la norme de la décision raisonnable est une approche visant à faire en sorte que les cours de justice interviennent dans les affaires administratives uniquement lorsque cela est vraiment nécessaire pour préserver la légitimité, la rationalité et l'équité du processus administratif. Il tire son origine du principe de la retenue judiciaire et témoigne d'un respect envers le rôle distinct des décideurs administratifs. Toutefois, il ne s'agit pas d'une « simple formalité » ni d'un moyen visant à soustraire les décideurs administratifs à leur obligation de rendre des comptes. Bien que les cours de justice doivent reconnaître la légitimité et la compétence des décideurs administratifs et adopter une attitude de respect, les décideurs administratifs doivent adhérer à une culture de la justification et démontrer que l'exercice du pouvoir public qui leur est délégué peut être justifié. Lorsqu'elle effectue un contrôle selon la norme de la décision raisonnable, la cour de révision doit tenir compte du résultat de la décision administrative eu égard au raisonnement sous-jacent à celle-ci afin de toward, the institutional role of the administrative decision maker.

s'assurer que la décision dans son ensemble est transparente, intelligible et justifiée. Le contrôle judiciaire porte à la fois sur le résultat et sur le raisonnement à l'origine de ce résultat. Une approche différente compromettrait le rôle institutionnel du décideur administratif plutôt que de le respecter.

Reasonableness review is methodologically distinct from correctness review. The court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it. A court applying the reasonableness standard does not ask what decision it would have made in place of the administrative decision maker, attempt to ascertain the range of possible conclusions, conduct a new analysis or seek to determine the correct solution to the problem. Instead, the reviewing court must consider only whether the decision made by the decision maker, including both the rationale for the decision and the outcome to which it led, was unreasonable.

Le contrôle selon la norme de la décision raisonnable est méthodologiquement distinct du contrôle selon la norme de la décision correcte. La cour de justice effectuant un contrôle selon la norme de la décision raisonnable doit centrer son attention sur la décision même qu'a rendue le décideur administratif, notamment sur sa justification. Une cour de justice qui applique la norme de contrôle de la décision raisonnable ne se demande donc pas quelle décision elle aurait rendue à la place du décideur administratif, ne tente pas de prendre en compte l'éventail des conclusions qu'aurait pu tirer le décideur, ne se livre pas à une analyse *de novo*, et ne cherche pas à déterminer la solution correcte au problème. La cour de révision n'est plutôt appelée qu'à décider du caractère raisonnable de la décision rendue par le décideur administratif — ce qui inclut à la fois le raisonnement suivi et le résultat obtenu.

In cases where reasons are required, they are the starting point for reasonableness review, as they are the primary mechanism by which decision makers show that their decisions are reasonable. Reasons are the means by which the decision maker communicates the rationale for its decision: they explain how and why a decision was made, help to show affected parties that their arguments have been considered and that the decision was made in a fair and lawful manner, and shield against arbitrariness. A principled approach to reasonableness review is therefore one which puts those reasons first. This enables a reviewing court to assess whether the decision as a whole is reasonable. Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process.

Dans les cas où des motifs sont requis, ceux-ci constituent le point de départ du contrôle selon la norme de la décision raisonnable, car ils sont le mécanisme principal par lequel les décideurs administratifs démontrent le caractère raisonnable de leurs décisions. Les motifs sont le moyen par lequel le décideur communique la justification de sa décision : ils servent à expliquer le processus décisionnel et la raison d'être de la décision en cause, permettent de montrer aux parties concernées que leurs arguments ont été pris en compte et démontrent que la décision a été rendue de manière équitable et licite, en plus de servir de bouclier contre l'arbitraire. Toute méthode raisonnée de contrôle selon la norme de la décision raisonnable s'intéresse donc avant tout aux motifs de la décision. Cela permet à la cour de révision de déterminer si la décision dans son ensemble est raisonnable. L'attention accordée aux motifs formulés par le décideur est une manifestation de l'attitude de respect dont font preuve les cours de justice envers le processus décisionnel.

In many cases, formal reasons for a decision will not be given or required. Even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason. There will nonetheless be situations in which neither the record nor the larger context sheds light on the basis for the decision. In such cases, the reviewing court must still examine the decision in light of the relevant

Dans de nombreux cas, les motifs écrits d'une décision ne sont ni présentés, ni nécessaires. Même en l'absence de motifs, il se peut que le dossier et le contexte révèlent qu'une décision repose sur un mobile irrégulier ou sur un autre motif inacceptable. Il existe néanmoins des situations dans lesquelles ni le dossier ni le contexte général ne permettent de discerner le fondement de la décision en cause. En pareil cas, la cour de révision doit tout de même factual and legal constraints on the decision maker in order to determine whether the decision is reasonable.

It is conceptually useful to consider two types of fundamental flaws that tend to render a decision unreasonable. The first is a failure of rationality internal to the reasoning process. To be reasonable, a decision must be based on an internally coherent reasoning that is both rational and logical. A failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a line-by-line treasure hunt for error. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic. Because formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point. Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies.

The second type of fundamental flaw arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. Although reasonableness is a single standard that already accounts for context, and elements of a decision's context should not modulate the standard or the degree of scrutiny by the reviewing court, what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The governing statutory scheme, other relevant statutory or common law, the principles of statutory interpretation, the evidence before the decision maker and facts of which the decision maker may take notice, the submissions of the parties, the past practices and decisions of the administrative body, and the potential impact of the decision on the individual to whom it applies, are all elements that will generally be relevant in evaluating whether a given decision is reasonable. Such elements are not a checklist; they may vary in significance

examiner la décision à la lumière des contraintes factuelles et juridiques imposées au décideur afin de déterminer s'il s'agit d'une décision raisonnable.

Il est utile, d'un point de vue conceptuel, de s'arrêter à deux catégories de lacunes fondamentales qui tendent à rendre une décision déraisonnable. La première est le manque de logique interne du raisonnement. Pour être raisonnable, une décision doit être fondée sur un raisonnement intrinsèquement cohérent qui est à la fois rationnel et logique. Un manquement à cet égard peut amener la cour de révision à conclure qu'il y a lieu d'infirmer la décision. Le contrôle selon la norme de la décision raisonnable n'est pas une chasse au trésor, phrase par phrase, à la recherche d'une erreur. Cependant, la cour de révision doit être en mesure de suivre le raisonnement du décideur sans buter sur une faille décisive dans la logique globale. Puisqu'il faut interpréter les motifs écrits eu égard au dossier et en tenant dûment compte du régime administratif dans lequel ils sont donnés, une décision sera déraisonnable lorsque, lus dans leur ensemble, les motifs ne font pas état d'une analyse rationnelle ou montrent que la décision est fondée sur une analyse irrationnelle. Une décision sera également déraisonnable si la conclusion tirée ne peut prendre sa source dans l'analyse effectuée ou qu'il est impossible de comprendre, lorsqu'on lit les motifs en corrélation avec le dossier, le raisonnement du décideur sur un point central. De même, la logique interne d'une décision peut également être remise en question lorsque les motifs sont entachés d'erreurs manifestes sur le plan rationnel.

La seconde catégorie de lacune fondamentale se présente dans le cas d'une décision indéfendable sous certains rapports compte tenu des contraintes factuelles et juridiques pertinentes qui ont une incidence sur la décision. Même si la norme de la décision raisonnable est une norme unique qui tient déjà compte du contexte, et les éléments du contexte entourant une décision ne doivent pas altérer cette norme ou le degré d'examen que doit appliquer une cour de révision, ce qui est raisonnable dans un cas donné dépend toujours des contraintes juridiques et factuelles propres au contexte de la décision particulière sous examen. Ces contraintes d'ordre contextuel cernent les limites et les contours de l'espace à l'intérieur duquel le décideur peut agir, ainsi que les types de solution qu'il peut retenir. Le régime législatif applicable, tout autre principe législatif ou principe de common law pertinent, les principes d'interprétation des lois, la preuve portée à la connaissance du décideur et les faits dont le décideur peut prendre connaissance d'office, les observations des parties, les pratiques et décisions antérieures de l'organisme administratif et depending on the context and will necessarily interact with one another.

l'impact potentiel de la décision sur l'individu qui en fait l'objet sont tous des éléments qui sont généralement utiles pour déterminer si une décision est raisonnable. Ces éléments ne doivent pas servir de liste de vérification; leur importance peut varier selon le contexte et ils interagissent forcément entre eux.

Accordingly, a reviewing court may find that a decision is unreasonable when examined against these contextual considerations. Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. A proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority.

En conséquence, il se peut que la cour de révision estime qu'une décision est déraisonnable au regard de ces considérations contextuelles. Comme les décideurs administratifs tiennent leurs pouvoirs d'une loi, le régime législatif applicable est probablement l'aspect le plus important du contexte juridique d'une décision donnée. L'application appropriée de la norme de la décision raisonnable permet de dissiper la crainte que le décideur administratif puisse interpréter la portée de sa propre compétence de manière à étendre ses pouvoirs au-delà de ce que voulait le législateur. La question de savoir si une interprétation est justifiée dépendra du contexte, notamment des mots choisis par le législateur pour décrire les limites et les contours du pouvoir du décideur.

Both statutory and common law will also impose constraints on how and what an administrative decision maker can lawfully decide. Any precedents on the issue before the administrative decision maker or on a similar issue, as well as international law in some administrative decision making contexts, will act as a constraint on what the decision maker can reasonably decide. Whether an administrative decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination.

Le droit — tant la loi que la common law — limitera lui aussi l'éventail des options qui s'offrent légalement au décideur administratif chargé de trancher un cas particulier. Tout précédent sur la question soumise au décideur administratif ou sur une question semblable, ainsi que le droit international dans certains domaines du processus décisionnel administratif, aura pour effet de circonscrire l'éventail des issues raisonnables. La question de savoir si le décideur administratif a agi raisonnablement en adaptant une règle de droit ou d'equity appelle un examen fondé dans une très large mesure sur le contexte.

Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Where this is the applicable standard, the reviewing court does not undertake a *de novo* analysis of the question or ask itself what the correct decision would have been. But an approach to reasonableness review that respects legislative intent must assume that those who interpret the law, whether courts or administrative decision makers, will do so in a manner consistent with the modern principle of statutory interpretation. Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision.

Les questions d'interprétation de la loi ne reçoivent pas un traitement exceptionnel. Comme toute autre question de droit, on peut les évaluer en appliquant la norme de la décision raisonnable. S'il s'agit de la norme applicable, la cour de révision ne procède pas à une analyse *de novo* de la question soulevée ni ne se demande ce qu'aurait été la décision correcte. Mais une méthode de contrôle selon la norme de la décision raisonnable qui respecte l'intention du législateur doit tenir pour acquis que les instances chargées d'interpréter la loi — qu'il s'agisse des cours de justice ou des décideurs administratifs — effectueront cet exercice conformément au principe moderne en matière d'interprétation des lois. Les décideurs administratifs ne sont pas tenus dans tous les cas de procéder à une interprétation formaliste de la loi. Or, quelle que soit la forme que prend l'opération d'interprétation d'une disposition législative, le fond de l'interprétation de celle-ci par le décideur administratif doit être conforme à son texte, à son contexte et à son objet.

Furthermore, the decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. The reasons must also meaningfully account for the central issues and concerns raised by the parties, even though reviewing courts cannot expect administrative decision makers to respond to every argument or line of possible analysis.

Qui plus est, le décideur doit prendre en considération la preuve versée au dossier et la trame factuelle générale qui a une incidence sur sa décision et celle-ci doit être raisonnable au regard de ces éléments. Le caractère raisonnable d'une décision peut être compromis si le décideur s'est fondamentalement mépris sur la preuve qui lui a été soumise ou n'en a pas tenu compte. Les motifs doivent aussi tenir valablement compte des questions et préoccupations centrales soulevées par les parties, même si les cours de révision ne peuvent s'attendre à ce que les décideurs administratifs répondent à tous les arguments ou modes possibles d'analyse.

While administrative decision makers are not bound by their previous decisions, they must be concerned with the general consistency of administrative decisions. Therefore, whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Finally, individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention.

Bien que les décideurs administratifs ne soient pas liés par leurs décisions antérieures, ils doivent se soucier de l'uniformité générale des décisions administratives. La question de savoir si une décision en particulier est conforme à la jurisprudence de l'organisme administratif est donc elle aussi une contrainte dont devrait tenir compte la cour de révision au moment de décider si cette décision est raisonnable. Enfin, les individus ont droit à une plus grande protection procédurale lorsque la décision sous examen est susceptible d'avoir des répercussions personnelles importantes ou de leur causer un grave préjudice. Lorsque la décision a des répercussions sévères sur les droits et intérêts de l'individu visé, les motifs fournis à ce dernier doivent refléter ces enjeux. Le principe de la justification adaptée aux questions et préoccupations soulevées veut que, si les conséquences sont particulièrement graves pour l'individu concerné, le décideur explique pourquoi sa décision reflète le mieux l'intention du législateur.

The question of the appropriate remedy — specifically, whether a court that quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons — is multi-faceted. The choice of remedy must be guided by the rationale for applying the reasonableness standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, concerns related to the proper administration of the justice system, the need to ensure access to justice and the goal of expedient and cost-efficient decision making. Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons. However, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended. An intention that the administrative

La question de la réparation qu'il convient d'accorder — en l'occurrence celle de savoir si la cour qui casse une décision déraisonnable devrait exercer son pouvoir discrétionnaire de renvoyer l'affaire pour réexamen à la lumière des motifs donnés par la cour — revêt de multiples facettes. Le choix de la réparation doit être guidé par la raison d'être de l'application de cette norme, y compris le fait pour la cour de révision de reconnaître que le législateur a confié le règlement de l'affaire à un décideur administratif, et non à une cour, les préoccupations liées à la bonne administration du système de justice, à la nécessité d'assurer l'accès à la justice et à la volonté de mettre sur pied un processus décisionnel à la fois rapide et économique. Donner effet à ces principes dans le contexte de la réparation signifie que, lorsque la décision contrôlée selon la norme de la décision raisonnable ne peut être confirmée, il conviendra le plus souvent de renvoyer l'affaire au décideur pour réexamen à la lumière des motifs donnés par la cour. Cependant, il y a des situations limitées dans lesquelles le renvoi de l'affaire pour nouvel examen fait échec au souci de résolution rapide et efficace d'une decision maker decide the matter at first instance cannot give rise to endless judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose. Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and efficient use of public resources may also influence the exercise of a court's discretion to remit the matter.

manière telle qu'aucune législature n'aurait pu souhaiter. L'intention que le décideur administratif tranche l'affaire en première instance ne saurait donner lieu à un va-et-vient interminable de contrôles judiciaires et de nouveaux examens. Le refus de renvoyer l'affaire au décideur peut s'avérer indiqué lorsqu'il devient évident qu'un résultat donné est inévitable, si bien que le renvoi de l'affaire ne servirait à rien. Les préoccupations concernant les délais, l'équité envers les parties, le besoin urgent de régler le différend, la nature du régime de réglementation donné, la possibilité réelle ou non pour le décideur administratif de se pencher sur la question en litige, les coûts pour les parties et l'utilisation efficace des ressources publiques peuvent aussi influer sur l'exercice par la cour de son pouvoir discrétionnaire de renvoyer l'affaire.

In the case at bar, there is no basis for departing from the presumption of reasonableness review. The Registrar's decision has come before the courts by way of judicial review, not by way of a statutory appeal. Given that Parliament has not prescribed the standard to be applied, there is no indication that the legislature intended a standard of review other than reasonableness. The Registrar's decision does not give rise to any constitutional questions, general questions of law of central importance to the legal system as a whole or questions regarding the jurisdictional boundaries between administrative bodies. As a result, the standard to be applied in reviewing the Registrar's decision is reasonableness.

Rien ne permet de s'écarter de la présomption de contrôle selon la norme de la décision raisonnable en l'espèce. La décision de la greffière a été soumise aux cours de justice par voie de contrôle judiciaire et non par voie d'appel prévu par la loi. Étant donné que le Parlement n'a pas prescrit la norme à appliquer, rien n'indique que le législateur voulait qu'une autre norme que celle de la décision raisonnable soit appliquée. La décision de la greffière ne soulève pas de questions constitutionnelles, de questions de droit générales d'importance capitale pour le système juridique dans son ensemble ou de questions liées aux délimitations des compétences respectives d'organismes administratifs. En conséquence, la décision de la greffière doit être examinée selon la norme de la décision raisonnable.

The Registrar's decision was unreasonable. She failed to justify her interpretation of s. 3(2)(a) in light of the constraints imposed by s. 3 considered as a whole, by international treaties that inform its purpose, by the jurisprudence on the interpretation of s. 3(2)(a), and by the potential consequences of her interpretation. Each of these elements — viewed individually and cumulatively — strongly supports the conclusion that s. 3(2)(a) was not intended to apply to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities. Though V had raised many of these considerations, the Registrar failed to address those submissions in her reasons and did not do more than conduct a cursory review of the legislative history of s. 3(2)(a) and conclude that her interpretation was not explicitly precluded by its text.

La décision de la greffière est déraisonnable. Elle n'a pas justifié son interprétation de l'al. 3(2)a) à la lumière des contraintes qu'imposent l'art. 3 pris dans son ensemble, les traités internationaux qui éclairent l'objet de cette disposition, la jurisprudence relative à l'interprétation de l'al. 3(2)a), et les conséquences possibles de son interprétation. Chacun de ces éléments — pris individuellement ainsi que dans leur ensemble — appuie fortement la conclusion selon laquelle l'al. 3(2)a) n'est pas censé s'appliquer aux enfants de représentants ou d'employés au service d'un gouvernement étranger à qui on n'avait pas accordé de privilèges et d'immunités diplomatiques. Bien que V ait soulevé bon nombre de ces considérations, la greffière n'a pas traité de ces arguments dans ses motifs et n'a pas fait davantage que se livrer à un examen superficiel de l'historique législatif de l'al. 3(2)a) et conclure que le libellé de celui-ci n'excluait pas explicitement son interprétation.

First, the Registrar failed to address the immediate statutory context of s. 3(2)(a), which provides clear support

En premier lieu, la greffière n'a pas examiné le contexte législatif qui entoure l'al. 3(2)a), lequel étaye clairement la for the conclusion that all of the persons contemplated by s. 3(2)(a) must have been granted diplomatic privileges and immunities in some form for the exception to apply. Second, the Registrar disregarded compelling submissions that s. 3(2) is a narrow exception consistent with established principles of international law and with the leading international treaties that extend diplomatic privileges and immunities to employees and representatives of foreign governments. Third, it was a significant omission to ignore the relevant cases that were before the Registrar which suggest that s. 3(2)(a) was intended to apply only to those individuals whose parents have been granted diplomatic privileges and immunities. Finally, there is no evidence that the Registrar considered the potential consequences of expanding her interpretation of s. 3(2)(a) to include all individuals who have not been granted diplomatic privileges and immunities. Rules concerning citizenship require a high degree of interpretive consistency in order to shield against arbitrariness. The Registrar's interpretation cannot be limited to the children of spies — its logic would be equally applicable to other scenarios. As well, provisions such as s. 3(2)(a) must be given a narrow interpretation because they potentially take away rights which otherwise benefit from a liberal and broad interpretation. Yet there is no indication that the Registrar considered the potential harsh consequences of her interpretation, or whether, in light of those potential consequences, Parliament would have intended s. 3(2)(a) to apply in this manner. Although the Registrar knew her interpretation was novel, she failed to provide a rationale for her expanded interpretation.

conclusion selon laquelle toutes les personnes visées par l'al. 3(2)a) doivent s'être vu accorder certains privilèges et immunités diplomatiques pour que l'exception trouve application. En deuxième lieu, la greffière a fait fi des observations convaincantes voulant que la raison d'être du par. 3(2) consiste à instituer une exception étroite conformément aux principes établis du droit international et aux traités internationaux d'importance en vertu desquels les employés et représentants au service d'un gouvernement étranger bénéficient de privilèges et immunités diplomatiques. En troisième lieu, il s'agissait d'une omission importante que d'ignorer les décisions pertinentes portées à la connaissance de la greffière qui tendent à indiquer que l'al. 3(2)a) n'est censé s'appliquer qu'aux personnes dont les parents se sont vu accorder des privilèges et immunités diplomatiques. En dernier lieu, rien n'établit que la greffière a tenu compte des conséquences que peut avoir le fait d'étendre son interprétation de l'al. 3(2)a) à l'ensemble des personnes à qui on n'a pas accordé de privilèges et d'immunités diplomatiques. Les règles concernant la citoyenneté commandent une grande uniformité en matière d'interprétation pour se prémunir contre la perception d'arbitraire. L'interprétation de la greffière ne saurait se limiter aux enfants d'espions; sa logique vaudrait tout autant dans d'autres cas. En outre, il faut donner aux dispositions telles que l'al. 3(2)a) une interprétation étroite puisqu'elles refusent ou risquent d'enlever des droits qui autrement recevraient une interprétation large et libérale. Néanmoins, rien n'indique que la greffière a pris en compte les possibles conséquences sévères de son interprétation ou que, compte tenu de ces conséquences éventuelles, elle s'est demandée si le Parlement aurait voulu que l'al. 3(2)a) s'applique de cette manière. Même si la greffière était au fait du caractère inédit de son interprétation, elle n'a pas motivé cette interprétation élargie.

It was therefore unreasonable for the Registrar to find that s. 3(2)(a) can apply to individuals whose parents have not been granted diplomatic privileges and immunities in Canada. It is undisputed that V's parents had not been granted such privileges and immunities. No purpose would therefore be served by remitting this matter to the Registrar. Given that V was born in Canada, his status is governed only by the general rule of citizenship by birth. He is a Canadian citizen.

Il était donc déraisonnable de la part de la greffière de décider que l'al. 3(2)a) peut s'appliquer aux personnes dont les parents ne se sont pas vu accorder de privilèges et immunités diplomatiques au Canada. Nul ne conteste que les parents de V ne s'étaient pas vu accorder pareils privilèges et immunités. En conséquence, il ne servirait à rien de renvoyer l'affaire à la greffière. En tant que personne née au Canada, V dispose d'un statut régi uniquement par la règle générale de la citoyenneté de naissance. Il est citoyen canadien.

Per Abella and Karakatsanis JJ.: There is agreement with the majority that the appeal should be dismissed. The Registrar's decision to cancel V's citizenship certificate was unreasonable and was properly quashed by the Court of Appeal.

Les juges Abella et Karakatsanis : Il y a accord avec les juges majoritaires pour rejeter le pourvoi. La décision de la greffière d'annuler le certificat de citoyenneté de V était déraisonnable et la Cour d'appel a eu raison de la casser.

There is also agreement with the majority that there should be a presumption of reasonableness in judicial review. The contextual factors analysis should be eliminated from the standard of review framework, and "true questions of jurisdiction" should be abolished as a separate category of issues subject to correctness review. However, the elimination of these elements does not support the foundational changes to judicial review outlined in the majority's framework that result in expanded correctness review. Rather than confirming a meaningful presumption of deference for administrative decision-makers, the majority strips away deference from hundreds of administrative actors, based on a formalistic approach that ignores the legislature's intention to leave certain legal and policy questions to administrative decision-makers. The majority's presumption of reasonableness review rests on a totally new understanding of legislative intent and the rule of law and prohibits any consideration of well-established foundations for deference. By dramatically expanding the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis, the majority's framework fundamentally reorients the relationship between administrative actors and the judiciary, thus advocating a profoundly different philosophy of administrative law.

Il y a également accord avec la majorité pour dire qu'il doit y avoir présomption d'application de la norme de la décision raisonnable en cas de contrôle judiciaire. L'analyse contextuelle doit être éliminée du cadre d'analyse applicable à la norme de contrôle, et la catégorie des « questions touchant vraiment à la compétence » doit être abolie en tant que catégorie distincte de questions assujetties à la norme de la décision correcte. Toutefois, l'élimination de ces éléments ne justifie pas les modifications fondamentales apportées au contrôle judiciaire qui sont décrites dans le cadre proposé par la majorité et qui entraînent un élargissement du contrôle judiciaire fondé sur la norme de la décision correcte. Au lieu de confirmer l'existence d'une présomption significative de déférence en faveur des décideurs administratifs, la majorité prive de déférence des centaines d'acteurs administratifs, en appliquant une approche formaliste qui néglige la volonté du législateur de laisser à des décideurs administratifs le soin de trancher certaines questions de droit et de politique. La présomption d'application de la norme de la décision raisonnable qu'énonce la majorité repose sur une compréhension totalement nouvelle de l'intention du législateur et de la primauté du droit et interdit toute prise en compte des postulats bien établis du principe de la déférence. En élargissant considérablement les circonstances dans lesquelles les juges généralistes pourront substituer leur propre opinion à celle des décideurs spécialisés qui exercent leur mandat au quotidien, le cadre proposé par la majorité réoriente complètement le rapport entre les acteurs administratifs et la magistrature, et préconise du même coup une philosophie du droit administratif profondément différente.

The majority's framework rests on a flawed and incomplete conceptual account of judicial review, one that unjustifiably ignores the specialized expertise of administrative decision-makers and reads out the foundations of the modern understanding of legislative intent. Instead of understanding legislative intent as being the intention to leave legal questions within their mandate to specialized decision-makers with expertise, the majority removes expertise from the equation entirely. In so doing, the majority disregards the historically accepted reason why the legislature intended to delegate authority to an administrative actor. In particular, such an approach ignores the possibility that specialization and expertise are embedded into this legislative choice. Post-*Dunsmuir*, the Court has been steadfast in confirming the central role of specialization and expertise, affirming their connection to legislative intent, and recognizing that they give administrative decision-makers the interpretative upper hand on questions of law. Specialized expertise has become the core

Le cadre établi par la majorité repose sur une conception du contrôle judiciaire qui est à la fois erronée et incomplète et qui néglige sans raison valable l'expertise spécialisée des décideurs administratifs et fait fi des fondements de la conception moderne de l'intention du législateur. Au lieu de considérer que la volonté du législateur est de confier à des décideurs spécialisés possédant une expertise en la matière le soin de trancher les questions de droit relevant de leur mandat, la majorité fait table rase de l'expertise de ces décideurs. Ce faisant, la majorité ne tient pas compte de la raison historiquement reconnue pour laquelle le législateur souhaitait déléguer des pouvoirs à des acteurs administratifs. En particulier, cette approche ne tient pas compte de la possibilité que la spécialisation et l'expertise fassent partie intégrante de ce choix du législateur. Depuis l'arrêt *Dunsmuir*, la Cour n'a cessé de confirmer le rôle central que jouent la spécialisation et l'expertise, de confirmer le lien entre celles-ci et l'intention du législateur et de reconnaître rationale for deference. Giving proper effect to the legislature's choice to delegate authority to an administrative decision-maker requires understanding the advantages that the decision-maker may enjoy in exercising its mandate. Chief among those advantages are the institutional expertise and specialization inherent to administering a particular mandate on a daily basis. In interpreting their enabling statutes, administrative actors may have a particularly astute appreciation for the on-the-ground consequences of particular legal interpretations, of statutory context, of the purposes that a provision or legislative scheme are meant to serve, and of specialized terminology. The advantages stemming from specialization and expertise provide a robust foundation for deference. The majority's approach accords no weight to such institutional advantages and banishes expertise from the standard of review analysis entirely. The removal of the current conceptual basis for deference opens the gates to expanded correctness review.

In the majority's framework, deference gives way whenever the rule of law demands it. This approach, however, flows from a court-centric conception of the rule of law. The rule of law means that administrative decision-makers make legal determinations within their mandate; it does not mean that only judges decide questions of law with an unrestricted license to substitute their opinions for those of administrative actors through correctness review. The majority's approach not only erodes the presumption of deference; it erodes confidence in the fact that law-making and legal interpretation are shared enterprises between courts and administrative decision-makers. Moreover, access to justice is at the heart of the legislative choice to establish a robust system of administrative law. This goal is compromised when a narrow conception of the rule of law is invoked to impose judicial hegemony over administrative decision-makers, which adds unnecessary expense and complexity. Authorizing more incursions into the administrative system by judges and permitting *de novo* review of every legal decision adds to the delay and cost of obtaining a final decision.

The majority's reformulation of "legislative intent" invites courts to apply an irrebuttable presumption of correctness review whenever an administrative scheme

qu'elles confèrent aux décideurs administratifs un privilège en matière d'interprétation sur les questions de droit. L'expertise spécialisée est devenue la principale raison invoquée pour justifier la déférence. Pour donner l'effet voulu à la volonté du législateur de déléguer des pouvoirs aux décideurs administratifs, il faut comprendre les avantages que peut comporter l'exercice, par ces décideurs, de leur mandat. Parmi ces avantages se trouvent, au premier chef, l'expertise institutionnelle et la spécialisation inhérentes à l'exécution quotidienne d'un mandat particulier. Lorsqu'ils interprètent leur loi habilitante, les acteurs administratifs sont particulièrement bien placés pour saisir avec justesse les conséquences concrètes d'interprétations juridiques particulières, le contexte législatif, les objectifs qu'une disposition ou un régime législatifs sont censés viser et la terminologie spécialisée. Les avantages conférés par la spécialisation et l'expertise constituent une raison convaincante de faire preuve de déférence. L'approche préconisée par la majorité n'accorde aucun poids à de tels avantages institutionnels et évacue totalement l'expertise de l'analyse relative à la norme de contrôle. La suppression du fondement conceptuel qui justifie actuellement la déférence ouvre les portes à un contrôle judiciaire élargi fondé sur la norme de la décision correcte.

Selon le cadre proposé par la majorité, la déférence est éclipsée chaque fois que la primauté du droit l'exige. Cette approche découle toutefois d'une conception judiciarisée de la primauté du droit. La primauté du droit signifie que les décideurs administratifs prennent des décisions juridiques dans le cadre de leur mandat; elle ne signifie pas que seuls les juges peuvent trancher des questions de droit et ont carte blanche pour substituer leur opinion à celle des acteurs administratifs par le biais d'un contrôle selon la norme de la décision correcte. L'approche de la majorité à la fois affaiblit la présomption de déférence, et mine la confiance dans le fait que l'élaboration et l'interprétation du droit relèvent de la participation commune des tribunaux judiciaires et des décideurs administratifs. De plus, l'accès à la justice est au cœur du choix du législateur d'instaurer un système de droit administratif solide. Cet objectif est compromis lorsqu'on invoque une conception étroite de la primauté du droit pour imposer l'hégémonie judiciaire aux décideurs administratifs, ce qui augmente inutilement les coûts et la complexité. Permettre aux juges de s'immiscer encore plus dans la justice administrative et permettre un examen *de novo* de chaque décision juridique allonge les délais et augmente les frais engagés pour obtenir une décision définitive.

La reformulation de la notion de « l'intention du législateur » proposée par la majorité invite les cours à appliquer une présomption irréfragable d'application de la includes a right of appeal. Elevating appeal clauses to indicators of correctness review creates a two-tier system that defers to the expertise of administrative decision-makers only where there is no appeal clause. Yet appeal rights do not represent a different institutional structure that requires a more searching form of review. The mere fact that a statute contemplates an appeal says nothing about the degree of deference required in the review process. The majority's position hinges almost entirely on a textualist argument — i.e., that the presence of the word "appeal" indicates a legislative intent that courts apply the same standards of review found in civil appellate jurisprudence. This disregards long-accepted institutional distinctions between courts and administrative decision-makers. The continued use by legislatures of the term "appeal" cannot be imbued with the intent that the majority ascribes to it. The idea that appellate standards of review must be applied to every right of appeal is entirely unsupported by the jurisprudence. For at least 25 years, the Court has not treated statutory rights of appeal as a determinative reflection of legislative intent, and such clauses have played little or no role in the standard of review analysis. Moreover, pre-*Dunsmuir*, statutory rights of appeal were still seen as only one factor and not as unequivocal indicators of correctness review. Absent exceptional circumstances, a statutory right of appeal does not displace the presumption of reasonableness.

The majority's disregard for precedent and *stare decisis* has the potential to undermine both the integrity of the Court's decisions, and public confidence in the stability of the law. *Stare decisis* places significant limits on the Court's ability to overturn its precedents. The doctrine promotes the predictable and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the integrity of the judicial process. Respect for precedent also safeguards the Court's institutional legitimacy. The precedential value of a judgment does not expire with the tenure of the panel of judges that decided it. When the Court does choose to overrule its own precedents, it should do so carefully, with moderation, and with due regard for all the important considerations

norme de la décision correcte lorsqu'un régime administratif prévoit un droit d'appel. En élevant des dispositions créant un droit d'appel au rang d'indicateurs d'un contrôle assujetti à la norme de la décision correcte, on crée un système de droit administratif à deux vitesses dans lequel les juges s'en remettent à l'expertise des décideurs administratifs seulement lorsqu'il n'existe pas de disposition d'appel. Cependant, l'existence de droits d'appel ne crée pas un régime institutionnel différent qui commanderait un contrôle plus fouillé. Le simple fait qu'une loi envisage la possibilité d'un appel ne permet pas de tirer de conclusions quant au degré de déférence requis lors du contrôle en question. La position de la majorité repose presque exclusivement sur un argument textuel suivant lequel la présence du mot « appel » indique que le législateur voulait que les cours de révision appliquent les mêmes normes de contrôle que celles que les cours d'appel appliquent dans leurs arrêts en matière civile. Cela néglige les distinctions institutionnelles qui sont reconnues depuis longtemps entre les tribunaux judiciaires et les décideurs administratifs. L'emploi systématique du terme « appel » par les législatures ne saurait s'expliquer par l'intention que la majorité lui prête. L'idée selon laquelle il faut appliquer les normes de contrôle d'appel à tous les droits d'appel ne trouve aucun appui dans la jurisprudence. Depuis au moins 25 ans, la Cour ne considère pas les droits d'appel accordés par une loi comme une expression déterminante de l'intention du législateur, et de telles dispositions ne sont presque pas ou pas du tout entrées en ligne de compte dans l'analyse relative à la norme de contrôle. De surcroît, avant l'arrêt *Dunsmuir*, les droits d'appel conférés par la loi n'étaient encore perçus que comme un facteur parmi d'autres et non comme des indices sans équivoque d'un contrôle selon la norme de la décision correcte. Sauf en présence de circonstances exceptionnelles, un droit d'appel conféré par la loi n'écarte pas la présomption d'application de la norme de la décision raisonnable.

Le mépris de la majorité pour les précédents et la règle du *stare decisis* risque de compromettre l'intégrité des décisions de la Cour et d'ébranler la confiance du public à l'égard de la stabilité du droit. La règle du *stare decisis* limite considérablement la capacité de la Cour d'infirmer ses propres précédents. La doctrine favorise le développement prévisible et cohérent des principes de droit, favorise la confiance envers les décisions judiciaires et contribue à l'intégrité du processus judiciaire. Le respect des précédents préserve également la légitimité institutionnelle de la Cour. Les décisions de la Cour ne perdent pas leur valeur de précédent avec le départ des juges qui y ont participé. Lorsque la Cour choisit d'écarter ses propres précédents, elle doit le faire avec prudence et modération that undergird the doctrine of *stare decisis*. A nuanced balance must be struck between maintaining the stability of the common law and ensuring that the law is flexible and responsive enough to adapt to new circumstances and societal norms. *Stare decisis* plays a critical role in maintaining that balance and upholding the rule of law.

et en tenant dûment compte de toutes les considérations importantes qui sous-tendent la doctrine du *stare decisis*. On doit trouver un équilibre subtil entre le maintien de la stabilité de la common law et l'assurance que le droit est suffisamment souple et réceptif pour s'adapter à de nouvelles réalités et à l'évolution des normes sociales. La règle du *stare decisis* joue un rôle essentiel pour maintenir cet équilibre et assurer le respect de la primauté du droit.

There is no principled justification for departing from the existing jurisprudence and abandoning the Court's long-standing view of how statutory appeal clauses impact the standard of review analysis. In doing so, the majority disregards the high threshold required to overturn the Court's decisions. The unprecedented wholesale rejection of an entire body of jurisprudence is particularly unsettling. The affected cases are numerous and include many decisions conducting deferential review even in the face of a statutory right of appeal and bedrock judgments affirming the relevance of administrative expertise to the standard of review analysis. Overruling these judgments flouts *stare decisis*, which prohibits courts from overturning past decisions that simply represent a choice with which the current bench does not agree. The majority's approach also has the potential to disturb settled interpretations of many statutes that contain a right of appeal; every existing interpretation of such statutes that has been affirmed under a reasonableness standard will be open to fresh challenge. Moreover, if the Court, in its past decisions, misconstrued the purpose of statutory appeal clauses, legislatures were free to clarify this interpretation through legislative amendment. In the absence of legislative correction, the case for overturning decisions is even less compelling.

Il n'existe aucune raison logique justifiant de rompre avec la jurisprudence existante et d'abandonner la conception bien établie de la Cour quant à l'effet des dispositions législatives créant un droit d'appel sur l'analyse de la norme de contrôle. Ce faisant, la majorité ne tient pas compte du critère rigoureux auquel il faut satisfaire pour pouvoir écarter l'une des décisions de la Cour. Le rejet en bloc sans précédent de tout un arsenal jurisprudentiel est particulièrement troublant. Les arrêts touchés sont nombreux et comprennent maintes décisions rendues aux termes d'un contrôle fondé sur la déférence en dépit de l'existence d'un droit d'appel conféré par la loi ainsi que des arrêts fondamentaux confirmant la pertinence de l'expertise administrative pour l'analyse de la norme de contrôle. L'abandon de ces jugements bafoue la règle du *stare decisis* qui interdit aux tribunaux d'écarter des décisions antérieures qui représentent simplement une solution à laquelle la formation actuelle ne souscrit pas. L'approche de la majorité risque également de bousculer les interprétations établies de nombreuses lois prévoyant un droit d'appel; chaque interprétation existante de ces lois qui a été confirmée en appliquant la norme de contrôle de la décision raisonnable sera susceptible d'être remise en question. Par ailleurs, si la Cour s'était, dans ses décisions antérieures, méprise sur l'objet des dispositions d'appel prévues par la loi, il aurait alors été loisible aux législateurs de clarifier cette interprétation au moyen d'une modification législative. En l'absence d'intervention du législateur, les arguments militant en faveur du renversement des décisions antérieures sont encore moins convaincants.

The Court should offer additional direction on reasonableness review so that judges can provide careful and meaningful oversight of the administrative justice system while respecting its legitimacy and the perspectives of its front-line, specialized decision-makers. However, rather than clarifying the role of reasons and how to review them, the majority revives the kind of search for errors that dominated the Court's prior jurisprudence. The majority's multi-factored, open-ended list of constraints on administrative decision making will encourage reviewing courts to dissect administrative reasons in a line-by-line hunt for error. These constraints may function in practice as a wide-ranging catalogue of hypothetical errors to justify

La Cour devrait fournir des balises supplémentaires quant à la façon de procéder à un contrôle judiciaire fondé sur la norme de la décision raisonnable afin que les juges puissent assurer une surveillance minutieuse et concrète du système de justice administrative tout en respectant la légitimité de celui-ci et le point de vue des décideurs spécialisés de première ligne. Toutefois, plutôt que de clarifier le rôle que jouent les motifs et de préciser comment on doit les contrôler, la majorité ressuscite la démarche axée sur la recherche d'erreurs qui occupait une place prépondérante dans l'ancienne jurisprudence de la Cour. La liste multifactorielle et non limitative des contraintes à la prise de décisions administratives dressée par la majorité incitera quashing an administrative decision. Structuring reasonableness review in this fashion effectively imposes on administrative decision-makers a higher standard of justification than on trial judges. Such an approach undercuts deference. Reasonableness review should instead focus on the concept of deference to administrative decision-makers and to the legislative intention to confide in them a mandate. Curial deference is the hallmark of reasonableness review, setting it apart from the substitution of opinion permitted under correctness.

les cours de révision à disséquer les motifs administratifs et à se lancer dans une chasse au trésor, phrase par phrase, à la recherche d'une erreur. En pratique, ces contraintes risquent de se transformer en un vaste catalogue d'erreurs hypothétiques qui peuvent servir à justifier l'annulation d'une décision administrative. Cette façon de structurer le contrôle selon la norme de la décision raisonnable astreint effectivement les décideurs administratifs à une norme de justification plus exigeante que celle qui s'applique aux juges de première instance. Cette approche sape la déférence. Le contrôle judiciaire selon la norme de la décision raisonnable devrait plutôt être centré sur le principe de la déférence à l'égard des décideurs administratifs et de l'intention du législateur de leur confier un mandat. La retenue judiciaire est la marque distinctive du contrôle selon la norme de la décision raisonnable et ce qui le distingue de la norme de la décision correcte, laquelle permet à la cour de substituer son opinion à celle du décideur administratif.

Deference imposes three requirements on courts conducting reasonableness review. First, deference is the attitude a reviewing court must adopt towards an administrative decision-maker. Deference mandates respect for the legislative choice to entrust a decision to administrative actors rather than to the courts, for the important role that administrative decision-makers play, and for their specialized expertise and the institutional setting in which they operate. Reviewing courts must pay respectful attention to the reasons offered for an administrative decision, make a genuine effort to understand why the decision was made, and give the decision a fair and generous construction. Second, deference affects how a court frames the question it must answer and the nature of its analysis. A reviewing court does not ask how it would have resolved an issue, but rather whether the answer provided by the decision-maker was unreasonable. Ultimately, whether an administrative decision is reasonable depends on the context, and a reviewing court must be attentive to all relevant circumstances, including the reasons offered to support the decision, the record, the statutory scheme and the particular issues raised, among other factors. Third, deferential review impacts how a reviewing court evaluates challenges to a decision. The party seeking judicial review bears the onus of showing that the decision was unreasonable; the decision-maker does not have to persuade the court that its decision is reasonable.

Le principe de la déférence soumet à trois exigences les tribunaux qui procèdent à un contrôle selon la norme de la décision raisonnable. D'abord, la déférence est l'attitude que la cour de révision doit adopter à l'égard du décideur administratif. Le principe de la déférence commande le respect du choix du législateur de confier à des acteurs administratifs plutôt qu'aux cours de justice le soin de rendre certaines décisions et la reconnaissance du rôle important que jouent les décideurs administratifs, ainsi que de leur expertise spécialisée et du cadre institutionnel dans lequel ils évoluent. Les cours de révision doivent également accorder une attention respectueuse aux motifs donnés à l'appui d'une décision administrative, s'efforcer sincèrement de comprendre la décision et interpréter la décision de façon équitable et généreuse. En deuxième lieu, le principe de la déférence influe sur la façon dont un tribunal formule la question à laquelle il doit répondre et la nature de l'analyse qu'il mènera. La cour de révision ne cherche pas à savoir comment elle aurait résolu la question, mais plutôt si la réponse donnée par le décideur administratif était déraisonnable. En fin de compte, la question de savoir si une décision administrative est raisonnable dépend du contexte, et la cour de révision doit tenir compte de toutes les circonstances pertinentes, y compris les motifs invoqués au soutien de la décision, le dossier, le régime législatif et les questions particulières soulevées par le demandeur, parmi d'autres facteurs. Troisièmement, le contrôle fondé sur le principe de la déférence influence la façon dont la cour de révision évalue la contestation dont fait l'objet la décision. Il incombe à la partie réclamant le contrôle judiciaire de démontrer que la décision en cause est déraisonnable; le décideur n'a pas à convaincre la cour de justice que sa décision est raisonnable.

The administrative decision itself is the focal point of the review exercise. In all cases, the question remains whether the challenging party has demonstrated that a decision is unreasonable. Where reasons are neither required nor available, reasonableness may be justified by past decisions of the administrative body or in light of the procedural context. Where reasons are provided, they serve as the natural starting point to determine whether the decision-maker acted reasonably. By beginning with the reasons, read in light of the surrounding context and the grounds raised, reviewing courts provide meaningful oversight while respecting the legitimacy of specialized administrative decision making. Reviewing courts should approach the reasons with respect for the specialized decision-makers, their significant role and the institutional context chosen by the legislator. Reviewing courts should not second-guess operational implications, practical challenges and on-the-ground knowledge and must remain alert to specialized concepts or language. Further, a reviewing court is not restricted to the four corners of the written reasons and should, if faced with a gap in the reasons, look to other materials to see if they shed light on the decision, including: the record of any formal proceedings and the materials before the decision-maker, past decisions of the administrative body, and policies or guidelines developed to guide the type of decision under review. These materials may assist a court in understanding the outcome. In these ways, reviewing courts may legitimately supplement written reasons without supplanting the analysis. Reasons must be read together with the outcome to determine whether the result falls within a range of possible outcomes. This approach puts substance over form where the basis for a decision is evident on the record, but not clearly expressed in written reasons.

La décision administrative est en soi le point de mire du contrôle judiciaire. Dans tous les cas, la question à trancher demeure celle de savoir si la partie qui conteste la décision a démontré que celle-ci est déraisonnable. Lorsque le décideur n'est pas tenu de motiver sa décision ou qu'il est impossible d'obtenir les motifs de la décision, le caractère raisonnable de la décision peut être démontré à l'aide de décisions antérieures de l'organisme administratif ou à la lumière du contexte procédural. Pour déterminer si le décideur a agi raisonnablement, la cour de révision doit d'abord, cela va de soi, examiner les motifs, s'il en est, qui ont été exposés. En se penchant d'abord sur les motifs de la décision, à la lumière du contexte qui l'entoure et des arguments invoqués pour la contester, la cour de révision procède à un véritable contrôle tout en respectant la légitimité du processus décisionnel des autorités administratives spécialisées. Les cours de révision devraient aborder les motifs dans un esprit de respect envers les décideurs spécialisés, le rôle important qui leur a été confié et le contexte institutionnel choisi par le législateur. Elles devraient se garder de reconsidérer les incidences concrètes, les difficultés d'ordre pratique de même que les connaissances de terrain, et demeurer attentives aux concepts ou termes spécialisés. De plus, l'examen qu'effectue la cour de révision ne se limite pas à la teneur même des motifs écrits de la décision; lorsqu'elle constate l'existence d'une lacune dans les motifs, la cour doit examiner d'autres documents pour savoir s'ils permettent de mieux comprendre la décision, y compris : le dossier des actes de procédure officiels, les documents portés à l'attention du décideur, les décisions antérieures de l'organisme administratif, ainsi que les politiques ou lignes directrices élaborées pour l'aider dans sa démarche. Ces documents pourraient aider un tribunal à comprendre le résultat. Voilà comment les cours de révision peuvent légitimement compléter les motifs écrits sans supplanter l'analyse. Les motifs doivent être examinés en corrélation avec le résultat afin de savoir si celui-ci fait partie des issues possibles. Cette approche privilégie le fond plutôt que la forme dans les situations où le fondement de la décision est évident au vu du dossier, mais n'est pas exposé clairement dans les motifs écrits.

As well, a court conducting deferential review must view claims of error in context and with caution, cognizant of the need to avoid substituting its opinion for that of those empowered and better equipped to answer the questions at issue. Because judicial substitution is incompatible with deference, reviewing courts must carefully evaluate the challenges raised to ensure they go to the reasonableness of the decision rather than representing a

De plus, lors d'un contrôle fondé sur le principe de la déférence, la cour doit examiner les allégations d'erreur avec prudence, en tenant compte du contexte et de la nécessité d'éviter de substituer son opinion à celle des personnes qui sont habilitées à répondre aux questions en litige et mieux outillées qu'elle pour le faire. Étant donné que le principe de la déférence lui interdit de substituer son opinion à celle du décideur, la cour de révision doit mere difference of opinion. Courts must also consider the materiality of any alleged errors. An error that is peripheral to the reasoning process is not sufficient to justify quashing a decision. The same deferential approach must apply with equal force to statutory interpretation cases. In such cases, a court should not assess the decision by determining what, in its own view, would be a reasonable interpretation. Such an approach imperils deference. A *de novo* interpretation of a statute necessarily omits the perspective of the front-line, specialized administrative body that routinely applies the statutory scheme in question. By placing that perspective at the heart of the judicial review inquiry, courts display respect for specialization and expertise, and for the legislative choice to delegate certain questions to non-judicial bodies. Conversely, by imposing their own interpretation of a statute, courts undermine legislative intent.

In the instant case, there is agreement with the majority that the standard of review is reasonableness. The Registrar's reasons failed to respond to V's submission that the objectives of s. 3(2)(a) of the *Citizenship Act* require its terms to be read narrowly. Instead, the Registrar interpreted s. 3(2)(a) broadly, based on a purely textual assessment. This reading was only reasonable if the text is read in isolation from its objective. Nothing in the history of this provision indicates that Parliament intended to widen its scope. Furthermore, the judicial treatment of this provision also points to the need for a narrow interpretation. In addition, the text of s. 3(2)(c) can be seen as undermining the Registrar's interpretation of s. 3(2)(a), because the former denies citizenship to children born to individuals who enjoy diplomatic privileges and immunities equivalent to those granted to persons referred to in the latter. This suggests that s. 3(2)(a) covers only those employees in Canada of a foreign government who have such privileges and immunities, in contrast with V's parents. By ignoring the objectives of s. 3 as a whole, the Registrar's decision was unreasonable.

évaluer avec circonspection les arguments que le demandeur invoque pour contester une décision administrative afin de s'assurer qu'ils concernent le caractère raisonnable de celle-ci et ne relèvent pas d'une simple divergence d'opinions. Les tribunaux doivent également tenir compte de la gravité des erreurs reprochées. Une erreur secondaire au regard du raisonnement ne suffit pas à justifier l'annulation d'une décision. Ils doivent conserver la même attitude de déférence lorsqu'ils interprètent une disposition législative. Dans ce genre de cas, la cour de révision ne devrait pas évaluer la décision en tentant de déterminer l'interprétation qui, à son avis, serait raisonnable. Pareille approche met en péril la déférence. Une interprétation *de novo* d'une loi occulte nécessairement le point de vue de l'organisme administratif spécialisé qui applique régulièrement le régime législatif en question. En plaçant ce point de vue au cœur de leur analyse, les cours de justice témoignent de leur respect à l'endroit des compétences et connaissances spécialisées des organismes administratifs ainsi qu'à l'égard du choix du législateur de déléguer le traitement de certaines questions à des organismes non judiciaires. À l'inverse, en imposant leur propre interprétation d'une loi, les cours de justice dénaturent l'intention du législateur.

En l'espèce, il y a accord avec la majorité sur le fait que la norme de contrôle applicable est celle de la décision raisonnable. La greffière n'a pas répondu à l'argument de V voulant que les objectifs de l'al. 3(2)a) de la *Loi sur la citoyenneté* exigent une interprétation restrictive de ses termes. Au contraire, la greffière a donné une interprétation large à l'al. 3(2)a) en se fondant sur une analyse purement textuelle. Cette interprétation n'était raisonnable que si l'on examinait le texte en faisant abstraction de son objectif. L'historique de la disposition n'indique nullement que le législateur fédéral avait l'intention d'en élargir le champ d'application. De plus, la façon dont les tribunaux ont interprété cette disposition indique elle aussi qu'il faut lui donner une interprétation restrictive. Qui plus est, le texte de l'al. 3(2)c) peut être perçu comme sapant l'interprétation que la greffière donne de l'al. 3(2)a), puisque l'al. 3(2)c) nie le droit à la citoyenneté aux enfants nés de personnes bénéficiant de privilèges et immunités diplomatiques équivalents à ceux dont jouissent les personnes visées par l'al. 3(2)a). Ce texte laisse croire que l'al. 3(2)a) ne vise donc que les personnes au service au Canada d'un gouvernement étranger qui jouissent de tels privilèges et immunités, ce qui n'est pas le cas des parents de V. La décision de la greffière était déraisonnable, vu qu'elle fait fi des objectifs de l'art. 3 dans son ensemble.

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Michael H. Morris, *Marianne Zorić* and *John Provart*, for the appellant.

Hadayt Nazami, *Barbara Jackman* and *Sujith Xavier*, for the respondent.

Sara Blake and *Judie Im*, for the intervener the Attorney General of Ontario.

Stéphane Rochette, for the intervener the Attorney General of Quebec.

J. Gareth Morley and *Katie Hamilton*, for the intervener the Attorney General of British Columbia.

Kyle McCreary and *Johnna Van Parys*, for the intervener the Attorney General of Saskatchewan.

Jamie Liew, for the intervener the Canadian Council for Refugees.

Karen Andrews, for the intervener the Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program.

Matthew Britton and *Jennifer M. Lynch*, for the interveners the Ontario Securities Commission, the British Columbia Securities Commission and the Alberta Securities Commission.

Laura Bowman and *Bronwyn Roe*, for the intervener Ecojustice Canada Society.

David Corbett and *Michelle Alton*, for the interveners the Workplace Safety and Insurance Appeals Tribunal (Ontario), the Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut),

POURVOI contre un arrêt de la Cour d'appel fédérale (les juges Stratas, Webb et Gleason), 2017 CAF 132, [2018] 3 R.C.F. 75, 52 Imm. L.R. (4th) 1, 30 Admin. L.R. (6th) 1, [2017] A.C.F. n^{o} 638 (QL), 2017 CarswellNat 9490 (WL Can.), qui a infirmé une décision du juge Bell, 2015 CF 960, [2016] 2 R.C.F. 39, 38 Imm. L.R. (4th) 110, [2015] A.C.F. n^{o} 981 (QL), 2015 CarswellNat 4747 (WL Can.). Pourvoi rejeté.

Michael H. Morris, *Marianne Zorić* et *John Provart*, pour l'appelant.

Hadayt Nazami, *Barbara Jackman* et *Sujith Xavier*, pour l'intimé.

Sara Blake et *Judie Im*, pour l'intervenant le procureur général de l'Ontario.

Stéphane Rochette, pour l'intervenante la procureure générale du Québec.

J. Gareth Morley et *Katie Hamilton*, pour l'intervenant le procureur général de la Colombie-Britannique.

Kyle McCreary et *Johnna Van Parys*, pour l'intervenant le procureur général de la Saskatchewan.

Jamie Liew, pour l'intervenant le Conseil canadien pour les réfugiés.

Karen Andrews, pour l'intervenant le Centre ontarien de défense des droits des locataires - Programme d'avocats de service en droit du logement.

Matthew Britton et *Jennifer M. Lynch*, pour les intervenantes la Commission des valeurs mobilières de l'Ontario, British Columbia Securities Commission et Alberta Securities Commission.

Laura Bowman et *Bronwyn Roe*, pour l'intervenante Ecojustice Canada Society.

David Corbett et *Michelle Alton*, pour les intervenants le Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail (Ontario), Workers' Compensation Appeals the Workers' Compensation Appeals Tribunal (Nova Scotia), the Appeals Commission for Alberta Workers' Compensation and the Workers' Compensation Appeals Tribunal (New Brunswick).

Written submissions only by *Gavin R. Cameron* and *Tom Posyniak*, for the intervener the British Columbia International Commercial Arbitration Centre Foundation.

Terrence J. O'Sullivan and *Paul Michell*, for the intervener the Council of Canadian Administrative Tribunals.

Written submissions only by *Susan L. Stewart*, *Linda R. Rothstein*, *Michael Fenrick*, *Angela E. Rae* and *Anne Marie Heenan*, for the interveners the National Academy of Arbitrators, the Ontario Labour-Management Arbitrators' Association and Conférence des arbitres du Québec.

Steven Barrett, for the intervener the Canadian Labour Congress.

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Brendan Van Niejenhuis and *Andrea Gonsalves*, for the intervener Queen's Prison Law Clinic.

Adam Goldenberg, for the intervener Advocates for the Rule of Law.

Toni Schweitzer, for the intervener Parkdale Community Legal Services.

Paul Warchuk and *Francis Lévesque*, for the intervener the Cambridge Comparative Administrative Law Forum.

James Plotkin and *Alyssa Tomkins*, for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

Tribunal (Territoires du Nord-Ouest et Nunavut), le Tribunal d'appel des décisions de la Commission des accidents du travail de la Nouvelle-Écosse, Appeals Commission for Alberta Workers' Compensation et le Tribunal d'appel des accidents au travail (Nouveau-Brunswick).

Argumentation écrite seulement par *Gavin R. Cameron* et *Tom Posyniak*, pour l'intervenante British Columbia International Commercial Arbitration Centre Foundation.

Terrence J. O'Sullivan et *Paul Michell*, pour l'intervenant le Conseil des tribunaux administratifs canadiens.

Argumentation écrite seulement par *Susan L. Stewart*, *Linda R. Rothstein*, *Michael Fenrick*, *Angela E. Rae* et *Anne Marie Heenan*, pour les intervenantes National Academy of Arbitrators, Ontario Labour-Management Arbitrators' Association et la Conférence des arbitres du Québec.

Steven Barrett, pour l'intervenant le Congrès du travail du Canada.

Argumentation écrite seulement par *William W. Shores*, *c.r.*, et *Kirk N. Lambrecht*, *c.r.*, pour l'intervenante l'Association nationale des organismes de réglementation de la pharmacie.

Brendan Van Niejenhuis et *Andrea Gonsalves*, pour l'intervenante Queen's Prison Law Clinic.

Adam Goldenberg, pour l'intervenant Advocates for the Rule of Law.

Toni Schweitzer, pour l'intervenant Parkdale Community Legal Services.

Paul Warchuk et *Francis Lévesque*, pour l'intervenant Cambridge Comparative Administrative Law Forum.

James Plotkin et *Alyssa Tomkins*, pour l'intervenante la Clinique d'intérêt public et de politique d'internet du Canada Samuelson-Glushko.

Guy Régimbald, for the intervener the Canadian Bar Association.

Audrey Macklin and *Anthony Navaneelan*, for the intervener the Canadian Association of Refugee Lawyers.

Written submissions only by *David Cote* and *Subodh Bharati*, for the intervener the Community & Legal Aid Services Programme.

Guillaume Cliche-Rivard and *Peter Shams*, for the intervener Association québécoise des avocats et avocates en droit de l'immigration.

Nicholas McHaffie, for the intervener the First Nations Child & Family Caring Society of Canada.

Daniel Jutras and *Audrey Boctor*, as *amici curiae*, and *Olga Redko* and *Edward Béchard Torres*.

The following is the judgment delivered by

[1] The Chief Justice and Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ. — This appeal and its companion cases (see *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, [2019] 4 S.C.R. 845), provide this Court with an opportunity to re-examine its approach to judicial review of administrative decisions.

[2] In these reasons, we will address two key aspects of the current administrative law jurisprudence which require reconsideration and clarification. First, we will chart a new course forward for determining the standard of review that applies when a court reviews the merits of an administrative decision. Second, we will provide additional guidance for reviewing courts to follow when conducting reasonableness review. The revised framework will continue to be guided by the principles underlying judicial review that this Court articulated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190: that judicial review functions to maintain the rule of law while giving effect to legislative intent. We will also affirm the need to develop and

Guy Régimbald, pour l'intervenante l'Association du Barreau canadien.

Audrey Macklin et *Anthony Navaneelan*, pour l'intervenante l'Association canadienne des avocats et avocates en droit des réfugiés.

Argumentation écrite seulement par *David Cote* et *Subodh Bharati*, pour l'intervenant Community & Legal Aid Services Programme.

Guillaume Cliche-Rivard et *Peter Shams*, pour l'intervenante l'Association québécoise des avocats et avocates en droit de l'immigration.

Nicholas McHaffie, pour l'intervenante la Société de soutien à l'enfance et à la famille des Premières Nations du Canada.

Daniel Jutras et *Audrey Boctor*, en qualité d'*amici curiae*, et *Olga Redko* et *Edward Béchard Torres*.

Version française du jugement rendu par

[1] Le juge en chef et les juges Moldaver, Gascon, Côté, Brown, Rowe et Martin — Le présent pourvoi et les pourvois connexes (voir *Bell Canada c. Canada (Procureur général)*, 2019 CSC 66, [2019] 4 R.C.S. 845), donnent à la Cour l'occasion de se pencher de nouveau sur sa façon d'aborder le contrôle judiciaire des décisions administratives.

[2] Dans les présents motifs, nous traitons de deux aspects clés de la jurisprudence actuelle en droit administratif qu'il est nécessaire de réexaminer et de clarifier. D'abord, nous traçons la nouvelle voie à suivre pour déterminer la norme de contrôle applicable lorsqu'une cour de justice contrôle une décision administrative au fond. Ensuite, nous donnons des indications additionnelles aux cours de révision qui procèdent au contrôle selon la norme de la décision raisonnable. Le cadre d'analyse révisé est encore guidé par les principes en matière de contrôle judiciaire qu'a énoncés la Cour dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190 : le contrôle judiciaire a pour fonction de préserver la primauté du droit tout en

The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.

[24] Parliament and the provincial legislatures are constitutionally empowered to create administrative bodies and to endow them with broad statutory powers: *Dunsmuir*, at para. 27. Where a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to be able to fulfill its mandate and interpret the law as applicable to all issues that come before it. Where a legislature has not explicitly prescribed that a court is to have a role in reviewing the decisions of that decision maker, it can safely be assumed that the legislature intended the administrative decision maker to function with a minimum of judicial interference. However, because judicial review is protected by s. 96 of the *Constitution Act, 1867*, legislatures cannot shield administrative decision making from curial scrutiny entirely: *Dunsmuir*, at para. 31; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at pp. 236-37; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1090. Nevertheless, respect for these institutional design choices made by the legislature requires a reviewing court to adopt a posture of restraint on review.

[25] For years, this Court's jurisprudence has moved toward a recognition that the reasonableness standard should be the starting point for a court's review of an administrative decision. Indeed, a presumption of reasonableness review is already a well-established feature of the standard of review analysis in cases in which administrative decision makers interpret their home statutes: see *Alberta Teachers*, at para. 30; *Saguenay*, at para. 46; *Edmonton East*, at para. 22. In our view, it is now appropriate to hold that whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness. While this presumption applies to the administrative decision maker's interpretation of its enabling statute, the

effet à cette intention. L'analyse a donc comme point de départ une présomption selon laquelle le législateur a voulu que la norme de contrôle applicable soit celle de la décision raisonnable.

[24] Le Parlement et les législatures provinciales sont habilités par la Constitution à créer des organismes administratifs et à les investir de larges pouvoirs légaux : *Dunsmuir*, par. 27. Si le législateur a constitué un décideur administratif dans le but précis d'administrer un régime législatif, il faut présumer que le législateur a également voulu que ce décideur soit en mesure d'accomplir son mandat et d'interpréter la loi qui s'applique à toutes les questions qui lui sont soumises. Si le législateur n'a pas prescrit expressément que les cours de justice ont un rôle à jouer dans le contrôle des décisions de ce décideur, on peut aisément présumer que le législateur a voulu que celui-ci puisse fonctionner en faisant le moins possible l'objet d'une intervention judiciaire. Toutefois, étant donné que le contrôle judiciaire bénéficie de la protection de l'art. 96 de la *Loi constitutionnelle de 1867*, le législateur ne peut soustraire le processus décisionnel administratif à tout examen judiciaire : *Dunsmuir*, par. 31; *Crevier c. Procureur général du Québec*, [1981] 2 R.C.S. 220, p. 236-237; *U.E.S., Local 298 c. Bibeault*, [1988] 2 R.C.S. 1048, p. 1090. Il n'en demeure pas moins que le respect de ces choix d'organisation institutionnelle de la part du législateur oblige la cour de révision à adopter une attitude de retenue lors du contrôle judiciaire.

[25] Depuis plusieurs années, la jurisprudence de notre Cour évolue vers une reconnaissance du fait que la norme de la décision raisonnable devrait être le point de départ du contrôle judiciaire d'une décision administrative. En effet, la présomption d'application de la norme de la décision raisonnable est déjà une caractéristique bien établie de l'analyse relative à la norme de contrôle applicable dans les cas où le décideur administratif interprète sa loi constitutive : voir *Alberta Teachers*, par. 30; *Saguenay*, par. 46; *Edmonton East*, par. 22. À notre avis, il y a maintenant lieu d'affirmer que chaque fois qu'une cour examine une décision administrative, elle doit partir de la présomption que la norme de contrôle applicable à l'égard de tous les aspects de cette décision est celle de la décision raisonnable. Si cette

Recovery of compensation

121(1) If an existing mineral lease holder or operator fails to pay money

(a) under a surface lease, or

(b) ordered to be paid by the Existing Leases Land Access Panel or the Land Access Panel,

within 30 days of the date it is due, the person entitled to receive the money may submit to the Land Access Panel evidence of the failure to pay.

(2) On receipt of satisfactory evidence of failure of the existing mineral lease holder or operator to pay, the Land Access Panel may direct the President of Treasury Board and Minister of Finance to pay out of the General Revenue Fund the amount of money to which the person is entitled.

(3) If the President of Treasury Board and Minister of Finance pays money to a person under this section, the amount paid constitutes a debt owing by the existing mineral lease holder or the operator to the Crown in right of Alberta.

(4) If a surface lease and a development agreement are combined in one document, this section applies only to that part of the document concerning the surface lease.

Responsibilities

189(1) The Appeal Tribunal

(a) must hear appeals and references and perform any function given to it under this Act or any other enactment;

(b) must hear appeals and references and perform any other function given to it or required to be performed by it under the regulations, bylaws or General Council Policies;

(c) may perform other functions given to it;

(d) may decide differences or disputes between 2 or more settlement members or between settlement members and persons who are not members if

(i) all the parties involved in the difference or dispute agree in writing that the Tribunal should decide the matter, and

(ii) the settlement council of the settlement area in which the difference or dispute arises agrees in writing that the Tribunal should decide the matter;

(e) may decide differences or disputes between 2 or more settlements if the settlements agree in writing that the Tribunal should decide the matter;

(f) may decide differences or disputes between a settlement and one or more settlement members or persons who are not members if all the parties involved in the difference or dispute agree in writing that the Tribunal should decide the matter;

(g) may decide differences or disputes between the General Council and any one or more settlements or other persons if all the parties involved in the difference or dispute agree in writing that the Tribunal should decide the matter;

(g.1) must review a General Council Policy pursuant to a request in accordance with a General Council Policy under section 222(1)(jj);

(h) may make an advance ruling on a matter referred to it by 2 or more persons, whether or not a difference or dispute has arisen over the matter.

(2) With respect to a matter referred to it under subsection (1)(c) to (h), the Appeal Tribunal may

(a) take no action on the matter and notify the parties accordingly;

(b) appoint a person to inquire into the matter and make a report, or endeavour to effect an agreement or resolution of the matter;

(c) hold a hearing or decide the matter on the basis of written submissions if the parties agree.

RSA 2000 cM-14 s189;2004 c25 s31

Definitions

1 In this Act,

(a) repealed 2020 cL-2.3 s26;

(a.1) "captured carbon dioxide" means captured carbon dioxide as defined in the *Mines and Minerals Act*;

(b) "compensation order" means an order providing for the payment of compensation and made

(i) under this Act or a former Act, or

(ii) by the Board of Public Utility Commissioners or a district court judge under regulations established pursuant to *The Provincial Lands Act*, RSA 1942 c62, prescribing the conditions under which right of entry may be obtained on land;

(c) "Crown" means the Crown in right of Alberta;

(d) "former Act" means *The Right of Entry Arbitration Act*, SA 1947 c24, *The Right of Entry Arbitration Act, 1952*, SA 1952 c79, *The Right of Entry Arbitration Act*, RSA 1955 c290 and RSA 1970 c322, the *Surface Rights Act*, SA 1972 c91 and RSA 1980 cS-27, *The Water, Gas, Electric and Telephone Companies Act*, RSA 1942 c260 and RSA 1955 c361, *The Expropriation Procedure Act*, SA 1961 c30 and RSA 1970 c130, and *The Expropriation Act*, SA 1974 c27;

(e) "minerals" means all naturally occurring minerals and, without restricting the generality of the foregoing, includes gold, silver, uranium, platinum, pitchblende, radium, precious stones, copper, iron, tin, zinc, asbestos, salts, sulphur, petroleum, oil, asphalt, bituminous sands, oil sands, natural gas, coal, anhydrite, barite, bauxite, bentonite, diatomite, dolomite, epsomite, granite, gypsum, limestone, marble, mica, mirabilite, potash, quartz rock, rock phosphate, sandstone, serpentine, shale, slate, talc, thenardite, trona, volcanic ash, sand, gravel, clay and marl, but does not include

(i) sand and gravel or clay and marl that belong to the owner of the surface of land under the *Law of Property Act*, or

(ii) peat on the surface of land and peat obtained by stripping off the overburden, excavating from the surface, or otherwise recovered by surface operations;

(f) "Minister" means the Minister determined under section 16 of the *Government Organization Act* as the Minister responsible for this Act;

Compensation

36(1) In this section, "operator" means any person who, at the time of non-payment under a surface lease, right of entry order or compensation order, became liable to pay the money in question because that person

(a) was an approval or registration holder who carried on an activity on or in respect of specified land pursuant to an approval or registration,

(b) carried on an activity on or in respect of specified land other than pursuant to an approval or registration,

(c) was the holder of a licence, approval or permit issued by the Alberta Energy Regulator for purposes related to the carrying on of an activity on or in respect of specified land,

(d) was a working interest participant in a well or other energy development on, in or under specified land, or

(e) was the holder of a surface lease or right of entry order for purposes related to the carrying on of an activity on or in respect of specified land,

and includes a successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in clause (a), (b), (c), (d) or (e) who was so liable and any person acting as principal or agent of any person referred to in or after clauses (a) to (e).

(2) Words and expressions used in subsection (1)(a) to (e) that are defined in the *Environmental Protection and Enhancement Act* shall be construed in accordance with that Act.

(3) Where any money payable by an operator under a compensation order or surface lease has not been paid and the due date for its payment has passed, the person entitled to receive the money may submit to the Tribunal written evidence of the non-payment.

(4) On receiving the evidence, if the Tribunal considers that it satisfactorily proves the non-payment, the Tribunal shall send a written notice to the operator demanding full payment.

(5) If the notice under subsection (4) is not complied with, the Tribunal may, by written order served on the operator,

(a) suspend the operator's right to enter the site affected by the compensation order or lease, and

(b) after giving the operator written notice of its intention to do so, terminate all the operator's rights under the right of entry order or lease relating to the site that is subject to the claim under this section,

without affecting any of the operator's obligations in regard to the site, including those under this section, or any other person's rights as against the operator, and on the basis that the lease or compensation order remains in place for purposes of shutting-in, suspension, abandonment and reclamation of the site.

(6) If, within 30 days of the Tribunal sending a written notice to an operator under subsection (4), the operator has not proven to the Tribunal's satisfaction that full payment has been made, the Tribunal may direct the Minister to pay out of the General Revenue Fund the amount of money to which the person referred to in subsection (3) is entitled.

(7) If the Minister has made a payment under subsection (6) and the person who received the payment provides evidence of a subsequent non-payment of compensation by the operator in relation to the same site, the Tribunal may direct the Minister to make any further payments due to the person, without any further application of subsection (4), until the transfer or reclamation of the site is complete.

(8) The Tribunal may direct the Minister not to make any further payments due to the person if it considers that the person entitled to receive them is refusing access for operations, abandonment or reclamation allowed by law.

(9) Where the Minister pays money under subsection (6) or (7),

(a) the amount paid and any expenses incurred, whether by the Crown or by a private agency, in collecting or attempting to collect the money owing, constitute a debt owing by the operator to the Crown, and

(b) a written certificate issued by or on behalf of the Minister certifying the payment of the amounts referred to in clause (a), including expenses, may be entered as a judgment of the Court of King's Bench for those amounts and enforced according to the ordinary procedure for enforcement of a judgment of that Court.

RSA 2000 cS-24 s36;2006 c23 s75;2012 cR-17.3 s108;2020 c25 s17;
2020 cL-2.3 s26;AR 217/2022

Transfer of Responsibilities

Responsibility for Acts

16(1) The Lieutenant Governor in Council may, by regulation,

(a) designate a Minister by the Minister's personal name or name of office as the Minister responsible for an Act;

(b) transfer the responsibility for an Act to another Minister in the Minister's personal name or name of office;

(c) transfer a power, duty or function of a Minister contained in an Act or regulation to another Minister in the Minister's personal name or name of office.

(2) If a Minister is transferred the responsibility for an Act under subsection (1)(b), then notwithstanding anything in that Act

(a) a reference in that Act or a regulation under it to a Minister is to be read as a reference to the Minister to whom the responsibility is transferred,

(b) a reference in that Act or a regulation under it to the deputy of a Minister is to be read as a reference to the deputy of the Minister to whom the responsibility is transferred, and

(c) a reference in that Act or a regulation under it to the department of a Minister is to be read as a reference to the department of the Minister to whom the responsibility is transferred.

(3) If, under subsection (1)(c), a Minister is transferred the responsibility for the exercise or discharge of a power, duty or function contained in a provision of an Act or regulation, then notwithstanding anything in that provision

(a) a reference in that provision to a Minister is to be read as a reference to the Minister to whom the responsibility is transferred,

(b) a reference in that provision to the deputy of a Minister is to be read as a reference to the deputy of the Minister to whom the responsibility is transferred, and

(c) a reference in that provision to the department of a Minister is to be read as a reference to the department of the Minister to whom the responsibility is transferred.

(4) Two or more Ministers may be given common responsibility for the same Act, and in that case any reference in the Act or a regulation under that Act to a Minister, the Minister's deputy or the Minister's department is to be read as a reference to any of those Ministers and their deputies and departments.

(5) Two or more Ministers may be given common responsibility for the exercise or discharge of the same provision of an Act or regulation, and in that case any reference in the provision to a Minister, the Minister's deputy or the Minister's department is to be read as a reference to any of those Ministers and their deputies and departments.

(6) If an Act identifies a Minister as the member of the Executive Council charged with the administration of the Act, that reference is to be read as a reference to the Minister designated under subsection (1) as the Minister responsible for that Act.

Environment and Protected Areas

9(1) The Minister of Environment and Protected Areas is designated as the Minister responsible for the following enactments:

(a) *Beaver River Basin Water Authorization Act*;

(b) *The Bighorn Agreement Validating Act*;

(c) repealed AR 96/2023 s8;

(d) *The Brazeau River Development Act*;

(e) *County of Westlock Water Authorization Act*;

(f) *East Central Regional Water Authorization Act*;

(g) *Emissions Management and Climate Resilience Act*;

(h) *Environmental Protection and Enhancement Act*, except section 37(1)(d) to (j);

(i) Schedule 5 to the *Government Organization Act*, except sections 4 to 9;

(j) *Hunting, Fishing and Trapping Heritage Act*;

(k) Part 8 of the *Mines and Minerals Act*, except section 108(g), (h) and (j);

(l) *Natural Resources Conservation Board Act*;

(m) *North Red Deer Water Authorization Act*;

(n) *North Saskatchewan River Basin Water Authorization Act*;

(o) *Oil Sands Emissions Limit Act*;

(p) *Surface Rights Act*, except section 8;

(r) *Water Act*, except section 6, Part 6 and sections 159 and 163.

Devon Canada Corporation v. Surface Rights Board, 2003 ABQB 7

Date: 20030106
Action No. 0210-00852

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF RED DEER

IN THE MATTER OF THE SURFACE RIGHTS ACT RSA 2000 CHAPTER S-24 ("THE SURFACE RIGHTS ACT");

AND IN THE MATTER OF DECISION NO. 2002/0076 OF THE SURFACE RIGHTS BOARD (THE "BOARD") DATED MAY 7, 2002, RELATING TO AN APPLICATION BY JAMES ROBERT DOUGLAS AND FLORENCE DOUGLAS FOR THE BOARD TO DIRECT THE PROVINCIAL TREASURER TO PAY COMPENSATION PAYABLE WITH RESPECT TO A SURFACE LEASE DATED JULY 18, 1977, BETWEEN JAMES GRAHAM DOUGLAS AND JAMES ROBERT DOUGLAS, AS LESSORS, AND LADD EXPLORATION COMPANY, AS LESSEE, IN RESPECT OF CERTAIN LANDS LOCATED IN THE SW 1/4 OF SECTION 24, TOWNSHIP 41, RANGE 27, WEST OF THE 4TH MERIDIAN IN THE PROVINCE OF ALBERTA.

BETWEEN:

DEVON CANADA CORPORATION

Applicant

- and -

SURFACE RIGHTS BOARD

Respondent

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE D. A. SIRRS

APPEARANCES:

John Gruber (Thackray Burgess)
for the Applicant

Marilyn McAvoy (Alberta Surface Rights Board)
for the Respondent

Brian K. O'Ferrall, Q.C.
for the Douglas family

Facts

[1] The Applicant, Devon Canada Corporation (Devon), seeks judicial review of the decision of the Surface Rights Board (Board) whereby the Board recommended that the surface owners (the Douglases) be paid $28,800.00 by the provincial treasurer.

[2] The facts as found by the Board are not in dispute.

> 1. Devon's predecessor, Ladd Exploration Company, leased 5.48 acres of the Douglases' lands effective July 18, 1977 for consideration of $1,200.00 per year.
>
> 2. Ladd drilled a dry hole in the summer of 1977.
>
> 3. Although there is no evidence of any work that Ladd did to reclaim the lands for farming use, Mr. Douglas signed a release on October 18, 1977, part of which says that he was satisfied that all excavations have been filled in a satisfactory manner, and the Douglases have farmed the 5.48 acres for the subsequent 24 years.
>
> 4. Ladd failed or neglected to obtain a reclamation certificate and at the date of the Board hearing this requirement has yet to be fulfilled.
>
> 5. The Board also found as fact that the Douglases did not prevent the operator from utilizing the lease site, notwithstanding that the operator and its successors did not seek access for the 24-year period.
>
> 6. As a result of the neglect or failure to obtain a reclamation certificate, the Douglases' claim that the lease was not terminated and they are entitled to 24 years of lease payments of $1,200.00 each.

> 7. As a statutory body, the Board is not limited by the provisions of the *Limitations Act*, or able to provide the operator with a remedy in equity such as unjust enrichment of the Douglases.
>
> 8. The Board found in favour of the Douglases and recommended that the provincial treasurer pay the Douglases $28,800.00.

[3] I dare say that without some reasons most people would consider the finding of the Board absurd.

Review of the law

[4] I have been provided with the similar decision of the Board in ***Suncor Energy Inc. v. Dargis,*** Decision no. 99/0122, wherein ***Suncor*** actually obtained a reclamation certificate but neglected to terminate the right of entry order. The Board found there was a subsisting lease and recommended payment of $2,800.00 per year for 10 years. The Board expressed some sympathy for the operator but stated that nothing had been argued that would permit the Board to deny payment and still maintain credibility of Board orders.

[5] In neither the ***Douglas*** nor the ***Dargis*** decision is there an explanation by the Board as to why they consider themselves duty bound to recommend payment.

[6] The assumed duty seems to arise from a judicial interpretation of s. 36(6) of the *Surface Rights Act*.

[7] The section provides that upon an operator failing to do certain things:

> . . . the Board may direct the provincial treasurer to pay out of the General Revenue Fund the amount of money to which the person referred to in subsection (3) is entitled.

[8] This wording appears to be discretionary. The legislation did not use the imperative "shall" direct the provincial treasurer.

[9] Thus, there must be another reason that the Board has concluded that they cannot consider any other factors other than whether there is a subsisting lease and whether there are outstanding rental arrears.

[10] In 1995, Justice Kent of the Court of Queen's Bench of Alberta handed down a decision in ***Todd Ranch Ltd. v. Alberta (Surface Rights Board)*** [1995] Carswell Alta. 668, 170 A.R.

[11] Justice Kent at paragraph 13 seems to find that the now s. 36(6) does not permit the Board to look beyond whether there is a lease and unpaid rent:

> Accordingly if a landowner meets the requirements set out in s. 39 (now s. 36), then the Board is obliged to grant relief. It does not have an overriding discretion to grant relief.

[12] In support of her conclusion, she finds that a fundamental purpose of s. 39 (now s. 36) is to guarantee payment to the surface owner.

[13] I am of the opinion that the ***Todd*** case can be distinguished on the facts and on the basis that it was pre 1998 ***Pushpanathan.***

[14] In the ***Todd*** case, Justice Kent had determined that the Board was biased from the outset of the hearing because they did not like the way that Mr. Todd conducted some settlement negotiations before the Board just prior to the hearing.

[15] Justice Kent was not pleased that the Board had concluded that they could not determine the legal issue of whether the lease was valid, finding that the Board was expected to make decisions of law.

[16] The Todds were caught in the middle of a dispute between the province and the operator, during which the operator decided to withhold the rent due to the Todds.

[17] Considering these facts, it is understandable that Justice Kent refused to find that notwithstanding the bias of the Board, their neglect of their duties to decide legal issues, and the Todds were not parties to the dispute, that the Board still had an "overriding discretion" as to whether the province should be directed to pay.

[18] The facts of the Douglases' case are not as supportive of a determination that the Board has no discretion.

[19] Also, in my opinion, notwithstanding the permissive wording of s. 36(6), the Board would still not have an open and overriding discretion. The Board's discretion is tempered by a review by this Court on a standard determined by the "pragmatic and functional approach" set forth in ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)*** 1 S.C.R. 982.

[20] This review process provides a remedy that would prevent the absurd result that Justice Kent feared if the then s. 39 provided the Board with an "overriding discretion."

[21] Thus, I do not find the ***Todd*** decision compelling on the 2002 facts of the Douglases.

THE "PRAGMATIC AND FUNCTIONAL APPROACH"

The Surface Rights Board

[22] There is little doubt that for years oil and gas have been the driving force of the Alberta economy. To search for oil, excepting the far north of the province, usually means an oil company must build a road and a drill site on a farmer's field. A mechanism was needed to provide for entry onto the lands, compensation for use of the lands, and reclamation of the lands upon the well expiring.

[23] These responsibilities were given to the Surface Rights Board by legislation, the *Surface Rights Act* c. S-24 R.S.A. 2000.

[24] Included in the legislation were powers under s. 36 that in certain circumstances the Board could direct the province to pay the lease rent to the surface owner and the province would then pursue the oil company for reimbursement.

[25] Justice Virtue in ***OH Ranch Ltd. v. Surface Rights Board (Alberta)*** [1994] 148 A.R. 315 referred to this process guaranteeing payment to the surface owner of compensation to which it is entitled. Although "guaranteeing payment" is correct in the usual case of a surface owner seeking payment from an insolvent oil company, I am not satisfied that the wording of s. 36 implies a blanket guarantee of all cases by the provincial government. S. 36 provides a pragmatic, inexpensive remedy for a surface owner to obtain payment when an operator is wrongfully withholding payment or is insolvent.

[26] The purpose of s. 144(1) of the *Environmental Protection And Enhancement Act*

> Notwithstanding anything in any other Act or any surface lease or right of entry order,
>
> (a) no surrender of a surface lease is effective or binding on any person, and
>
> (b) no expropriation board shall order the termination of a right of entry order
>
> insofar as the surrender or termination relates to any interest of the registered owner, until a reclamation certificate has been issued in respect of the specified land affected by the surrender or termination.

is to prevent oil companies from circumventing the requirement to obtain a reclamation certificate, thus ensuring that farmlands are returned to a certain acceptable standard.

[27] Section 140 of the *Environmental Protection And Enhancement Act* permits the province to obtain orders to reclaim the lands at the expense of the oil company.

[28] Another purpose of the *Surface Rights Act* is provided by Justice Andrekson, as he then was, at paragraph 19 of ***Sandboe et al*** v. ***Coseka Resources Ltd.*** 74 Alta. L.R. (2d) 277:

> There is no mandate in the Act to overcompensate a surface owner. It is an error to overcompensate.

In my opinion, to read s. 36 as providing a blanket guarantee is to permit the Board to overcompensate in certain circumstances.

Appropriate Standard of Review

[29] The ***Pushpanathan*** case has provided certain factors to be considered in determining a standard of review on a spectrum between correctness of the decision to a patently unreasonable standard.

Factors

1. Privative Clause

The *Surface Rights Act* does not contain a privative clause. There is no right of appeal in the legislation concerning decision made by the Board pursuant to s. 36 of the Act. Thus, I place little weight on this factor in the pragmatic and functional analysis.

2. Expertise

Expertise is a relative concept: ***Pushpanathan***, supra at 1007.

The Surface Rights Board has developed an expertise in quantifying land values, inconvenience, weed control, damage to topsoil and oil company techniques. Some legal expertise is required to determine whether a lease is valid and subsisting. No expertise is needed to determine whether rent has been paid. In determining which factors are relevant to decide whether a direction should be made that the province pay the rental arrears, the Board has much experience and thus is better aware of how best to exercise this discretion.

3. Purpose of the Legislation

As previously indicated, the function of sections 36(5) and 36(6) appears to me to provide the surface owner with some assurance that if they cooperate with providing the oil industry access to their lands, they need not fear the operator will not pay them.

The sections provide a pragmatic solution whereby the surface owner need only prove the existence of a lease and that rent has not been paid. Upon proof of such, in most cases, the province would then pay the rent and the operator would then face the province, seeking reimbursement from the operator.

The function of the sections intentionally favour the surface owner; In most cases, the Board will direct the province to pay the back rent to the surface owner; however, section 36(6) seems to me to leave the Board with some discretion in this regard. In my opinion, if the operator satisfies the Board that the surface owner's claim is unjustified, is patently absurd, or provides an unjust enrichment, the Board should be able to use its discretion under s. 36(6) to refuse to direct that Alberta taxpayers pay the rental arrears.

To ensure the function of these sections of providing a pragmatic, inexpensive solution to the surface owner when rent under a surface lease is not paid, the Board should be afforded much deference.

4. Nature of the Issue

In the Douglases case, there is no issue that in law they have a subsisting lease and 24 years' rent has not been paid.

The Surface Rights Board has already suspended the operators' right of entry to the property and given notice to terminate the operators' rights under its lease. The issue is whether circumstances exist to justify the Board exercising its discretion to refuse to direct the province pay the back rent.

In this regard, the experience of the Board makes it better suited than the Court to determine what evidence is relevant. Thus, much deference is owed the Board in this regard.

5. Discretion

In my opinion, the wording of s. 36(6) entitles the Surface Rights Board to exercise statutory discretion.

Justice L'Heureux Dubé of SCC as she was in 1999, in ***Baker*** v. ***Canada*** [1999] 2 S.C.R. 817, stated at paragraph 53:

> . . . In my opinion, these doctrines incorporate two central ideas-that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers

> broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manouevre contemplated by the legislature, in accordance with the principles of the rule of law (***Roncarelli*** v. ***Duplessis***, [1959] S.C.R. 121 (S.C.C.), in line with general principles of administrative law governing the exercise of discretion, and consistent with the ***Canadian Charter of Rights and Freedoms (Slaight Communications Inc.*** v. ***Davidson***, [1989] 1 S.C.R. 1038 (S.C.C.).

and at paragraph 56:

> Incorporating judicial review of decisions that involve considerable discretion into the pragmatic and functional analysis for errors of law should not be seen as reducing the level of deference given to decisions of a highly discretionary nature. In fact, deferential standards of review may give substantial leeway to the discretionary decision-maker in determining the "proper purposes" or "relevant considerations" involved in making a given determination. The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options . . .

Justice L'Heureux Dubé determined that the applicable standard of review applicable to discretionary decision-making was reasonableness simpliciter.

Conclusion on Standard of Review

[30] Thus, the determination of J. Iacolucci in ***Canada (Director of Investigation and Research) v. Southern Inc.*** that the expertise of the tribunal is the most important factor in the pragmatic and functional approach. Coupling the Surface Rights Board's experience with the purpose of the legislation, the nature of the issue, and statutory discretion, I am of the opinion that reasonableness is too high a standard.

[31] The Surface Rights Board is owed some considerable deference in using their discretion under s. 36(6) of the Act. Each case will have different relevant facts to weigh in determining whether the surface owner is entitled to payment by the province. The standard of review of s. 36(6) of the *Surface Rights Act*, in my opinion, should be patent unreasonableness. The Board must not be patently unreasonable in exercising its discretion whether or not to direct the provincial treasurer to pay the surface owner rental arrears owing by an operator.

Judicial Review of the Board's Decision in the Douglases' Case

[32] There is no issue concerning the fact that the lease document remained in force and effect notwithstanding the surrender of the lease document signed by Mr. Douglas.

[33] The issue is whether the Surface Rights Board came to a patently unreasonable conclusion that the surface owner was entitled to rent payments by the provincial treasurer for 24 years after the oil company vacated the lands.

[34] In its determination, the Board considered whether the Douglases prevented the oil company from coming onto the land. This issue is hypothetical because the oil company never attempted to gain access to the land after October of 1977. The Board considered it a factor in favour of the Douglases that they did not actually deny the oil company access. In my opinion, this determination in the case of the Douglases is irrelevant.

[35] The Board determined that Devon had been notified of their failure to pay the rent pursuant to the requirements of s. 36 of the *Surface Rights Act*. I am of the opinion that the Board was correct in this regard.

[36] Was the Surface Rights Board's decision patently unreasonable? In fairness to the Board, it was not using reasonableness as the basis of its decision. After the Board determined that a lease existed and annual rent had not been paid, it seemed to consider itself bound to direct the province to pay the 24 years of rental arrears.

[37] In my opinion, the matter should be returned to the Board to ascertain the facts that the Board considers relevant in determining whether the province should be directed to pay the 24 years of rental arrears.

[38] The decision of the Board is quashed and the matter is referred back to the Board for a new hearing or a continuation of the prior hearing to consider evidence relevant to the Board exercising its discretion under s. 36(6) of the *Surface Rights Act*.

[39] The Douglases are entitled to their costs on a solicitor-client basis for this hearing from the Applicant.

HEARD on the 19th day of December, 2002.
DATED at Red Deer, Alberta this 6th day of January, 2003.

J.C.Q.B.A.

Court of King's Bench of Alberta

Citation: Bateman v Alberta (Surface Rights Board), 2023 ABKB 640

Date: 20231114
Docket: 2308 00025
Registry: Medicine Hat

Between:

Wayne Albert Bateman

Applicant

- and -

Alberta Surface Rights Board and Minister of Justice and Attorney General for the Province of Alberta

Respondents

Corrected judgment: A corrigendum was issued on November 24, 2023; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of the
Honourable Justice N.M Carruthers

I. Introduction

[1] This is a dispute about payment for an oil producer's access to an individual's land. The Applicant, Wayne Bateman, was seeking recovery of unpaid compensation under a surface lease

agreement with Lexin Resources Ltd. ("Lexin") for the years 2015-2019. The Alberta Surface Rights Board ("SRB") awarded compensation to Mr. Bateman in respect of his claim, but for only half of the amount owing. Mr. Bateman argues that this award is unreasonable and seeks judicial review.

[2] Lexin was not represented on this application. Counsel appeared for the Land and Property Rights Tribunal (the "Tribunal"), which has subsumed the SRB. Tribunal Counsel took no position, but limited her role to addressing the standard of review and providing information about Tribunal policy, practice and jurisdiction.

II. The Surface Rights Regime

[3] Mr. Bateman's claim was made pursuant to section 36 of the *Surface Rights Act*, RSA 2000, c S-24 (the "*Act*"). The purpose of the *Act* is to ensure that landowners are protected and properly compensated in the event energy companies enter their land to establish an oil or gas well. This is necessary as landowners are not entitled to refuse entry.

[4] In his brief and submissions, Mr. Bateman's counsel summarized the history and purpose of this legislation in Alberta. His position is that there has been a clear and consistent intent to make landowners whole. Prior to 1972, operators were required by legislation to provide security sufficient to protect the owner's rights.[1] Starting in 1972, the *Act* provided that the provincial treasurer would pay if an operator failed to make a payment due under a compensation order or surface lease. The legislation reflects an attempt to balance the rights of energy companies and landowners. Energy companies have the right to enter onto agricultural lands to develop Crown resources, while landowners have a right to fair compensation.

A. Setting Compensation

[5] Mr. Bateman submits that the intention to make landowners whole is reflected in sections 23 to 27 of the *Act*, which establish a fair process for setting and reviewing the compensation payable by operators. If the parties are unable to agree on compensation, they may apply to the Tribunal to have it set. Section 25(1) of the *Act* sets forth a number of factors for the Tribunal to consider in setting the initial compensation, including:

> (c) the loss of use by the owner or occupant of the area granted to the operator,
>
> (d) the adverse effect of the area granted to the operator on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator…

[6] Counsel advised that the Tribunal receives detailed evidence and will consider the types of crops grown on the owner's property and their value, crop rotation practices, yields, farming practices and the equipment used. There is often expert evidence from appraisers, agrologists, agronomists, and others. If the land is used for ranching or grazing, different considerations may be brought to bear. The focus remains on the loss of use and the adverse effect of the area granted to the operator on the remaining land, as well as the nuisance, inconvenience and noise that might be generated by operations on site. A separate amount is attributed to loss of use and adverse effect, respectively, for the purpose of determining the total lease payment.

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[1] *An Act to Provide for the Exercise of any Right of Entry and for the Determination of the Compensation to be paid therefor*, SA 1947, c 24.

[7] Mr. Bateman argues that ***Canadian Natural Resources Ltd v Bennett & Bennett Holdings Ltd***, 2008 ABQB 19 sets out two approaches that have been developed to quantify the relevant factors. In the first, the parties may look at a pattern of dealings regarding standard compensation rates for certain types of lands or uses. The second approach calculates the actual loss of use and adverse effect arising as a consequence of the rights granted to the operator.

[8] The second approach involves three steps. First, the Tribunal will examine farming practices to quantify revenue per acre and how much is lost due to the surface lease. Second, the Tribunal will quantify the effect of the obstruction on the remaining land, as a landowner typically must farm around the lease site. Issues such as the need for weed control and the negative effect on soil are considered as part of this analysis. Finally, the Tribunal considers intangible factors that contribute to an adverse effect, such as noise, nuisance and inconvenience.

[9] The courts have considered the effect on compensation when landowners farm the lease site and obtain revenue from the crop. In ***Conocophillips Canada Resources Corp v Lemay***, 2009 ABQB 72, the Court held that compensation should be based on the premise that entire site is being used by the operator because, at any time during the lease, the operator can come on site and the landowner's crop will be at risk of damage or loss. The Court also assumed that landowners should be compensated for the gross crop revenue rather than net, particularly when the crop is not a speciality crop. (See also ***Funk et al v Ember Resources Inc***, 2021 ABLPRT 516.)

[10] Section 27 of the *Act* provides for a review of compensation every five years and indicates that the factors in subsections 25(1)(c) and (d) must be considered on this review.

[11] Compensation continues to be payable until the land is reclaimed and turned back over to the landowner, pursuant to section 144 of the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 (the "*EPEA*"). A reclamation certificate is required to establish that a surface lease has been surrendered.

B. If the Operator Does Not Pay

[12] The *Act* provides for the possibility that the operator will fail to pay the required compensation. Section 36 states, in part, as follows:

> (3) Where any money payable by an operator under a compensation order or surface lease has not been paid and the due date for its payment has passed, the person entitled to receive the money may submit to the Tribunal written evidence of the non-payment.
>
> ...
>
> (4) On receiving the evidence, if the Tribunal considers that it satisfactorily proves the non-payment, the Tribunal shall send a written notice to the operator demanding full payment.
>
> ...
>
> (6) If, within 30 days of the Tribunal sending a written notice to an operator under subsection (4), the operator has not proven to the Tribunal's satisfaction that full payment has been made, the Tribunal <u>may direct</u> the Minister to pay out of the General Revenue Fund the amount of money to which the person referred to in subsection (3) is entitled. *[emphasis added]*

[13] A party dissatisfied with a decision of the Tribunal may apply for a reconsideration pursuant to section 29 of the *Act* and Rule 37 of the *Surface Rights Board Rules*. This is not an appeal or a judicial review, but a discretionary remedy that allows the Tribunal to reconsider a prior decision. Rule 37(3) establishes the following prerequisites for reconsideration:

> (3) The Board may only decide to review a decision or order if one of the following basic requirements for review are met:
>
> > (a) the decision or order shows an obvious and important error of law or jurisdiction;
> >
> > (b) the decision or order shows an important error of fact, or an error of mixed fact and law, in the decision or order that affects the decision or order;
> >
> > (c) the decision or order was based on a process that was obviously unfair or unjust;
> >
> > (d) the decision or order is inconsistent with an earlier Board decision or order, binding judicial authority, or provision of the relevant legislation, regulation, or rules; or
> >
> > (e) there was evidence at the time of the hearing that was not presented because it was unavailable to the party asking for review, and which is likely to make a substantial difference to the outcome of the decision or order.

[14] Section 17 of the *Land and Property Rights Tribunal Act*, SA 2020, c L-2.3 (the "*LPRTA*") contemplates judicial review of decisions of the Tribunal. The standard of review is set by section 19 of the *LPRTA*:

> **Standard of review**
>
> **19** On an application for judicial review of or leave to appeal a decision or order of the Tribunal or on an appeal of a decision or order of the Tribunal, the standard of review to be applied is reasonableness.

III. Background

[15] The facts of this matter do not appear to be in dispute. Mr. Bateman owns a quarter section of farmland in Vulcan County. Lexin was the operator of a 3.99 acre natural gas well site on the property and was to pay Mr. Bateman $2700 in annual compensation. Payment was not made from 2015 to 2019. Lexin is now bankrupt and has no valid corporate existence.

[16] Mr. Bateman applied to the SRB for compensation pursuant to section 36 of the *Act*. On July 16, 2020, the SRB issued Decision No. 2020/0591 (the "Decision"), cited as ***Bateman v Lexin***, 2020 ABSRB 591. The SRB found there was a valid surface lease under which annual compensation of $2700 was payable and that there was non-payment. However, it directed the Minister to pay to Mr. Bateman only 50% of the outstanding payments, totalling $6750. He was also awarded $347.59 in costs.

[17] The SRB summarized its findings at paragraphs 13 to 16 of the Decision, as follows:

> The Applicant submits the Site consists of a midfield access road and well site on dryland cultivation. The entrance to the access road is gravelled but the gravel only extends a short distance into the field; the balance of the road is undeveloped and the Applicant farms over it, but soil compaction is evident on the road. On the Site is also a well head, a fibreglass dome shack, a vent pipe, and valve risers with above ground piping. The equipment is on a small gravel pad and is surrounded by a low metal tech fence. There are four steel corner posts to protect the equipment from impact as well. The balance of the Site is farmed over to control weeds, which is a benefit to the Operator.
>
> The Applicant submits he is not satisfied with the crop growth on the part of the Site that is farmed, therefore, the Applicant submits payment of the full amount of the Compensation for the Site is very justified.
>
> Based on the submissions, the Applicant does not have full use of the Site for high quality agricultural purposes but does farm the Site with under performing crops as well as preforms [*sic*] weed control on the Site.
>
> There is some Operator equipment on the Site requiring the Applicant to farm around the Site. Therefore, on the balance of probabilities, the Panel finds the Applicant has use of most of the Site but not full use because of the presence of some equipment and compaction on the access road, and earns some income from the ability to farm over most of the Site.

[18] The Tribunal reconsidered the Decision in ***Bateman v Lexin Resources Ltd***, 2021 ABLPRT 893 and in ***Bateman v Lexin Resources Ltd***, 2022 ABLPRT 604 (collectively, the "Reconsiderations"). Ultimately, the Tribunal confirmed the compensation ordered by the SRB.

IV. Issues

[19] Mr. Bateman applies for judicial review. He seeks an order quashing the Decision and the Reconsiderations and directing the Tribunal to issue a direction to the Minister to pay the full compensation owing under the lease, plus costs.

[20] The standard of review is not at issue. Mr. Bateman seeks judicial review on the grounds that the Decision is unreasonable. Mr. Bateman identified the following sub-issues in his brief:

1. Was the tribunals' approach to section 36 inconsistent with the wording and purpose of the *Act*?
2. Did the tribunals misconstrue the test in ***Devon Canada Corporation v Surface Rights Board,*** 2003 ABQB 7, and fail to follow binding precedent?
3. Was it unreasonable for the tribunals to exercise their discretion to reduce Mr. Bateman's compensation?
4. Were the decisions of the tribunals arbitrary, or did they contain significant gaps in reasoning?
5. Did the tribunals depart from longstanding practices or established internal authority and, if so, did they justify their reasons for departure?

6. Did the tribunals make factual findings in the absence of evidence, without providing Mr. Bateman a fair opportunity to submit additional evidence?
7. Were the Reconsiderations unreasonable?

[21] In these Reasons, I have focused on the Decision. Nevertheless, the Reconsiderations provide necessary context with regard to the SRB's and Tribunal's process and policy considerations when determining section 36 applications, and prior decisions made under section 36.

V. Analysis

A. Standard of Review

[22] As noted above, the standard of review in this matter is reasonableness. The principles governing a reasonableness review are those set out by the Supreme Court of Canada in ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65. Reasonableness, as articulated at para 86 of ***Vavilov***, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." The Supreme Court held at paras 92-94 that a tribunal's written reasons are to be reviewed with the decision-maker's expertise in mind, as well as the context of the hearing, the history of decisions and the administrative body's policies or guidelines.

[23] In ***Vavilov***, the Supreme Court identified some of the contextual elements that are relevant in evaluating a decision. These include the governing statutory scheme (para 109), principles of statutory interpretation (para 122), the evidence before the decision-maker (paras 125-126), the parties' submissions (paras 127-128), the past practices and decisions of the administrative body (paras 129-131) and the potential impact of the decision on the individual to whom it applies (paras 133-135).

B. Mr. Bateman's Position

[24] The burden is on Mr. Bateman to establish that the Decision is unreasonable. As noted above, he sets out in his brief several sub-issues in support of his position. I will review his arguments first, then set out my conclusions in respect of the reasonableness of the Decision.

1. Was the Tribunal's Approach to Section 36 Inconsistent With the Wording and Purpose of the *Act*?

[25] Mr. Bateman submits that the *Act* does not give the Tribunal discretion to direct payment of anything other than full payment of the amount owed or, alternatively, no compensation. He asserts that section 36 does not give the Tribunal authority to review and adjust the compensation in the manner contemplated in section 27.

[26] I do not agree that section 36 mandates an "all or nothing" approach. In my view, this would unduly restrict the Tribunal's discretion. In ***Provident Energy Ltd v Alberta (Surface Rights Board),*** 2004 ABQB 650, this Court held that the Tribunal has discretion to direct a lesser amount of compensation to be paid by the Minister. I do agree with Mr. Bateman's position, however, that the Tribunal did not exercise its discretion in a reasonable manner.

[27] The purpose of section 36 is to ensure unpaid landowners have a right of recourse. Section 36 does not permit the Board to change the compensation under the lease between the owner and the operator, and that amount remains payable by the operator. In this case, the Minister was the only source of payment as Lexin was insolvent. Mr. Bateman objects to the extent to which the loss of use and adverse effect were considered under section 36 to permit a reduction of what the Minister was required to pay as the result of the operator's default. Typically, those factors are considered in setting fair compensation, as between an operator and landowner. It is inconsistent with the purpose of the legislation to then reapply those factors when applying section 36, in an effort to reduce the amount owing when it is being paid by the Minister. I will address Mr. Bateman's submissions on this point in more detail later in these reasons.

2. Did the Tribunals Misconstrue the Test in *Devon* and Fail to Follow Binding Precedent?

[28] The SRB relied on ***Devon*** as support for its interpretation of section 36 of the *Act*, permitting it to reduce the compensation to be paid by the Minister. The SRB and the Tribunal also relied on ***Praskach Farms Ltd v Lexin Resources Ltd***, 2020 ABSRB 85, which was decided by the SRB just five months prior to Mr. Bateman's application. In addition, the Tribunal conducted a high-level review of other cases in which claimants had been awarded either full or reduced compensation, most of which were recent and followed ***Praskach Farms***. The Tribunal found, based on its review, that the SRB had not deviated from existing practice or precedent. Pursuant to Rule 37 of the *Surface Rights Board Rules*, this finding effectively precluded the Tribunal from reviewing the Decision.

[29] It is necessary to consider the fact patterns set forth in the case law on which the SRB and Tribunal relied. The operator in ***Devon*** had hit a dry hole on the site. All holes had been filled in and no well equipment was ever installed. The operator obtained a release from the owner with regard to the condition of the property and the owner was able to farm the land without restriction, and presumably without any risk of damage to the crops as there was no activity on site. The operator did not obtain a reclamation certificate. Subsequently, the landowner sought compensation for 24 years of unpaid rent. The claim may have had the appearance of an attempt to take advantage of a technicality, arising from the fact that the operator had not obtained a reclamation certificate.

[30] The Court in ***Devon*** described the purpose of the *Act* at para 22: "A mechanism was needed to provide for entry onto the lands, compensation for use of the lands, and reclamation of the lands upon the well expiring." The purpose of the legislation is to provide surface owners with an assurance that the operator will pay them and, when the well ceases to operate, that the condition of the land will be restored. In that case, the SRB had determined that it could not consider anything other than the existence of a lease and unpaid rent. The decision was reviewed. At para 25, the Court stated:

> Justice Virtue in ***OH Ranch Ltd. v. Surface Rights Board (Alberta)***, [1994] 148 A.R. 315 referred to this process guaranteeing payment to the surface owner of compensation to which it is entitled. Although "guaranteeing payment" is correct in the usual case of a surface owner seeking payment from an insolvent oil company, I am not satisfied that the wording of s. 36 implies a blanket guarantee of all cases by the provincial government. S. 36 provides a pragmatic, inexpensive

> remedy for a surface owner to obtain payment when an operator is wrongfully withholding payment or is insolvent.

[31] Under the circumstances in ***Devon***, the Court found that an award of rent arrears was absurd and would lead to the landowner being overcompensated. The Court held at para 29 that if the claim "...is unjustified, is patently absurd or provides an unjust enrichment, the [SRB] should be able to use its discretion under s. 36(6) to refuse to direct that Alberta taxpayers pay the rental arrears." The matter was remitted to the SRB to consider what facts would be relevant in determining whether the province should be directed to pay 24 years of rental arrears. Notably, the Court did not explicitly state whether the SRB has discretion to order payment of a portion of the rental arrears.

[32] ***Devon*** provides authority to reduce the amount payable when paying the full arrears is unjustified, patently absurd or provides unjust enrichment. Accordingly, in my view, the threshold for reducing compensation appears to be higher than simply reviewing factors related to loss of use and adverse effect. It is also not correct to state that the Tribunal should look for any reason to direct the Minister to pay a reduced amount, as stated in the first Reconsideration.

[33] ***Provident Energy,*** referred to above, was another case in which the operator had abandoned a dry hole and an owner applied for compensation after many years. The SRB ordered a reduced payment and the successor operator applied for judicial review, contending that it had no interest in the lease. The award was confirmed and Justice Erb held at para 36 that the SRB was correct in exercising its discretion to reduce payments to reflect the actual loss incurred. Mr. Bateman submits that ***Devon*** was not properly canvassed and that, therefore, ***Provident Energy*** is not useful when considering the exercise of discretion under section 36. As noted above, I do not endorse this aspect of Mr. Bateman's argument. It is important, however, to keep the fact pattern in ***Provident Energy*** in mind.

[34] In ***Praskach Farms***, the SRB held that the applicant was not entitled to the full amount of rent from the government and set forth the factors it took into account. Paragraphs 10 through 13 of ***Praskach Farms*** are set forth below:

> There are two factors particularly important for considering annual compensation and whether directing the Minister to pay the full amount owing is unjustified. When the Board reviews the rate of compensation under section 27 of the *Act*, the factors considered under section 25(1)(c) and (d) are the loss of use by the owner of the area of the surface lease and the adverse effect of the lease on the remaining land of the owner. The Board also assesses the nuisance, inconvenience, and noise that might be caused by or arising from or in connection with the operations of the operator. As noted above, this is not a review of compensation under section 27, however, the loss of use and adverse effect are components of fair compensation which the Board can consider when determining if directing the Minister to pay the full amount owing is justified.
>
> When considering the loss of use of the lease area, the Panel examines the status of the area taken and whether the Applicant is using the site to generate income or otherwise. The Panel also considers the adverse effect on the remaining land or the nuisance, inconvenience, and noise that might be caused by or arising from or in connection with the operations of the operator. The purpose of annual

compensation under the *Act* is to compensate the owner for loss and adverse effect arising from the surface lease and the operations of the operator.

Where, at the relevant time, there is ongoing loss of use or adverse effect; equipment, fencing and facilities remain on site; the site is compacted preventing production; or there are reclamation activities or other damages, it is less likely that there would be a reduction in the amount that the Minister is directed to pay. On the other hand, if the site is near reclamation and the owner has full use of it, the loss of use and adverse effect would be almost nonexistent and directing the Minister to pay the full amount owing under the lease would not be justified. Likewise, if the site is reclaimed, but no Reclamation Certificate is issued, the Board may determine that there should be a significant reduction in the amount that the Minister is directed to pay. For example, in *Provident Energy*, in finding that the Board was correct in following *Devon* and exercising its discretion to reduce the payments to the landowners in an amount reflecting the loss incurred, the Court stated at paragraph 27:

> As Sirrs J. held in the *Devon* case, the application of Section 36 is discretionary and even if a land owner shows sufficient evidence that a lease exists, the Board is not bound to order compensation. If the Board was bound to do so, this would amount to a fettering of its discretion.

The Board may determine the amount the Minister is directed to pay by considering of a combination of factors relevant to loss of use and adverse effect. Some compelling factors include facilities, fencing, and equipment remaining on the lease; operator activity on the lease; the condition of the land within the lease, including compaction, foreign materials, and changes of elevation; how the remaining land is used and how the site impacts this use; if and to what extent the owner is using the lease for production, including cropping and grazing; and the existence and extent of nuisance, inconvenience, and noise.

[35] Once again, the facts of ***Praskach Farms*** are important to understand. The wellsite was abandoned in 1998 and some incomplete reclamation work had been done five to seven years before the application. There was no equipment or fencing on site. It was cropped annually, and although the soil conditions negatively impacted farming operations to a minor degree, the applicant could not estimate the reduced yield. There was no evidence of adverse effect. On this basis, the panel directed the Minister to pay 25% of the unpaid rentals, as full payment would be "unjustified and would cause unjust enrichment". As with some of the other cases on which the Tribunal relied, the fact pattern is not similar to Mr. Bateman's circumstances. I also note that it is not clear how the application of these principles to Mr. Bateman's application would justify a reduction of his compensation.

[36] Mr. Bateman asserts that ***Praskach Farms*** is not consistent with the overall intent of the *Act*. For example, the passage above suggests that one relevant factor in reducing compensation is the extent to which the owner uses the land for production. Mr. Bateman submits that the fact that an owner farms part of the lease does not negatively impact the lease payment under a section 27 review. As long as there is an existing lease, the crop is at risk of damage if the operator decides to access the site. In the case of an abandoned well, there may be damage from

the Orphan Well Association entering the site to clean and reclaim the land. Mr. Bateman argues that reliance on this factor as a basis for reduction of section 36 compensation is not consistent with the *Act* as a whole. Again, this submission will be addressed later in these reasons.

3. Was it Unreasonable for the Tribunals to Exercise Their Discretion to Reduce Mr. Bateman's Compensation?

[37] The reasonableness of the decision is a central issue and will be addressed more fully later in these reasons. I have, however, determined that the exercise of discretion was not reasonable.

4. Were the Decisions of the Tribunals Arbitrary or did They Contain Significant Gaps in Reasoning?

[38] Mr. Bateman submits that the SRB's decision to reduce his compensation was arbitrary and that there were gaps in the reasoning. Mr. Bateman submits that, even if this Court agrees with the SRB's conclusion, it cannot fashion its own reasons to buttress a decision based on an unreasonable analysis. The SRB's findings are summarized in the four paragraphs set out in paragraph 17 of these reasons, and do not provide a clear justification for reducing Mr. Bateman's compensation by 50%. The SRB observed that the owner farmed most of the site but also did weed control, which was the operator's responsibility. It stated that the weed control offset the benefit the owner received from the crop, but there was no evidence from Mr. Bateman about the crops grown or the income generated. It appears some reliance was placed on other case law that supported a 75% reduction in the first instance, though its application to Mr. Bateman's situation was not explained, nor was there an explanation as how Mr. Bateman had been unjustly enriched. It does not clearly explain how it arrived at its compensation assessment in Mr. Bateman's matter and does not explain how Mr. Bateman's circumstances placed him in a position to receive less than full compensation. The Decision appears to be somewhat arbitrary as a result.

[39] The Reconsiderations provide further context for the SRB's decision.

[40] In the second Reconsideration, the Tribunal stated that the oil and gas sector had taken a downturn and the number of section 36 applications rose dramatically. The Tribunal's brief indicated that the number of section 36 applications increased dramatically, rising from approximately 1800 in 2017 to over 6000 in 2021. The volume of decisions leaves the panels less time to craft lengthy and detailed written reasons. This is relevant to the context in which the Decision was made and to the practices of the Tribunal. At para 34 of the second Reconsideration, the Tribunal suggests that processes were changed to become more pragmatic and expeditious, but it does not explicitly justify reduced payments on the basis of increased numbers of section 36 applications. It states instead that the process favours the landowner in the usual case and suggests that the panels are considering whether the evidence supports a finding of unjust enrichment.

[41] With regard to the suggestion that process changes were introduced to improve efficiencies, Mr. Bateman noted that the claim forms were in fact changed to require more detail than had been required in the past. Historically, applicants had been required to provide only proof of a lease and of non-payment, as that is all that is required by section 36 of the *Act*. The new forms require details about the well site condition. Mr. Bateman submits this information

was used as a pretext for reducing compensation payable by the Minister in the event of the operator's default.

[42] As further evidence of the arbitrariness of the Decision, Mr. Bateman subsequently made a separate application for compensation related to the 2020 rent owing on this same property. The application materials were included in the Certified Record of Proceedings filed by the Tribunal. He was awarded the full amount of Lexin's unpaid rent, in the sum of $2700. The property had not significantly changed. Some equipment was removed, though that had only occurred late in 2020, which I note is after the crop season was over. Mr. Bateman continued to farm around the site and future rehabilitation of the soils and removal of a gravel pad was pending. The later award to Mr. Bateman, in the full amount of Lexin's unpaid rent, is inconsistent with the earlier decision to award him only 50% of the outstanding payment for the same land, and there seems to be no apparent reason for the different outcome.

5. Did the Tribunals Depart From Longstanding Practices or Established Internal Authority and, if so, Did They Justify That Departure?

[43] Pursuant to ***Vavilov***, parties involved in administrative processes are entitled to expect that like cases generally will be treated alike. In the Reconsiderations, the Tribunal held that the SRB did not depart from longstanding practices and followed established internal authority.

[44] As noted under the preceding heading, the change in approach followed a downturn which was coupled with increasing numbers of section 36 applications. This does not justify the marked departure from the Tribunals' practice of awarding full compensation, in light of the remedial nature of the governing legislation. Section 10 of the *Interpretation Act,* RSA 2000, c. I-8, provides as follows:

> **10** An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

[45] Mr. Bateman took the position that it had been the SRB's typical practice to award full compensation, in accordance with the objectives of the *Act*. He submits that the authorities on which the SRB and the Tribunal relied to justify a reduction in his compensation, specifically ***Praskach Farms*** and subsequent decisions that applied it, were not well-established. In the second Reconsideration, the Tribunal stated that the SRB's decision to reduce Mr. Bateman's compensation was an established practice and of a longstanding nature. In reality, this line of authority appears to have arisen with ***Praskach Farms*** in 2020, only five months before Mr. Bateman's matter. The justification for the departure from awarding full compensation is not clearly articulated, but seems linked to an implicit policy decision that was implemented in response to an industry downturn and increasing liability on the part of the government for unpaid lease payments.

6. Did the Tribunals Make Factual Findings in the Absence of Evidence Without Providing Mr. Bateman Fair Process and an Opportunity to Submit Additional Evidence?

[46] In the Reconsiderations, the Tribunal indicated that Mr. Bateman had the onus to provide sufficient evidence. However, he submits that only limited information was requested in the revised forms. Nothing was asked about crop income or other issues of potential relevance, as identified in the Tribunal's reasons, nor was there any guidance about why the information

sought was important or how it would be applied. The FAQ suffered from the same limitations. The forms require information about the condition of the site, but not about income earned from crops or expenses associated with weed control. The panels appear to be making findings and assumptions about the use of the leased site and potential income, then determining compensation based on inadequate or non-existent financial information.

C. Reasonableness

[47] With these arguments in mind, I now turn to consider whether the Decision (and, by extension, the Reconsiderations) met the reasonableness standard of review as articulated by the Supreme Court of Canada in ***Vavilov***.

1. Justification, Transparency and Intelligibility

[48] The rationale for the Decision to decrease the amount payable to Mr. Bateman was that he should be compensated for his *actual* loss of use and adverse effect arising from the surface lease. The SRB stated that payment of the full amount owing under the lease would result in an overpayment or unjust enrichment and, accordingly, directed the Minister to pay only 50% of the lease compensation to Mr. Bateman. For the reasons that follow, I have found the Decision was unreasonable.

[49] The SRB relied on ***Devon*** in exercising its discretion and on ***Praskach Farms*** to support a finding that reduced compensation was payable when the owner farmed the lease site. As noted above, the facts of both cases cited differ from those in Mr. Bateman's application. The SRB also referred to and relied on ***Wildeboer v Goldenrod Resources Inc***, 2019 ABSRB 639. In that case, the lease site had been abandoned in 2015 and was fully farmed with alfalfa by 2019 when the matter was heard. The compensation payable to the owner in that case was reduced by 75%. In my view, it is significant that the owners in that case prevented the Orphan Well Association from accessing the site to conduct the reclamation work necessary for obtaining a reclamation certificate. That did not appear to be considered by the SRB in its Decision, when it relied on ***Wildeboer*** as justification for the reduction in Mr. Bateman's claim.

[50] Despite the SRB's reliance on these decisions, there is no consideration in the Decision of the factual differences between those matters and Mr. Bateman's application. This analysis is essential to address how a reduction in this case might be justified under section 36 of the *Act*.

[51] In Mr. Bateman's case, there was some recognition of the factors that would support a finding of adverse effect, but the focus of the Decision seems to be the existence of a crop and Mr. Bateman's efforts at weed control. The SRB found that Mr. Bateman had use of most of the site but not all of it, as full access was limited by site equipment and soil compaction. He earned some income from crops, though he was not satisfied with the crop growth on the part of the site that was farmed, and the crops were described as underperforming. The SRB commented that no crop income information was available, implying that it should have been provided or that they would have relied on it had it been available. In my view, Mr. Bateman cannot be faulted for this on the basis of the submissions outlined above.

[52] The application for compensation was made in writing and there was no oral hearing. The application forms are included in the certified record of proceedings filed with the Court. These forms direct applicants to describe the condition of the leased area. There are specific questions about whether the site is fenced, whether equipment or structures are on site, and whether the site is still being visited by workers. Applicants are also asked to describe losses suffered because of

the existence of the lease or because of activities on the leased area, including reclamation work. They are not asked directly for information about crop income or yields. It is difficult to understand how the information requested can be used to justify such specific reductions in the compensation to be paid by the Minister, particularly when the process of setting the lease payments in the first instance is subject to a rigorous hearing process under section 27 of the *Act*.

[53] The Decision ultimately lacks a connection between the evidence and the conclusions. As Mr. Bateman was growing a crop on the site, the SRB appears to start from the assumption that payment should be reduced by 75% in the absence of other factors. The application of the 75% reduction as a starting point appears to be based on ***Wildeboer***, another decision bearing little resemblance to Mr. Bateman's circumstances. It appears that Mr. Bateman's efforts at weed control, which was actually the operator's responsibility, may have caused the SRB to set the reduction at 50% instead of 75%. Nevertheless, the reduction appears arbitrary, as there was no information before the SRB about crop revenues, the type and amount of crop planted, or the cost and extent of weed mitigation. Neither is there any clear indication in the Decision of how loss of use or adverse effect factored into the calculation of the reduction, although both are referenced as factors in the decision. It is not enough to list the factors without then indicating how they are being applied.

[54] This conclusion is further supported by the fact that, in 2020, Mr. Bateman was awarded full compensation when the condition of the land was virtually the same. The inconsistency between these decisions points to arbitrariness.

[55] The Tribunal's counsel submitted that the volume of section 36 applications and the need for timely decisions makes it difficult to craft lengthy and detailed reasons. The Tribunal's submissions also state that the panel members have expertise and familiarity with surface rights matters. While the courts have recognized the SRB's expertise, a decision maker is still required to issue reasons that are justifiable, transparent and intelligible and are sufficient to permit judicial review.

[56] I find that the Decision was unreasonable, in that it was not justifiable, transparent, or intelligible. There are gaps in the analysis that give the Decision the appearance of arbitrariness. There is a lack of connection between the information sought in the application form and the SRB's analysis and decision. The 50% reduction is not justified or explained by the analysis, and is not transparent or explained in a manner that lends itself to judicial review.

[57] The Reconsiderations are similarly lacking in transparency and rationality. I will address the Reconsiderations further below.

2. Range of Possible, Acceptable Outcomes

[58] As noted above, the Supreme Court of Canada, at paras 106-107 of ***Vavilov***, identified contextual elements that are relevant in evaluating a decision, including the governing statutory scheme, principles of statutory interpretation, the evidence before the decision-maker, the parties' submissions, the past practices and decisions of the administrative body and the potential impact of the decision on the individual to whom it applies. The Supreme Court went on to say at para 108 of ***Vavilov*** that, while an administrative tribunal may have discretion in making a decision, that decision must comply with the rationale and purview of the statutory scheme under which it is adopted. At para 109, the Supreme Court stated:

> Although a decision maker's interpretation of its statutory grant of authority is generally entitled to deference, the decision maker must nonetheless properly justify that interpretation. Reasonableness review does not allow administrative decision makers to arrogate powers to themselves that they were never intended to have, and an administrative body cannot exercise authority which was not delegated to it. ...

[59] With this guidance in mind, I have addressed the following issues:

a. whether the decision-maker has properly justified its interpretation of its statutory authority;

b. whether the decision is justified in relation to the factual and legal constraints that are relevant to the decision, including the governing statute and case law; and

c. whether the decision-maker has departed from past longstanding practice or established internal authority, such that it must justify and explain the departure.

[60] Mr. Bateman does not appear to have asked the Tribunal at the first Reconsideration to address the scope of the SRB's discretion to order reduced compensation under section 36 of the *Act*. The focus was instead on the issue of unjust enrichment. In the first Reconsideration, the Tribunal did not find an error in the SRB's approach to its discretion, stating as follows at para 27:

> The reasons in the original decision clearly show that the original panel considered section 36 of the *Surface Rights Act* and the case law as the appropriate framework within which to decide whether to direct the Minister to pay the full amount owed. The original panel clearly turned its mind to the scope of the Tribunal's authority by considering the factors of loss of use and adverse effect in reaching the conclusion that paying the full amount would amount unjust enrichment or an overpayment. In this context, the original Panel was not required to show consideration of whether there was a benefit to one party, a corresponding deprivation to another party and the absence of juristic reasons. *Devon* did not direct the Tribunal to adapt an equitable doctrine originating from the courts, rather it instructs the Tribunal to exercise its discretion and apply its expertise when doing so. The reference to unjust enrichment in the original panel's reasons do not reveal an intention to adapt the doctrine of unjust enrichment arising from the common law. It was simply a conclusion that the full amount would result in an overpayment when taking into consideration the factors of loss of use and adverse effect.

[61] The Tribunal maintained that ***Devon*** stands for the proposition that SRB has discretion under section 36 to refuse to direct that Alberta taxpayers pay the full rental arrears in circumstances where a landowner would be overcompensated. Mr. Bateman argues that the SRB has no such discretion.

[62] As indicated above, I am satisfied that the SRB does have discretion under section 36 of the *Act* to refuse to direct full payment of rental arrears in appropriate circumstances. The more relevant question is whether its approach to that discretion has changed from previous cases and whether that change is justifiable in the context of the governing statute.

[63] The Tribunal acknowledged that consistency with past decisions is a relevant consideration. For the purposes of the second Reconsideration, Mr. Bateman was directed to address whether there was a longstanding practice or established internal authority with respect to cases in which the landowner was using all or some of the site for farming. If so, the Tribunal would consider whether the Decision departed from the established authority and whether that departure was justified. Ultimately, the Tribunal found that the SRB had relied on longstanding practice and established internal authority in making the Decision.

[64] The Tribunal began by considering ***Devon***, then observed that there were relatively few section 36 applications between 2003 and 2015. The decisions during that period in which reduced compensation was awarded appear to have arisen, for the most part, in circumstances where there was a long period of inactivity on the property. For example, in ***Juhar v Ocelot Energy Inc,*** 2012 ABSRB 308, as one example, a well was spudded but abandoned within a week and there were no further activities or installations on the site. The applicants delayed applying for section 36 compensation for 13 years, asserting that they were not aware of the legislation. They had not pursued the operator for payment. Accordingly, the applicants' claim for compensation was reduced from $36,400 to $9,100.

[65] The Tribunal then turned its attention to the period commencing in 2016, noting that the number of section 36 applications had risen dramatically. The Tribunal asserts that it relied on ***Devon*** to implement a change in process, in which panels began to examine if there was any reason why they should direct the Minister to pay a reduced amount. The Tribunal indicated at para 34 of the second Reconsideration that the revised process had to favour the landowner and that full payment would be ordered in the absence of a reason to do otherwise.

[66] The Tribunal stated that, beginning in 2020, ***Praskach Farms*** became a leading internal authority. Based on that case, the SRB began to consider loss of use, whether an applicant could generate income from the site, and whether there was a continuing adverse effect on the remaining land. In determining these factors, the SRB would consider the equipment on site, fencing, facilities or buildings, soil compaction, presence of foreign material, changes in elevation, use of remaining land and impacts on its use, the extent to which the owner was using the lease for production or grazing, and the existence and extent of nuisance, inconvenience, and noise. While the SRB acknowledged in ***Praskach Farms*** that a section 36 application is not a section 27 compensation review, it used the same factors to determine whether it was justified to direct the Minister to pay the full amount of unpaid rent.

[67] The Tribunal then listed numerous cases decided in 2020 or later in which lease payment reductions were ordered. The Tribunal did not review them all, expressing the obvious impossibility of conducting a meaningful detailed review and comparison of hundreds of cases. I selected one listed case to review, based on the reduction of 68% that the Tribunal had applied, though I later determined that the actual reduction was closer to 64%. The matter of ***Henry-Ratcliffe v Canadian Oil & Gas International Inc***, 2021 ABLPRT 418, was decided after the Bateman Decision. The annual lease payment was $2900, but the operator was insolvent and had abandoned the lease in 2019. There was no evidence of any adverse effect once the well was abandoned, though no reclamation certificate had issued. The applicant had stated in the application form that there were no losses due to the gas well. The Minister was directed to pay a reduced amount, to reflect the amount of $1850 per year that would otherwise have been payable under the lease for adverse effect during the 18 months since the well had been abandoned. Despite the panel's findings that there were no crop losses, there was no reduction for loss of

use. This matter is again factually dissimilar to the Bateman application and the outcome is not clearly justified. It follows a different path of reasoning than what was employed in the original Bateman decision and gives separate consideration to the amounts of the lease payment that are attributable to loss of use and to adverse effect, respectively. That was not done in the Bateman decision, lending further strength to the suggestion that proceedings under section 36 are somewhat random and do not follow any predictable path of reasoning.

[68] The Tribunal ultimately declined to interfere with the Decision in Mr. Bateman's matter. It found that the SRB had followed a longstanding practice in considering and determining the loss of use and adverse effect and the resulting impact on payments from the Minister. As a result, the Tribunal found it was not necessary to consider whether departure from precedent was justified.

[69] In my view, the Tribunal's conclusion with respect to longstanding practice is not reasonable. As previously noted, ***Praskach Farms*** was decided only five months before the Decision. The longstanding practice that existed prior to ***Praskach Farms*** was to award full compensation in almost all section 36 applications. The Tribunal offered no clear justification for the change in practice, other than the increasing number of claims.

[70] While I accept that there is authority for the SRB's discretion to decrease the amount of compensation payable by the Minister, it is important to note that neither the statute, nor the policy reasons behind compensating landowners, have changed. Yet the Tribunal suggests in the second Reconsideration that a decision was made to actively look for reasons to direct the Minister to pay reduced compensation. While the Tribunal also stated that it adopted a more pragmatic and expeditious process to deal with the high volume of claims, in reality the new forms are more extensive and require information beyond proof of the lease and default on the payment, which is all that is required by section 36. The same factors that are considered in awarding fair compensation to the landowner in a section 27 review are now being reapplied on section 36 applications, despite the explicit purpose and wording of the *Act*. I agree with Mr. Bateman that it is objectionable to rely on loss of use and adverse effect to reduce compensation when those factors have already been considered in setting a fair value for the compensation under a different process dictated by the *Act*. There is no justification for this approach or outcome in the authorities on which the Tribunal relied. In circumstances where parties have agreed on a rent payment that reflects their commercial reality or where there has been a detailed hearing to set the amount of rent, that amount already has taken into account loss of use and adverse effect. It has been recognized in the cases cited that, as long as the operator or the Orphan Well Association has the right to enter the lease site when they wish, any crops the owner may have planted on the lease site are potentially at risk. Therefore, cultivation of the lease site is not a factor when setting compensation under section 27 of the *Act*, as there is no guarantee the landowner will get to harvest the crop. It is therefore unreasonable to then use the existence of a crop on the lease site as the basis to reduce the amount payable under section 36. These factors are clearly absent from the wording of section 36, which requires only that the landowner provide proof of a lease and of non-payment.

[71] When I examined the evolution of the section 36 decisions, I concluded that the more recent decisions appear to be deviating from the purpose of the *Act*. In earlier decisions, such as ***Devon***, compensation was reduced when landowners were seeking an award on the basis of a technicality, when no real loss or inconvenience had been sustained. In ***Devon***, no well equipment had ever been installed on site. In some cases, such as ***Wildeboer,*** the circumstances

warranted a denial of payment, such as a refusal to allow the Orphan Well Association to access the property. In those circumstances, it is reasonable to conclude that requiring the Minister to pay the outstanding rent is unjustified or absurd, or will unjustly enrich a landowner, applying the test in ***Devon***. These exceptional cases, however, are being used as authority to justify reductions in compensation when the underlying fact patterns do not support a reduction.

[72] In the Reconsiderations, the Tribunal indicated that a sharp increase in defaults and claims appears to have led to a change in process with the result that landowners will not be fully compensated if, for example, they derive any benefit from a crop on a lease site. Implicit in this change of process, there appears to be a policy decision to avoid making taxpayers responsible for a rapidly increasing volume of claims caused by lagging market conditions in the oil and gas sector. However, the legislation has not changed and the protection that was intended to be in place for landowners is significantly diluted by the new approach.

[73] Taking all of this into account, I find that the Decision was unreasonable. It does not align with the rationale and purview of the statutory scheme under which the SRB derived its authority. The statute guarantees lease payments when operators do not make them, unless there are valid reasons for the SRB to exercise its discretion not to do so. I do not agree with Mr. Bateman that this requires an "all or nothing" approach; there is nothing in the *Act* to suggest that the only discretion the SRB may exercise is to pay the full amount or decline to order any compensation under section 36. The case law supports the discretion to direct partial payment by the Minister in circumstances that would give rise to an absurdity, an unjustified payment, or an unjust enrichment. Refusal to allow access for reclamation or excessive delay in seeking compensation are two examples of situations which warrant a reduction in compensation. The circumstances in ***Devon*** also warranted a finding that compensation should be reduced or denied, as there was effectively no impact on the landowner. In contrast, in Mr. Bateman's situation, equipment and facility structures were still on site, the operator was insolvent and had failed to make the lease payments, and he sought payment in a timely way. These circumstances are not extraordinary and indeed are precisely what is contemplated by section 36. In these circumstances, and in the context of the purpose of section 36 of the *Act*, the exercise of discretion to decrease his compensation is unreasonable.

[74] I am not suggesting that the Tribunal is not entitled to look at background factors in exercising its discretion to set the compensation payable under section 36. However, I am not satisfied that Mr. Bateman's circumstances were properly considered in either the Decision or the Reconsiderations and the outcome was unreasonable. The Tribunal has not justified the deviation from the decisions that predate ***Praskach Farms***, with regard to the legal constraints that are present in the governing statute and case law. The Decision and Reconsiderations also do not deal with the factual distinctions that exist in the cases cited and on which reliance is placed to justify the reduction in Mr. Bateman's compensation.

[75] I realize that this decision may have implications that go beyond this particular case, given the manner in which section 36 compensation applications appear to have been decided in recent years. It seems that the more recent decisions may have arisen as a reaction to an increase in operator defaults, and the resulting section 36 applications, and may reflect a concern that taxpayers should not be funding payments to landowners who may have suffered little or no actual financial loss. Nevertheless, the statute remains unchanged and reflects a legislative policy decision to ensure that, absent extraordinary circumstances, landowners should be fully compensated when an operator is in default of its lease payments.

VI. Conclusion

[76] In summary, I have concluded that the SRB and the Tribunal unreasonably interpreted their statutory authority and that the Decision and the Reconsiderations are not justified in relation to relevant factual and legal constraints, including the governing statute and case law. I am satisfied that the SRB has some discretion in determining whether full payment will be made under section 36, and may reduce payments in appropriate circumstances. However, the case law from the superior courts, and the purpose and language of the *Act*, do not justify the current approach of the SRB and the Tribunal to section 36 applications. Even if the SRB and Tribunal had properly interpreted its authority, the SRB Decision suffered from a lack of justification, transparency and intelligibility in determining the reduction of Mr. Bateman's compensation, for the reasons earlier stated. Accordingly, the Decision is quashed.

[77] Rule 3.24 of the *Rules of Court* provides the Court with the following authority on judicial review:

> **3.24(1)** If an originating applicant is entitled to a declaration that a decision or act of a person or body is unauthorized or invalid, the Court may, instead of making a declaration, set aside the decision or act.
>
> **(2)** The Court may
>
> (a) direct a person or body to reconsider the whole or any part of a matter,
>
> (b) direct a person or body to reconsider the whole or any part of a decision if the Court has set aside the decision under subrule (1), and
>
> (c) give any other directions it considers necessary.
>
> ...

[78] Ordinarily, having found that an administrative decision is unreasonable, the reviewing court should remit the matter for rehearing. There is, however, authority permitting the reviewing court to issue a decision on the merits if "...in light of the circumstances and the evidence in the record, only one interpretation or solution is possible, that is, where any other interpretation or solution would be unreasonable": ***Telus Communications Inc v Telecommunications Workers Union***, 2014 ABCA 199 at para 36, citing ***Canadian Airlines International Ltd v C.A.L.PA.*** [1998] 1 WWR 609 (BCCA).

[79] In this matter, I have found that Mr. Bateman's particular circumstances were not properly considered by the SRB, and there did not appear to be any reason to find that full compensation was unjustified, patently absurd or provided unjust enrichment. Indeed, on a subsequent application involving the same lease and same land, the Tribunal awarded Mr. Bateman full compensation for the nonpayment of the 2020 rent. In such circumstances, there appears to be little utility in remitting the matter back to the Tribunal as the only logical conclusion is that it should also award full compensation for 2016 to 2019 in the amount of $13,500.

[80] With respect to costs, I agree with the reasoning in ***Manawan Drainage District v Lutz,*** 2013 ABQB 217 at para 14 and I award Mr. Bateman solicitor-client costs, subject to review by the assessment officer if the parties are unable to agree on the quantum. If solicitor-client costs

were not awarded, Mr. Bateman's compensation likely would be significantly eroded, despite his success on this judicial review. I understand, based on the submissions of counsel, that these costs will form part of the compensation award payable by the Minister.

Heard on the 24th day of March, 2023.
Dated at the City of Medicine Hat, Alberta this 14th day of November, 2023.

N.M Carruthers
J.C.K.B.A.

Appearances:

Keith Wilson, KC
for the Applicant

Shannon L.M. Boyer
for the Respondent

Corrigendum of the Reasons for Judgment
of
The Honourable Justice N.M Carruthers

Citation in Footnote on page 2 corrected to reflect accurate legislation.

MSAT Order 499

Before:

Metis Settlements Appeal Tribunal

Between:

Paddle Prairie Metis Settlement,

Appellant,

-and-

Long Run Exploration Ltd.,
Metis Settlements General Council,
President of Treasury Board and Minister of Finance,
PricewaterhouseCoopers (Receiver for Long Run Exploration Ltd. in CCAA Proceedings)

Respondents

Concerning:

An application under s. 121 of the *Metis Settlements Act* for recovery of compensation

Decision Date:

December 5, 2025

DECISION

Panel Members:
Phyllis Collins, Panel Chair
Anne-Marie Lambert, Panel Member
Dennis Callihoo, Panel Member

Parties Present
Paddle Prairie Metis Settlement
Alden Armstrong, Chairman
Kris Bower, CEO Welltraxx Surface Asset Management
Alex Yiu, Ackroyd LLP, Legal Counsel for Paddle Prairie Metis Settlement

W.L. (Bill) McElhanney, Ackroyd LLP, Observer

Appeal Tribunal Staff
BJ Simpson, Tribunal Secretary
Jason Lavallee, Dispute Resolution Officer
M. Joseph Redman, Independent Legal Counsel for Metis Settlements Appeal Tribunal

Place and Date of the Hearing:
Metis Settlements Appeal Tribunal Offices in Edmonton, Alberta
April 28, 2025

File: 05-0003-24

Context

[1] Paddle Prairie Metis Settlement ("PPMS") applied to the Metis Settlements Appeal Tribunal (the "Appeal Tribunal") for the payment of compensation owed under surface lease agreements and a Joint Benefits Agreement for well-sites and access roads on the Settlement.

[2] The Respondent, Long Run Exploration Ltd. ("Long Run"), is a party to surface lease agreements and a Joint Benefits Agreement, signed August 21, 2014. On March 5, 2025, PricewaterhouseCoopers ("PwC") was appointed as receiver for Long Run.

[3] For the reasons that follow, the Appeal Tribunal is satisfied that Long Run has failed to pay money owed to PPMS for 278 surface leases dating back to 2020. Pursuant to section 121(2) of the *Metis Settlements Act*, the Appeal Tribunal directs the President of Treasury Board and Minister of Finance to pay $4,402,361.09 to PPMS out of the General Revenue Fund.

Statutory Scheme

[4] The *Metis Settlements Act*, RSA 2000, c M-14 provides a comprehensive scheme for management of settlement land, including access to settlement land for the purpose of oil and gas development and compensation for that access. Part 4, Division 7 of the *Metis Settlements Act* deals with access to patented land.

[5] Section 113 sets out the purpose of Division 7:

> 113 The purpose of this Division is
>
> (a) to enable an operator to enter and use the surface of patented land for an authorized project,
>
> (b) to entitle an existing mineral lease holder who has no right of entry in respect of the existing mineral lease or who has a right of entry in respect of an existing mineral lease but requires additional surface access to apply for the right to enter and use the surface of patented land for the purpose of that lease, and
>
> (c) to enable occupants of parcels of patented land required for an authorized project or existing mineral lease to have their interests considered and to receive fair compensation for any entry, use and related damage to the land.

[6] Section 118 permits the Appeal Tribunal (sitting as a Land Access Panel) to determine the amount of money payable by an existing mineral lease holder or operator to an occupant as compensation. Section 118 goes on to set out factors that the Land Access Panel must consider:

> 118(1) In determining the amount of money payable by an existing mineral lease holder or operator to an occupant as compensation, the Existing Leases Land Access Panel or the Land Access Panel must consider any relevant development agreement and may consider the following:
>
> (a) the value of the parcel of land affected, including
>
> (i) the cultural value for preserving a traditional Metis way of life,
>
> (ii) the economic value as an asset, and
>
> (iii) the productive value;
>
> (b) damage in the specific existing mineral lease or authorized project area, including
>
> (i) the effect of the lease or project on the present and planned use of the parcel and surrounding area,
>
> (ii) the special damages to improvements, crops, wildlife, livestock, trap lines and natural vegetation resulting from the lease or project, and
>
> (iii) the amount of the lease or project area that the existing mineral lease holder or operator may damage;
>
> (c) the impact of the lease or project on other areas, including
>
> (i) disturbance to the physical, social and cultural environment,
>
> (ii) location of the lease or project in relation to existing or planned community uses, and
>
> (iii) other specific matters, such as the cumulative effect of related projects;
>
> (d) any agreement, in addition to a development agreement, entered into by an existing mineral lease holder or operator and the General Council or an occupant;

(e) any other factors the Panel considers appropriate.

[7] Section 121 provides the Appeal Tribunal with the ability to provide remedies in the event an existing mineral lease holder or operator fails to pay money under a surface lease. Section 121(1) provides:

> 121(1) If an existing mineral lease holder or operator fails to pay money
>
> (a) under a surface lease, or
>
> (b) ordered to be paid by the Existing Land Access Panel or the Land Access Panel,
>
> within 30 days of the date it is due, the person entitled to receive the money may submit to the Land Access Panel evidence of the failure to pay.

Section 121(2) goes on to state:

> 121(2) On receipt of satisfactory evidence of failure of the existing mineral lease holder or operator to pay, the Land Access Panel may direct the President of Treasury Board and Minister of Finance to pay out of the General Revenue Fund the amount of money to which the person is entitled.

[8] Section 111(h) defines "occupant" as:

> (i) a settlement council,
> (ii) the person in actual possession of a parcel of patented land, and
> (iii) a person having a right or interest in patented land that is registered in the Metis Settlements Land Registry.

[9] Section 111(i) defines "operator" as "the person who is authorized or permitted to engage in an authorized project."

[10] Section 111(j) defines "surface lease" as "a lease or other instrument under which the surface of a parcel of patented land is held for any purpose for which a right of entry order may be made under this Division, and that provides for compensation."

Background

Relationship Between Long Run and PPMS

[11] On August 21, 2014, PPMS and Long Run entered into a Joint Benefits Agreement (the "Agreement"). A copy of the Agreement was provided to the Appeal Tribunal and was included

in the Hearing package at Tab 3. The recitals of the Agreement note that PPMS was prepared to provide surface access to Long Run to conduct activities to extract petroleum substances, in exchange for compensation for the impact of those activities on PPMS lands and people.

[12] Schedule "B" to the Agreement incorporates the "Existing Surface Agreements" into the Agreement, which includes the surface leases, easements, rights of way, road use agreements and other surface rights agreements between Long Run and PPMS.

[13] Section 4 of the Agreement, titled "Yearly Investment" contemplated that in exchange for access to PPMS lands, Long Run would annually pay $50,000 to PPMS for investment in the community; and an additional $50,000 for education and scholarships for PPMS youth. This amount is in addition to the specific compensation payable for each well-site and access.

[14] Section 10 is titled "Surface Access Compensation", and provides in part:

> 10(f)(i) New Takings: [Long Run] shall pay the surface compensation rates for all future Surface Agreements as are set forth in Schedule "D".
> .....
>
> 10(f)(iii) Future Surface Lease Compensation Review: The amended annual compensation for the Existing Surface Leases as set forth in Schedule "H" shall automatically be increased by 10% once every 5 years calculated from the Effective Date [January 1, 2014]. Further, the annual compensation for new Surface Leases shall automatically be increased by 10% once every 5 years calculated from the date of such surface agreement. The parties agree that such review and amendment constitutes a rate of compensation review under the *Metis Settlements Act (Alberta)* and satisfies any and all other requirements under any statute or regulation regarding rental notifications or rental increase requirements.

[15] The term of the Agreement was 10 years from the effective date (January 1, 2014), with a 10 year automatic renewal as follows:

> 21: Term and Renewal
>
> The provisions of this Agreement shall be in effect for a term of 10 years from the Effective Date. Subject to both parties meeting all the terms and conditions contained in this Agreement, the term may be automatically renewed for additional terms of 10 years (including this renewal provision), upon [Long Run] providing written notice to Paddle Prairie prior to the expiry of the current term.

[16] Long Run held 281 surface leases for well sites and access roads on PPMS. In 2011, three of the lease sites were reclaimed, leaving 278 lease sites.

Pre-hearing process

[17] On July 24, 2024, Welltraxx Surface Asset Management ("Welltraxx"), on behalf of their client PPMS, applied to MSAT for the recovery of compensation for the years 2020 to 2024. The Appeal Tribunal began gathering relevant records for the appeal.

[18] While gathering records, the Appeal Tribunal discovered that on July 4, 2024, the Court of King's Bench issued an order appointing a monitor under the *Companies' Creditors Arrangement Act,* RSC 195, c C-36 for Long Run. Between July 2024 and February 2025, several additional orders were issued by the Court of King's Bench, staying various proceedings as against Long Run. On February 26, 2025, an application was made to the Court of King's Bench to appoint a receiver for Long Run.

[19] On March 21, 2025, the Appeal Tribunal circulated a draft Hearing package to Long Run, PPMS, Welltraxx, the Metis Settlements General Counsel, and PwC (Hearing package, Tab 38). On March 24, 2025, counsel for PwC wrote to the Appeal Tribunal to advise that through the various court proceedings, "Long Run first, and now the Receiver [PwC], was granted a stay prohibiting the exercise of rights or remedies against Long Run". Counsel went on to write:

> Based on the foregoing, the Receiver is hereby providing express notice that it will not be participating in the Paddle Prairie appeal and that it takes the position that no award (should one be granted) is enforceable against Long Run or the Receiver pursuant to the Stay.

[20] On March 26, 2025, counsel for PPMS wrote to the Appeal Tribunal, noting that section 121(2) of the *Metis Settlements Act* provides that the Appeal Tribunal may issue directions to the President of Treasury Board and Minister of Finance to pay out of the General Revenue Fund an amount of money for outstanding surface rights payments to which PPMS is entitled.

[21] On March 28, 2025, the Chair of the panel hearing this appeal wrote to the parties, and to the Honourable Nate Horner, President of Treasury Board and Minister of Finance (Hearing package, Tab 41). The Chair wrote:

> The Land Access Panel understands that paragraph 8 of the [stay Order] prevents any proceedings against or in respect of Long Run or the Receiver from continuing except with the written consent of the Receiver or leave of

the Court. However, in the Panel's view, a proceeding under section 121(2) is not a proceeding against or in respect of Long Run or the Receiver, it is a proceeding between a person entitled to receive compensation and the President of Treasury Board and Minister of Finance (the "Minister"). The purpose of section 121(2) in the *Metis Settlements Act* is to ensure that Metis settlements and settlement members are not left without recourse in the event that a mineral lease holder or operator fails or is unable to fulfil its obligations. Under the statutory scheme, the Minister acts as a backstop to ensure the fiscal stability necessary for Metis Settlements to remain viable self-governing bodies.

By way of this letter, the Panel provides notice to the Minister, that it will be proceeding with the Settlement's request for recover[y] of compensation under section 121(2) of the *Metis Settlements Act* on Monday April 28, 2025 at 10:00am in the MSAT Offices located at 9920 – 108 Street in Edmonton, Alberta.

It is up to the parties to decide whether they wish to attend or not. The Appeal Tribunal notes that section 47 of its *Rules of Procedure* provides:

> 47. Non-Attendance at Hearing
> (a) If a party fails to attend the hearing after receiving due notice from the Appeal Tribunal of the date, time and place of the hearing, the Appeal Tribunal assigned to the matter may proceed with the hearing as scheduled and the decision will be based on the evidence before it and as provided by the parties present.

[22] The letter from the Chair enclosed the Draft Hearing Package, the letter from counsel for PwC to the Appeal Tribunal, and the letter from counsel to PPMS to the Appeal Tribunal.

[23] The hearing proceeded on April 28, 2025 at 10:00 am.

Issues

[24] The issues to be addressed in this appeal are:

1. Is there satisfactory evidence of failure of the existing mineral lease holder or operator to pay funds under:
    a. the 278 surface lease agreements; and
    b. the Joint Benefit Agreement dated August 21, 2014?

2. If the answer to the questions above is yes, should the panel direct the President of Treasury Board and Minister of Finance to pay out of the General Revenue Fund any unpaid amounts?

Evidence and Findings of Fact

[25] The key facts underlying the appeal are not disputed. Notably, PPMS was the only party that attended the hearing, and the only party to call evidence.

[26] PPMS Chairman Alden Armstrong provided the Appeal Tribunal with an overview of the importance of surface lease payments to PPMS. He noted that Long Run was the only oil and gas company that operated on PPMS. Therefore, 100% of the external funding for PPMS services is funded by the surface rights agreements at issue in this appeal. The lack of funding meant PPMS had to defer and cancel projects. He noted that every single aspect of PPMS' budget has been affected, including senior and youth programming.

[27] Welltraxx CEO Kris Bower took the Appeal Tribunal through the work that he has done on behalf of PPMS. He started with the Agreement and explained the negotiated price for each well-site, and the built-in inflation adjustor of 10% every 5 years. His evidence was that at the end of the first 5 years of the Agreement, Long Run honoured the adjustment provision and increased the compensation paid by Long Run by 10%.

[28] Mr. Bower walked the Appeal Tribunal through Tab 12 of the Hearing package. Tab 12 is a spreadsheet summarizing all the payments made by Long Run to PPMS, and all of the payments owed by Long Run to PPMS, sorted by year. Mr. Bower explained that each of the figures in the spreadsheet was supported by original records that Welltraxx also provided to the Appeal Tribunal.

[29] In summary, Welltraxx calculated the following amounts were outstanding between January 1, 2020, and January 28, 2025:

Wells Total:	$3,635,361.09
Low Grade Road:	$417,000.00
2022-2024 High Grade Road:	$150,000.00
Community Payments (Yearly Investment):	$200,000.00
Total:	**$4,402,361.09**

[30] Within the spreadsheet in Tab 12, each of the well-sites has an associated dollar value. The value is based on the surface lease, with some variation in value based on the size of the facility, or if a site was only a valve (rather than an operating well), for example.

[31] Starting in 2020, payments from Long Run to PPMS began to become sporadic. For example, Long Run made a partial payment to PPMS in 2021, even though amounts for 2020 were

still outstanding. There was no indication from Long Run at the time why payments were jumping. By 2023, Long Run had stopped making payments altogether. Welltraxx concluded that Long Run made partial payments under surface leases in 2020, 2021, and 2022: $290,686.15, $692,546.12, and $132,415.89 respectively. Copies of the cheque stubs for the partial payments are included, sorted by month, throughout Tabs 16-33 of the Hearing package. The "Wells Total" figure is based on the outstanding balances from 2020-2022, and the full balances owing from 2023-January 2025.

[32] With respect to the road payments, Tab 8 of the Hearing package sets out the terms and corresponding fee for road use. Mr. Bower noted that there were 50 km of heavy grade gravel roads on PPMS, supported by mapping data. For the low-grade gravel roads that would go directly to well-sites, Welltraxx used a flat number of metres per road access, rather than individually accounting for small variances in meterage across several hundred wells. Welltraxx calculated a flat fee of $500 per low-grade road. This approach was consistent with the approach taken when Long Run was making payments to PPMS (Hearing package, Tab 11).

[33] Mr. Bower explained that Welltraxx applied a 10% increase to the amounts owed under the Agreement for the year 2024, consistent with the 10% increase every five years provided for in the Agreement. He noted that Tab 18 of the Hearing package included copies of cheque stubs from Long Run to PPMS that demonstrate the 10% increase in 2019.

[34] With respect to the "Community Payments", Mr. Bower noted that the last year Long Run made community payments was 2022. Copies of the cheque stubs for the community payments are included at Hearing package, Tab 14. Long Run did not make community payments for 2023 or 2024.

[35] Mr. Bower explained that in his experience, the partial payments from Long Run to PPMS are consistent with other files he has worked on in Alberta. When oil companies get into financial trouble, they will often continue to make partial payments in order to try and maintain some good will. In this case, Long Run received a cash injection at one point, which may explain why partial payments were made in 2021, while other balances from 2020 remained outstanding.

[36] In response to questions from the Appeal Tribunal, Mr. Bower confirmed that he received no information from Long Run to suggest they did not intend to renew the Agreement or the leases. To the best of his knowledge, the well-sites continue to produce to this day.

[37] In Tabs 34 and 35 of the Hearing package, Welltraxx set out a request for cost recovery, and a request for interest on behalf of PPMS. Mr. Bower noted that he is aware of other cases where landowners have been awarded costs and interest. With respect to costs, he indicated that PPMS is seeking $132,000 in costs based on Welltraxx's fees of 3% of the total amount of recovery sought by PPMS. He also indicated that PPMS is seeking 50% indemnity for its legal costs. For interest, Mr. Bower calculated the rate based on available historic one-year GIC rates from different banks and settled on 3.00%. He described this as a modest rate of return on a safe investment.

Legal Argument

[38] Counsel for PPMS submitted that PPMS had established the necessary facts to support an award under section 121 of the *Metis Settlements Act*.

[39] Counsel emphasized that while the Appeal Tribunal could not issue a decision against Long Run, this did not preclude it from issuing a decision against the Minister.

[40] Counsel drew the Appeal Tribunal's attention to section 36 of the *Surface Rights Act*, RSA 2000, c. s-24 which sets out a similar scheme to Division 7 of the *Metis Settlements Act*, but for lands outside Metis settlements. Section 36(6) of the *Surface Rights Act* provides:

> If, within 30 days of the [Land and Property Rights] Tribunal sending a written notice to an operator under subsection (4), the operator has not proven to the Tribunal's satisfaction that full payment has been made, the Tribunal may direct the Minister to pay out of the General Revenue Fund the amount of money to which the person referred to in subsection (3) [the person entitled to receive money under a surface lease] is entitled.

[41] Counsel directed the Appeal Tribunal to a decision of the Land and Property Rights Tribunal ("LPRT") applying section 36 in *40-Mile Grazing Co-op Limited v Sanling Energy Limited*, 2024 ABLPRT 901222 ("*40-Mile*"). Counsel noted that Long Run was one of the respondent operators to this decision.

[42] In *40-Mile*, the LPRT directed the Minister to pay out of the General Revenue Fund compensation that became due in 2021, 2022, and 2023. The LPRT cited the Alberta Court of King's decision in *Bateman v Alberta (Surface Rights Board)*, 2023 ABKB 640 ("*Bateman*") for

the proposition that the applicant need only establish that a right of entry instrument exists, and that there is default on a payment owed.

[43] Counsel urged the Appeal Tribunal to exercise its discretion under section 118(1)(e) to award interest, in addition to the surface lease payments. He argued that the Welltraxx fees and 50% indemnity for the legal fees were appropriate in the circumstances as partial indemnification for a successful litigant.

Analysis/Reasons

Is there satisfactory evidence of failure of the existing mineral lease holder or operator to pay funds?

[44] Section 111(j) of the *Metis Settlements Act* defines "surface lease" as a lease, or any other instrument under which the surface of a parcel of patent land is held for any purpose for which a right of entry order may be made under this Division, and that provides for compensation. The meaning of surface lease is clear, unambiguous, and broad enough to capture the different types of contractual arrangements that may exist between lease holders or operators, Metis settlements, and landowners. In this case, the surface lease agreements for the 278 well-sites at issue are clearly "surface leases".

[45] The Agreement is also a surface lease, as it guarantees Long Run access to existing and future well sites in exchange for compensation in the form of "Yearly Investment" payments. The Appeal Tribunal agrees with Mr. Bower's observation that the implementation of a single joint benefits agreement appears to have been an administratively efficient manner to deal with compensation for a large number of well-sites, without the need to repeatedly engage in additional negotiations.

[46] There is no dispute that Long Run is an operator, and that PPMS is an occupant of the lands where the wells are situated.

[47] With respect to the amount of the outstanding payments, the spreadsheet provided by Welltraxx on behalf of PPMS was detailed, clear, and supported by original documentation where necessary. The Appeal Tribunal accepts the figures as presented by Welltraxx, and summarized in the spreadsheet at Tab 12 of the Hearing package.

[48] The Appeal Tribunal accepts the methodology of Welltraxx with respect to its calculation of the outstanding amount owing for 2024. Welltrax explained that it increased the amount owing under the surface leases under the Agreement by 10% for 2024. This approach is consistent with the express terms of the Agreement, and with the previous escalation of payment implemented by Long Run and PPMS in 2019 after the first 5 years of the Agreement.

[49] The Appeal Tribunal also accepts that the Agreement continues to apply beyond the end of its initial 10-year term. The Appeal Tribunal notes that the renewal provisions of the Agreement are somewhat ambiguous, in that they contemplate an "automatic renewal", but also the possibility of written notice prior to the expiry of the term. In any event, the Appeal Tribunal is satisfied with the undisputed evidence of Mr. Bower that the well-sites continue to be operated, and that Long Run has not provided notice of intention to terminate the lease agreements. In the Appeal Tribunal's view, the implied intention of the parties was to renew the term of the contract by their conduct.

[50] With respect to interest, the Appeal Tribunal declines to find that PPMS is entitled to additional money under section 121(2). The Appeal Tribunal acknowledges that it has discretion under section 118(e) to consider "any other factors the Panel considers appropriate" when determining the amount of money payable by an existing lease holder to an occupant as compensation. However, the Appeal Tribunal must also consider the factors set out in sections 118(1), including 118(1)(d):

> (d) any agreement, in addition to a development agreement, entered into by an existing mineral lease holder or operator and the General Council or an occupant;

[51] The Appeal Tribunal notes that the Agreement does not contain any provision dealing with interest. Where a negotiated agreement exists between an operator and an occupant, the terms of that agreement should be respected to the extent possible. The Appeal Tribunal is not convinced there is a compelling reason to read-in an interest provision where none exists in the Agreement.

[52] With respect to the fees for Welltraxx and legal counsel, the Appeal Tribunal similarly declines the request to award these costs. The Appeal Tribunal notes that the term "costs" is not included in sections 118 or 121. While the Appeal Tribunal has made cost awards in the past, it does so rarely and typically only in cases where there has been an abuse of process or some other misconduct. The Court of Appeal considered the Appeal Tribunal's discretion to issue costs in *McCargar v Metis Settlements General Council*, 2025 ABCA 33, and noted that the usual practice

of the Appeal Tribunal was not to award costs, so as to not create a general chilling effect on individuals who seek recourse to the Appeal Tribunal (see para 35).

[53] In summary, the Appeal Tribunal finds that the evidence of PPMS demonstrates a failure of Long Run to pay money owed between January 1, 2020 and January 28, 2025, as follows:

Wells Total:	$3,635,361.09
Low Grade Road:	$417,000.00
2022-2024 High Grade Road:	$150,000.00
Community Payments (Yearly Investment):	$200,000.00
Total:	**$4,402,361.09**

Should the panel direct the President of Treasury Board and Minister of Finance to pay out of the General Revenue Fund the unpaid amounts?

[54] Having concluded that PPMS has provided satisfactory evidence of a failure to pay, the Appeal Tribunal considered whether to exercise its discretion to direct the President of Treasury Board and Minister of Finance to pay PPMS out of the General Revenue Fund.

[55] In the Appeal Tribunal's view, this is an appropriate case to exercise its discretion to direct payment be made to PPMS. The case law and statutory scheme discussed below strongly favour the conclusion that the payment of the full outstanding balance should be made to PPMS.

[56] The Appeal Tribunal first considered the case of *Bateman*. While *Bateman* dealt with an application under the *Surface Rights Act*, as noted above, the statutory scheme is very similar to that contained in the *Metis Settlements Act*. The Court noted at paragraph 70 that while the tribunal in that case had discretion to modify the amount of compensation payable by the Minister, "[t]he longstanding practice...was to award full compensation in almost all section 36 applications." The Court went on to critique the Surface Rights Board's decision to decrease compensation payable without clear justification for doing so. Notably, no party provided a compelling justification for the Appeal Tribunal to decline to direct the Minister to pay.

[57] The Appeal Tribunal also considered the purpose statement in section 113 of the *Metis Settlements Act*. One of the purposes of Division 7 is to ensure that occupants of parcels of land on Metis settlements have their interests considered and can receive fair compensation for the entry onto, and use of their land. Were the Appeal Tribunal to simply refuse to exercise its jurisdiction,

the interests of occupants would be harmed and section 121(2) would be rendered meaningless. Such a decision would also turn a blind eye to the types of challenges that arise in operating small-scale self-governing communities (see *Canadian Natural Resources Limited v Elizabeth Metis Settlement*, 2020 ABQB 210 at para 102).

[58] Finally, the Appeal Tribunal considered section 187.1 of the *Metis Settlements Act*, which provides that:

> 187.1 The Appeal Tribunal shall exercise its powers and carry out its duties with a view to preserving and enhancing Metis culture and identity and furthering the attainment of self-governance by Metis settlements under the laws of Alberta.

[59] The undisputed evidence of Chairman Armstrong was that the removal of surface lease income from PPMS has had a significant impact on every aspect of self-governance in the community. Surface lease payments are a significant source of funding for PPMS, funding which is used to provide services to youth and seniors. Without this funding, programs on PPMS have been delayed or cut. Meanwhile, the demands on community resources from the surface leases continue. Mr. Bower's evidence was that the wells on the settlement continue to operate and may be purchased by a new operator. Maintaining the roads and the infrastructure necessary to provide access to the lease sites is not free.

Order

[60] The President of Treasury Board and Minister of Finance is directed to pay to PPMS $4,402,361.09 from the General Revenue Fund.

Dated in the City of Edmonton in the Province of Alberta on this 5th day of December, 2025

Phyllis Collins
Panel Chair

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited *Appellants*

v.

Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited *Respondent*

and

The Ministry of Labour for the Province of Ontario, Employment Standards Branch *Party*

INDEXED AS: RIZZO & RIZZO SHOES LTD. (RE)

File No.: 24711.

1997: October 16; 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the *Employment Standards Act* ("*ESA*") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to sever-

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez et Lindy Wagner en leur propre nom et en celui des autres anciens employés de Rizzo & Rizzo Shoes Limited *Appelants*

c.

Zittrer, Siblin & Associates, Inc., syndic de faillite de Rizzo & Rizzo Shoes Limited *Intimée*

et

Le ministère du Travail de la province d'Ontario, Direction des normes d'emploi *Partie*

RÉPERTORIÉ: RIZZO & RIZZO SHOES LTD. (RE)

N° du greffe: 24711.

1997: 16 octobre; 1998: 22 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

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

Employeur et employé — Faillite — Indemnités de licenciement et de cessation d'emploi payables en cas de licenciement par l'employeur — Faillite peut-elle être assimilée au licenciement par l'employeur? — Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2(3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 121(1) — Loi d'interprétation, L.R.O. 1990, ch. I.11, art. 10, 17.

Les employés d'une entreprise en faillite ont perdu leur emploi lorsqu'une ordonnance de séquestre a été rendue à l'égard des biens de l'entreprise. Tous les salaires, les traitements, toutes les commissions et les paies de vacances ont été versés jusqu'à la date de l'ordonnance de séquestre. Le ministère du Travail de la province a vérifié les dossiers de l'entreprise pour déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi* (la «*LNE*») et il a remis une preuve de réclamation au syndic. Ce dernier a rejeté les réclamations pour le ance, termination or vacation pay under the *ESA*. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40*a* of the *ESA* suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Moreover, s. 10 of Ontario's *Interpretation Act* provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the *ESA* and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40*a* to be inapplicable in bankruptcy situations is incompatible with both the object of the *ESA* and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbi-

motif que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*. En appel, le ministère a eu gain de cause devant la Cour de l'Ontario (Division générale) mais la Cour d'appel de l'Ontario a infirmé ce jugement et a rétabli la décision du syndic. Le ministère a demandé l'autorisation d'interjeter appel de l'arrêt de la Cour d'appel mais il s'est désisté. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé et obtenu l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. En l'espèce, il s'agit de savoir si la cessation d'emploi résultant de la faillite de l'employeur donne naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*.

Arrêt: Le pourvoi est accueilli.

Une question d'interprétation législative est au centre du présent litige. Bien que le libellé clair des art. 40 et 40*a* de la *LNE* donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé, l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. Il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur. Au surplus, l'art. 10 de la *Loi d'interprétation* ontarienne dispose que les lois «sont réputées apporter une solution de droit» et qu'elles doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

L'objet de la *LNE* et des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. Conclure que les art. 40 et 40*a* sont inapplicables en cas de faillite est incompatible tant avec l'objet de la *LNE* qu'avec les dispositions relatives aux indemnités de licenciement et de cessation d'emploi. Le législateur ne peut avoir voulu des conséquences absurdes mais c'est le résultat auquel on arriverait si les employés congédiés avant la faillite avaient droit à ces avantages mais pas les employés congédiés après la faillite. Une distinction serait établie entre les employés sur la seule base de la date de leur trarily deprive some of a means to cope with economic dislocation.

congédiement et un tel résultat les priverait arbitrairement de certains des moyens dont ils disposent pour faire face à un bouleversement économique.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the *Employment Standards Amendment Act, 1981* exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the *ESA* is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

Le recours à l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié. En vertu du par. 2(3) de l'*Employment Standards Amendment Act, 1981*, étaient exemptés de l'obligation de verser des indemnités de cessation d'emploi, les employeurs qui avaient fait faillite et avaient perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale. Le paragraphe 2(3) implique nécessairement que les employeurs en faillite sont assujettis à l'obligation de verser une indemnité de cessation d'emploi. Si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin. En outre, comme la *LNE* est une loi conférant des avantages, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur.

When the express words of ss. 40 and 40*a* are examined in their entire context, the words "terminated by an employer" must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Termination as a result of an employer's bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *Bankruptcy Act* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. It was not necessary to address the applicability of s. 7(5) of the *ESA*.

Lorsque les mots exprès employés aux art. 40 et 40*a* sont examinés dans leur contexte global, les termes «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui sont licenciés pour quelque autre raison serait arbitraire et inéquitable. Une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. La cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. Il était inutile d'examiner la question de l'applicabilité du par. 7(5) de la *LNE*.

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Distinguished: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343; **referred to:** *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213;

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Employment Standards Act, 1974, S.O. 1974, c. 112, s. 40(7).
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APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. nº 586 (QL), qui a infirmé un jugement de la Cour de l'Ontario (Division générale) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, statuant que le ministère du Travail pouvait prouver des réclamations au nom des employés de l'entreprise en faillite. Pourvoi accueilli.

Steven M. Barrett and *Kathleen Martin*, for the appellants.

Raymond M. Slattery, for the respondent.

David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

Steven M. Barrett et *Kathleen Martin*, pour les appelants.

Raymond M. Slattery, pour l'intimée.

David Vickers, pour le ministère du Travail de la province d'Ontario, Direction des normes d'emploi.

The judgment of the Court was delivered by

Version française du jugement de la Cour rendu par

IACOBUCCI J. — This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

LE JUGE IACOBUCCI — Il s'agit d'un pourvoi interjeté par les anciens employés d'un employeur maintenant en faillite contre une ordonnance qui a rejeté les réclamations qu'ils ont présentées en vue d'obtenir une indemnité de licenciement (y compris la paie de vacances) et une indemnité de cessation d'emploi. Le litige porte sur une question d'interprétation législative. Tout particulièrement, le pourvoi tranche la question de savoir si, en vertu des dispositions législatives pertinentes en vigueur à l'époque de la faillite, les employés ont le droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi lorsque la cessation d'emploi résulte de la faillite de leur employeur. 1

1. Facts

Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving

1. Les faits

Avant sa faillite, la société Rizzo & Rizzo Shoes Limited («Rizzo») possédait et exploitait au Canada une chaîne de magasins de vente au détail de chaussures. Environ 65 pour 100 de ces magasins étaient situés en Ontario. Le 13 avril 1989, une pétition en faillite a été présentée contre la 2 the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legisla-*

licencier un employé . . .» Le paragraphe 40*a*(1a) contient également les mots: «si [. . .] l'employeur licencie cinquante employés ou plus . . .» Par conséquent, la question dans le présent pourvoi est de savoir si l'on peut dire que l'employeur qui fait faillite a licencié ses employés.

La Cour d'appel a répondu à cette question par la négative, statuant que, lorsqu'un créancier présente une pétition en faillite contre un employeur, les employés ne sont pas licenciés par l'employeur mais par l'effet de la loi. La Cour d'appel a donc estimé que, dans les circonstances de l'espèce, les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNE* n'étaient pas applicables et qu'aucune obligation n'avait pris naissance. Les appelants répliquent que les mots «l'employeur licencie» doivent être interprétés comme établissant une distinction entre la cessation d'emploi volontaire et la cessation d'emploi forcée. Ils soutiennent que ce libellé visait à dégager l'employeur de son obligation de verser des indemnités de licenciement et de cessation d'emploi lorsque l'employé quittait son emploi volontairement. Cependant, les appelants prétendent que la cessation d'emploi forcée résultant de la faillite de l'employeur est assimilable au licenciement effectué par l'employeur pour l'exercice du droit à une indemnité de licenciement et à une indemnité de cessation d'emploi prévu par la *LNE*.

Une question d'interprétation législative est au centre du présent litige. Selon les conclusions de la Cour d'appel, le sens ordinaire des mots utilisés dans les dispositions en cause paraît limiter l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi aux employeurs qui ont effectivement licencié leurs employés. À première vue, la faillite ne semble pas cadrer très bien avec cette interprétation. Toutefois, en toute déférence, je crois que cette analyse est incomplète.

Bien que l'interprétation législative ait fait couler beaucoup d'encre (voir par ex. Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3e éd. 1994) (ci-après «*Construction of Statutes*»); Pierre-André Côté, *Interprétation des lois* (2e éd.

tion in Canada (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

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

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of ". . . the interests of employees by requiring employers to comply with

1990)), Elmer Driedger dans son ouvrage intitulé *Construction of Statutes* (2e éd. 1983) résume le mieux la méthode que je privilégie. Il reconnaît que l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. À la p. 87, il dit:

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

Parmi les arrêts récents qui ont cité le passage ci-dessus en l'approuvant, mentionnons: *R. c. Hydro-Québec*, [1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103.

Je m'appuie également sur l'art. 10 de la *Loi d'interprétation*, L.R.O. 1980, ch. 219, qui prévoit que les lois «sont réputées apporter une solution de droit» et doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables». 22

Bien que la Cour d'appel ait examiné le sens ordinaire des dispositions en question dans le présent pourvoi, en toute déférence, je crois que la cour n'a pas accordé suffisamment d'attention à l'économie de la *LNE*, à son objet ni à l'intention du législateur; le contexte des mots en cause n'a pas non plus été pris en compte adéquatement. Je passe maintenant à l'analyse de ces questions. 23

Dans l'arrêt *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986, à la p. 1002, notre Cour, à la majorité, a reconnu l'importance que notre société accorde à l'emploi et le rôle fondamental qu'il joue dans la vie de chaque individu. La manière de mettre fin à un emploi a été considérée comme étant tout aussi importante (voir également *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701). C'est dans ce contexte que les juges majoritaires dans l'arrêt *Machtinger* ont défini, à la p. 1003, l'objet de la *LNE* comme étant la protection «. . . [d]es intérêts des employés en exigeant que 24

Alberta Court of Queen's Bench
Agapi v. Youngpine
Date: 1994-12-07

R.G. Penner, for the plaintiff/creditor;

J.L. Gladstone, for the defendant/debtor.

(Lethbridge No. 9206-00710)

December 7, 1994.

[1] HUTCHINSON J.: — The Director of Maintenance Enforcement, on behalf of the plaintiff Catherine Agapi, brings this action against the co-defendant, St. Paul Treatment Centre, claiming the amount that should have been paid pursuant to a continuing attachment served May 24, 1991. The Minister of Family and Social Services is subrogated to the rights of Ms. Agapi pursuant to s. 14 of the **Social Development Act**, R.S.A. 1980, c. S-16.

Facts

[2] This action arises as a result of two paternity agreements, dated January 20, 1989, between the debtor, Dallas Youngpine, and the creditor, Catherine Agapi, and the Director of Maintenance and Recovery. These paternity agreements require Mr. Youngpine to pay to Ms. Agapi the sum of $50 per month, per agreement, for the education and maintenance of their two children. These agreements were then filed with the Director of Maintenance Enforcement April 3, 1989. Both Mr. Youngpine and Ms. Agapi are Indians pursuant to the **Indian Act**, R.S.C, c. I-5, s. 2.

[3] Mr. Youngpine failed to make the payments stipulated in the paternity agreements. A Notice of Default and a notice of Continuing Attachment were filed with the Court of Queen's Bench on May 14, 1991 and served on the St. Paul Treatment Centre May 24, 1991. The St. Paul Treatment Centre is an institution, funded by Parliament through an Indian Band, which provides health and welfare services to Indians. Mr. Youngpine was employed by the St. Paul Treatment Centre at the time of the filing of the Notice of Default and the Notice of Attachment. According to the attachment order, St. Paul Treatment Centre was to pay certain monies, constituting part of Mr. Youngpine's wages or salary, to the Director of maintenance enforcement. The director of Maintenance

enforcement received no monies from the St. Paul Treatment Centre pursuant to the Notice of Continuing Attachment. As of November 1, 1993 Mr. Youngpine was in arrears under his obligations arising out of the paternity agreements in the amount of $4,959.01.

Issues

[4] The issues are twofold:

1) Are the paternity agreements, entered into pursuant to s. 10 of the **Maintenance and Recovery Act**, enforceable?

2) Does s. 89 of the **Indian Act** prohibit the attachment of Mr. Youngpine's wages?

Issue #1 Validity of the Paternity Agreements

[5] The defendants claim that the paternity agreements in question were entered into pursuant to the **Social Development Act** which is not an Act of General application and does not apply to Indians. Therefore, the paternity agreements are not valid and cannot be enforced. In fact, the paternity agreements were entered into pursuant to the **Maintenance and Recovery Act**, R.S.A. 1980, c. M-2, s. 10 which was repealed by s. 29 of the **Parentage and Maintenance Act**, S.A. 1990, c. P-0.7 as of January 1, 1991. The defendant then suggests that s. 25 of the **Parentage and Maintenance Act** renders the paternity agreements unenforceable. Section 25 provides that any complaints made, in which a summons has not been issued and served, cease to have any effect after repeal of the sections dealing with complaint. This action began after the repeal date of January 1, 1991. However, a "complaint" under the **Maintenance and Recovery Act** is different than an action. A "complaint" dealt with the question of whether a certain individual was the father of the child in question. The summons, with regard to the complaint, ensured the fathers appearance at a hearing to determine if the "complaint" was justified, and the individual in question was in fact the father.

[6] In this case, Mr. Youngpine acknowledged he was the father of the two children. Therefore, this is not an issue. The action brought by Ms. Agapi and the Director of Maintenance and Enforcement is not a "complaint" as contemplated in s. 25 of the and therefore s. 25 is not applicable.

given to the Provincial Government by s. 14 of the **Social Development Act**, and the defendants claim that any similar section attempted to be enacted by the Federal Government would violate their treaty rights. Therefore, the section dealing with subrogation under the **Social Development Act** should not apply to Indians and the Minister should not be allowed to be subrogated to an Indian creditors rights.

[15] The opposing parties to this action disagree as to whether social assistance is a treaty right guaranteed by s. 35 of the **Constitution Act 1982**. However, it is not necessary to determine this issue. As mentioned in **Potts v. Potts (**1991), supra, this issue might arise between Ms. Agapi and the Alberta Government. This action is not between Ms. Agapi and the Minister and therefore this issue becomes moot.

[16] The issue which must be explored is whether the minister, subrogated to the rights of Ms. Agapi, continues to enjoy Ms. Agapi's immunity to the prohibitions on attachment, mentioned in s. 89 of the **Indian Act**. The issue revolves around the meaning of "subrogation" in s. 14 of the **Social Development Act**.

[17] **Blacks Law Dictionary** defines "subrogation" as follows:

> "Subrogation. The substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights remedies or securities."

[18] In H.N. Sheldon, the **Law of Subrogation** (2nd Ed.) (Boston: University Press, 1893) subrogation is defined at 1-2:

> "It is a substitution, ordinarily the substitution of another person in the place of a creditor, so that the person in whose favour it is exercised succeeds to the rights of the creditor in relation to the debt. More broadly, it is the substitution of one person in the place of another, whether as a creditor or as the possessor of any other lawful claim. The substitute is put in all respects in the place of the party to whose rights he is subrogated."

[19] These definitions make it clear that the Minister of Family and Social Services is given the same rights, and is placed in the same position, as Ms. Agapi with regards to the proceeds owed according to the paternity agreements. The Minister is not bringing the

R. *v*. B.W.P.; R. *v*. B.V.N., [2006] 1 S.C.R. 941, 2006 SCC 27

Her Majesty The Queen *Appellant*

v.

B.W.P. *Respondent*

and

Attorney General of Ontario, Attorney General of Alberta, Canadian Foundation for Children, Youth and the Law, Youth Criminal Defence Office and Aboriginal Legal Services of Toronto Inc. *Interveners*

- and -

B.V.N. *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario, Attorney General of Alberta, Canadian Foundation for Children, Youth and the Law, and Youth Criminal Defence Office *Interveners*

Indexed as: R. *v*. B.W.P.; R. *v*. B.V.N.

Neutral citation: 2006 SCC 27.

File Nos.: 30514, 30512.

2005: November 10; 2006: June 22.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Charron JJ.

on appeal from the court of appeal for manitoba

on appeal from the court of appeal for british columbia

Criminal law — Young persons — Sentencing — Considerations — Whether general deterrence factor to be considered in sentencing young persons under Youth Criminal Justice Act — Youth Criminal Justice Act, S.C. 2002, c. 1, ss. 3, 38.

Criminal law — Young persons — Sentencing — Considerations — Young person pleading guilty to manslaughter and sentenced under s. 42(2)(o) of Youth Criminal Justice Act — Whether s. 42(2)(o) requires sentencing judge to impose at least two-thirds of sentence in custody and one-third under supervision — Youth Criminal Justice Act, S.C. 2002, c. 1, s. 42(2)(o).

B.W.P., a young person, killed a man during a fight and pled guilty to manslaughter. After reviewing the relevant provisions of the *Youth Criminal Justice Act* ("*YCJA*"), the sentencing judge held that general deterrence was no longer a principle of sentencing under the new *YCJA* regime. He also disagreed with the Crown's position that ss. 42(2)(*n*) and 42(2)(*o*) of the *YCJA* must be read in tandem so as to require the court to impose two-thirds of the sentence in custody and one-third under supervision. Rather, he took the view that s. 42(2)(*o*) gave him the discretion to determine the appropriate length of the custody and supervision portions of the sentence. He sentenced B.W.P. to a 15-month custody and supervision order. He directed that B.W.P. serve one day in open custody and the remainder of the 15 months under conditional supervision in the community. The Manitoba Court of Appeal affirmed the sentencing judge's decision.

B.V.N., also a young person, pled guilty to the offence of aggravated assault causing bodily harm and was sentenced under s. 42(2)(*n*) of the *YCJA* to nine-month custody and supervision order, with the custodial part of the order to be spent in closed custody. Both the sentencing judge and the British Columbia Court of Appeal concluded that general deterrence is one factor, albeit a minor one, in determining the appropriate sentence under the *YCJA*. The Court of Appeal noted that this factor did not increase the sentence that would otherwise have been imposed.

Held: The appeals should be dismissed.

The *YCJA* introduced a new sentencing regime, and its wording can only support the conclusion that Parliament deliberately excluded general deterrence as a factor of youth sentencing. By virtue of s. 50(1) of the *YCJA*, the provisions of the *Criminal Code* on sentencing, save certain listed exceptions, do not apply to youth sentencing. Since s. 718(*b*) of the *Code*, which set out the adult deterrence sentencing principle, is not one of the exceptions mentioned in s. 50(1), this deliberate omission clearly indicates that Parliament chose not to incorporate that principle in the new youth sentencing regime. Furthermore, had Parliament intended to make deterrence part of the new regime, one would reasonably expect that it would be expressly included in the detailed purpose and principles set out in the statute. Yet the words "deter" and "deterrence" are nowhere to be found in the *YCJA*: the words do not appear in the "Declaration of Principle" under s. 3, in the "Purpose and Principles" listed under s. 38 or in the list of particular sanctions found in s. 42. This omission is also of considerable significance. Nor can general deterrence, or some equivalent concept, be implied from the wording of ss. 3 and 38. Rather, the focus throughout remains on the young person before the court. Since no basis can be found in the *YCJA* for imposing a harsher sanction than would otherwise be called for to deter others from committing crime, general deterrence is not a principle of youth sentencing under the new regime. The *YCJA* also does not speak of specific deterrence. Parliament has sought preferably to promote the long-term protection of the public by addressing the circumstances underlying the offending behaviour, by rehabilitating and reintegrating young persons into society and by holding young persons accountable through the imposition of meaningful sanctions related to the harm done. Undoubtedly, the sentence may have the effect of deterring the young person and others from committing crimes, but Parliament has not included deterrence as a basis for imposing a sanction under the *YCJA*. [4] [22-30] [39-40]

It follows that the Manitoba courts in *B.W.P.* adopted the correct approach on the question of general deterrence. They were also correct in their interpretation of s. 42(2)(*o*) of the *YCJA*. Under that provision, a court is not required to impose on a young person guilty of manslaughter two-thirds of the sentence in custody and one-third under supervision. Unlike the wording of s. 42(2)(*n*), there is no restriction in s. 42(2)(*o*) on what part of the time that can be spent in a custodial setting. Accordingly, nothing in s. 42(2)(*o*) prevents a court from imposing a lesser proportion of time in actual custody if it sees fit. Since the Manitoba courts made no error in principle, the quantum of B.W.P.'s sentence need not be reviewed. There is also no need to review the quantum of the sentence imposed on B.V.N. While the British Columbia courts erred in considering general deterrence as a principle of sentencing, this factor did not play a significant role in the determination of the sentence. Further, as B.V.N. has fully served his sentence, the quantum of his sentence has become moot. [5] [42-49]

Cases Cited

Distinguished: *R. v. M. (J.J.)*, [1993] 2 S.C.R. 421; **referred to:** *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. Gardiner*, [1982] 2 S.C.R. 368; *R. v. O.* (1986), 27 C.C.C. (3d) 376; *R. v. C.D.*, [2005] 3 S.C.R. 668, 2005 SCC 78.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 718(*b*), 718.2(*e*).

Young Offenders Act, R.S.C. 1985, c. Y-1.

Youth Criminal Justice Act, S.C. 2002, c. 1, preamble, ss. 2, 3, 38, 39, 42(2), 50(1), 104, 105.

Authors Cited

Canada. Department of Justice. *YCJA Explained* (May 7, 2002). Ottawa: Department of Justice (online: www.justice.gc.ca/en/ps/yj/repository/downlds/3040301.pdf).

Roberts, Julian V., and Nicholas Bala. "Understanding Sentencing Under the *Youth Criminal Justice Act*" (2003), 41 *Alta. L. Rev.* 395.

APPEAL from a judgment of the Manitoba Court of Appeal (Huband, Kroft and Hamilton JJ.A.) (2004), 187 Man. R. (2d) 80, 330 W.A.C. 80, 187 C.C.C. (3d) 20, 122 C.R.R. (2d) 214, [2004] M.J. No. 267 (QL), 2004 MBCA 110, affirming a sentence imposed by Meyers Prov. Ct. J. (2003), 176 Man. R. (2d) 218, [2003] M.J. No. 331 (QL). Appeal dismissed.

APPEAL from a judgment of the British Columbia Court of Appeal (Lambert, Mackenzie and Oppal JJ.A.) (2004), 196 B.C.A.C. 100, 322 W.A.C. 100, 186 C.C.C. (3d) 21, [2004] B.C.J. No. 974 (QL), 2004 BCCA 266, affirming in part a sentence imposed by Auxier Prov. Ct. J., [2004] B.C.J. No. 153 (QL), 2004 BCPC 22. Appeal dismissed.

Jo-Ann Natuik, *Ami Kotler* and *Dale Tesarowski*, for the appellant Her Majesty the Queen.

Brock Martland and *Reginald P. Harris*, for the appellant B.V.N.

Jason Miller, for the respondent B.W.P.

Jennifer Duncan, for the respondent Her Majesty the Queen.

Miriam Bloomenfeld and *Melissa Ragsdale*, for the intervener the Attorney General of Ontario.

James C. Robb, *Q.C.*, for the intervener the Attorney General of Alberta.

Martha Mackinnon, for the intervener the Canadian Foundation for Children, Youth and the Law.

Cathy Lane Goodfellow and *Patricia G. Yuzwenko*, for the intervener the Youth Criminal Defence Office.

Jonathan Rudin and *Kimberly R. Murray*, for the intervener the Aboriginal Legal Services of Toronto Inc.

The judgment of the Court was delivered by

CHARRON J. —

1. Overview

1 These two appeals raise the same question of statutory interpretation: whether general deterrence is a factor to be considered in sentencing a young person under the *Youth Criminal Justice Act*, S.C. 2002, c. 1 ("*YCJA*"). The decisions under appeal reveal a divergence of opinion on this issue. The Manitoba courts in *B.W.P.* held that general deterrence was no longer a principle of sentencing under the new *YCJA* regime. The Crown appeals this decision, arguing that general deterrence should be factored in the determination of an appropriate sentence. (The Crown raises a second issue in *B.W.P.* relating to the respective duration of the custody and supervision portions of an order made under s. 42(2)(*o*) of the *YCJA*.) The British Columbia courts in *B.V.N.* held that general deterrence, while a minor factor, remained applicable under the new sentencing regime. B.V.N. appeals his sentence, arguing that general deterrence is no longer applicable in the sentencing of young persons. The appellant in each case takes the position that, if the courts below had taken a correct approach, the sentence would have been different.

> **50.** (1) Subject to section 74 (application of *Criminal Code* to adult sentences), Part XXIII (sentencing) of the *Criminal Code* does not apply in respect of proceedings under this Act except for paragraph 718.2(*e*) (sentencing principle for aboriginal offenders), sections 722 (victim impact statements), 722.1 (copy of statement) and 722.2 (inquiry by court), subsection 730(2) (court process continues in force) and sections 748 (pardons and remissions), 748.1 (remission by the Governor in Council) and 749 (royal prerogative) of that Act, which provisions apply with any modifications that the circumstances require.

23 It is particularly noteworthy that s. 718(*b*) of the *Criminal Code* is *not* one of the listed exceptions incorporated in the *YCJA* — s. 718(*b*) provides that one of the objectives in sentencing adults is "to deter the offender and other persons from committing offences". Since Parliament has expressly included other provisions, in particular one of the adult sentencing principles — s. 718.2(*e*) with respect to aboriginal offenders — one can only conclude that the omission is deliberate. Parliament chose not to incorporate the adult sentencing principle of deterrence in the new youth sentencing regime. The question then becomes whether deterrence, or some equivalent concept, can be found in the words of the *YCJA* itself.

3.3 *"Deterrence", "Deter" or Equivalent Concepts Not Found in the YCJA*

24 As indicated earlier, deterrence, as a general principle of sentencing, is well known. Had Parliament intended to make deterrence part of the youth sentencing regime, one would reasonably expect that it would be expressly included in the detailed purpose and principles set out in the statute. Yet the words "deter" and "deterrence" are nowhere to be found in the *YCJA*: the words do not appear in the "Declaration of Principle" under s. 3, nor in the "Purpose and Principles" listed under s. 38 and not even in the list of particular sanctions found in s. 42. This omission is of considerable significance.

33 In the same way, when the statute speaks of "accountability" or requires that "meaningful consequences" be imposed, the language expressly targets the young offender before the court: "ensure that a young person is subject to meaningful consequences" (s. 3(1)(*a*)(iii)); "accountability that is consistent with the greater dependency of young persons and their reduced level of maturity" (s. 3(1)(*b*)(ii)); "be meaningful for the individual young person given his or her needs and level of development" (s. 3(1)(*c*)(iii)). Parliament has made it equally clear in the French version that these principles are offender-centric and not aimed at the general public: e.g., s. 3(1)(*a*) speaks of "*le système de justice pénale pour adolescents vise à prévenir le crime par la suppression des causes sous-jacentes à la criminalité chez les adolescents . . . et à assurer la prise de mesures leur offrant des perspectives positives*".

34 In my view, the words of the statute can only support the conclusion that Parliament deliberately excluded general deterrence as a factor of youth sentencing.

3.4 *Exclusion of General Deterrence Accords With Parliament's Intention*

35 The general object and scheme of the *YCJA*, and Parliament's intention in passing it, has already been the subject of much discussion, by courts and commentators alike, most recently by this Court in *R. v. C.D.*, [2005] 3 S.C.R. 668, 2005 SCC 78. I will not repeat this Court's analysis in *C.D.* here. It is quite clear in considering the preamble and the statute as a whole that Parliament's goal in enacting the new youth sentencing regime was to reserve the most serious interventions for the most serious crimes and thereby *reduce the over-reliance on incarceration for non-violent young persons*. This goal is expressly set out in the preamble to the *YCJA*. It reads as follows:

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RURAL UTILITIES ACT

Chapter R-21

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1 In this Act,

(a) "association" means an association continued under section 2 or incorporated under section 5;

(b) "bylaws" means the standard bylaws and the supplemental bylaws of an association;

(c) "Director" means

(i) with respect to rural electrification associations, the Director of Rural Electrification Associations,

(ii) with respect to natural gas associations, the Director of Natural Gas Co-operatives, and

(iii) with respect to water, sewage or water and sewage associations, the Director of Water and Sewage Co-operatives, appointed by the Minister and, with respect to an association that supplies more than one type of utility service, means the Director designated by the Minister;

(d) "extraordinary resolution" means a resolution passed by a majority of not less than 2/3 of the votes cast at a general meeting of which not less than 15 days' written notice specifying the intention to propose the resolution as an extraordinary resolution has been given;

(e) "Minister" means the Minister determined under section 16 of the *Government Organization Act* as the Minister responsible for this Act;

(f) "Registrar" means Registrar as defined in the *Business Corporations Act*;

(g) "standard bylaws" means the standard bylaws prescribed under this Act;

(h) "works" means electric power lines, natural gas pipelines, water pipelines or sewage mains and any fitting, apparatus, meter, regulator, wire, conductor, transformer, pole, pipe, valve or other thing constructed or placed in or on land for the purpose of providing a utility service.

1985 cR-21 s1;1991 c32 s2

Existing rural utility associations

2(1) A co-operative association incorporated under the *Co-operative Associations Act* before July 21, 1986 that has as its principal object the supplying of one of the services enumerated in section 3(1) is continued as an association under this Act as if it were incorporated under this Act.

(2) A reference in any enactment or elsewhere to an association registered or incorporated under this Act is deemed to include a reference to an association continued under subsection (1).

1985 cR-21 s2

Part 1
Rural Utility Associations

Incorporation

Application to incorporate

3(1) Five or more persons who desire to be associated together in a co-operative association with the following objects may apply to be incorporated under this Act:

(a) the principal object of supplying any one or more of the following to the association's members primarily in a rural area:

(i) electricity;

(ii) natural gas;

(iii) water, primarily for domestic use;

(iv) sewage disposal;

(b) any other secondary object that is permitted under the regulations.

(2) An application for incorporation is to be made by delivering to the Director

(a) a memorandum of association in the prescribed form signed by the 5 or more persons,

(b) a deposit of the fees payable to the Registrar as required by the regulations, is guilty of an offence.

(2) If an association contravenes subsection (1), then, whether or not the association has been prosecuted or convicted in respect of the contravention, any director or officer of the association who knowingly authorizes, permits or acquiesces in the contravention is guilty of an offence.

(3) A person who contravenes this Part or the regulations is guilty of an offence.

(4) Each act and default constituting an offence, if continued, constitutes a new offence in each week during which it continues.

(5) A person who is guilty of an offence under section 10(5.2) is liable to a fine of not more than $50 000.

(6) A person who is guilty of an offence, other than an offence under section 10(5.2), is liable to a fine of not more than

(a) $500, in the case of an individual, or

(b) $1000, in the case of an association or other corporation.

RSA 2000 cR-21 s31;2003 c5 s3

Part 2
Rural Utilities Loans Guarantee

Guarantee of borrowings

32(1) If

(a) an association

(i) has first paid at least 15% of the amount of any capital expenditure proposed to be made by the association in carrying out its objects, and

(ii) has made provision satisfactory to the President of Treasury Board and Minister of Finance for the repayment of the guaranteed borrowings and interest,

(b) the association and its members have complied with any terms and conditions that may be made from time to time by the Lieutenant Governor in Council,

(c) the borrowed sum is required to be repaid within a period not to exceed 20 years by instalments on an annual, semi-annual, quarterly or monthly basis, and

(d) the total amount of the liability of the Government as a guarantor under this subsection does not exceed $50 000 000,

the President of Treasury Board and Minister of Finance may, on behalf of the Government, guarantee the due repayment of any sum, together with interest, borrowed by the association for the purpose of acquiring, constructing, operating, maintaining and administering the works necessary for the provision of its utility service.

(2) When the borrowings of an association have been guaranteed pursuant to subsection (1) and the association desires to extend its works, if the requirements of subsection (1) are complied with in respect of the additional borrowings required by the association for that purpose, the President of Treasury Board and Minister of Finance may guarantee the additional borrowings.

(b) the name of the association entitled to recover the deficiency, and

(c) the persons by the judgment adjudged to pay the deficiency,

and the association may enforce payment by writ proceedings under the *Civil Enforcement Act*.

1985 cR-21 s41;1994 cC-10.5 s167;1997 c18 s29

Receiver

44(1) The Court may, on the application of a judgment creditor made at any time before the sale of the property, appoint a receiver to take charge of the property and to rent or operate it on any terms and conditions the receiver thinks fit.

(2) The proceeds received by a receiver appointed under subsection (1) shall, after deduction of all rates, taxes, insurance or other expense necessary for the maintenance of the property, including the costs of management, be applied in any manner that may be directed by the Court.

1985 cR-21 s42

Appeal

45(1) An appeal lies to the Court of Appeal from the decision of the Court of King's Bench in all matters where the amount of the lien is $200 or more.

(2) When the amount of the lien is less than $200, the decision of the court of first instance is final.

RSA 2000 cR-21 s45;AR 217/2022

Distribution of earnings

46 No association whose borrowing has been guaranteed under this Act shall make any distribution of earnings or profits among its members without the consent of the President of Treasury Board and Minister of Finance so long as the guaranteed borrowed sum or any part of it is unpaid.

RSA 2000 cR-21 s46;2006 c23 s72;2013 c10 s32

Audit

47(1) An association whose borrowings are guaranteed under this Act shall,

(a) so long as the guaranteed borrowing remains unpaid, and

(b) if and when required to do so by the President of Treasury Board and Minister of Finance,

have its books investigated and audited at the expense of the association by the auditors and in the manner prescribed by the President of Treasury Board and Minister of Finance.

(2) The auditors shall report fully to the President of Treasury Board and Minister of Finance on the investigations and audit.

RSA 2000 cR-21 s47;2006 c23 s72;2013 c10 s32

Subrogation

48(1) If the President of Treasury Board and Minister of Finance is called on to make a payment in respect of a guarantee provided for by this Act, the President of Treasury Board and Minister of Finance is subrogated as against the borrowing association to all rights, powers, remedies and securities of the person entitled to the benefit of the guarantee.

(2) If the President of Treasury Board and Minister of Finance is called on to make a payment in respect of a guarantee pursuant to section 32, the President of Treasury Board and Minister of Finance is also subrogated to the rights of the borrowing association and of the person entitled to the benefit of the guarantee to enforce any lien notes made by the association's members, notice of which is filed pursuant to section 38.

(3) No payment by the President of Treasury Board and Minister of Finance affects any liability of the association or releases any security given by the association in respect of the borrowing, but notwithstanding any payment, the liability and security remain and continue in force and may be enforced by the President of Treasury Board and Minister of Finance against the association.

RSA 2000 cR-21 s48;2006 c23 s72;2013 c10 s32

Enforcement of existing obligations

49 Where any borrowing of an association continued under section 2 was guaranteed before July 21, 1986 under the *Co-operative Marketing Associations Guarantee Act*, RSA 1980 cC-25, the borrowing and guarantee, any lien note and any right, duty or obligation in respect of it may be dealt with and enforced under this Part as if created under this Part.

1985 cR-21 s47

Part 3
General

Administration by Director

50(1) Where an association has borrowed public money under an Act of Alberta or has had any of its borrowings guaranteed by the Government under this or any other Act and

(a) is in arrears on its repayment of any loan, or

(b) is, in the opinion of the President of Treasury Board and Minister of Finance, likely to go into arrears on its repayment of a loan,

the Lieutenant Governor in Council, on the recommendation of the President of Treasury Board and Minister of Finance, may by order appoint the Director as a director of the association until the association no longer, in the opinion of the President of Treasury Board and Minister of Finance, requires the services of the Director, or for any period fixed in the order.

(2) The Director may for the period of appointment exercise all the powers and duties of the directors for the collection and repayment of any loan with interest or any instalments or money owing by any member to the association or any instalments or money accruing due to the association or to the lender.

RSA 2000 cR-21 s50;2006 c23 s72;2013 c10 s32

Discontinuance of utility service

51(1) When a utility company or municipality is providing a utility service where it was formerly provided by an association and a person to whom the service is being provided defaults

(a) in payment due to the association pursuant to a lien note under this Act, the *Rural Electrification Long-term Financing Act* or the *Rural Electrification Loan Act*, or

(b) in payment of indebtedness to the association for utility services previously provided,

the association or the Director may, by written notice, direct the utility company or municipality to discontinue the utility service to that person until the association advises the utility company or municipality that the default has been remedied or the Director otherwise orders.

(2) When a notice is given under subsection (1),

(a) the association or Director shall, within 5 days after giving it, serve a copy of the notice on the person in default either personally or by registered mail addressed to the address of the person according to the records of the utility company or municipality, and

Feeder Associations Guarantee Act, SA 2009, c F-11.1

This statute replaces RSA 2000, c F-11.

Current version: in force since 2025-06-11

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FEEDER ASSOCIATIONS GUARANTEE ACT

Chapter F-11.1

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1 In this Act,

(a) "feeder association" means an association that enters into agreements with its members for the members to grow, finish or otherwise deal with livestock or livestock products owned by the feeder association;

(b) "guarantee" means a guarantee given under this Act;

(c) "guaranteed loan" means a loan to a feeder association in respect of which a guarantee is given;

(d) "livestock" means cattle, sheep or any another animals specified in the regulations;

(e) “Minister” means the Minister determined under section 16 of the *Government Organization Act* as the Minister responsible for this Act;

(f) “personal information” means personal information as defined in the *Protection of Privacy Act*.

2009 cF-11.1 s1;AR 141/2025

Guarantee

2(1) The Lieutenant Governor in Council, on the recommendation of the Minister, may by order authorize the President of Treasury Board and Minister of Finance to give guarantees on behalf of the Government with respect to loans made to feeder associations.

(2) The President of Treasury Board and Minister of Finance may give a guarantee with respect to a loan made to a feeder association

(a) if authorized by an order referred to in subsection (1), and

(b) subject to the requirements of this Act and the regulations.

2009 cF-11.1 s2;2013 c10 s33

Incorporation requirement

3 A guaranteed loan may only be made to a feeder association that is incorporated under an Act of the Legislature.

Purpose requirement

4 A guaranteed loan may only be used by a feeder association for a purpose provided for in the regulations.

Maximum liability

5(1) The Lieutenant Governor in Council shall, in an order made under section 2, set out the maximum amount of the total outstanding contingent liability of the Crown as a result of the guarantees.

(2) The Minister shall, with the consent of the President of Treasury Board and Minister of Finance, set the maximum amount of the total outstanding contingent liability of the Crown as a result of a guarantee in respect of a specific feeder association.

2009 cF-11.1 s5;2013 c10 s33

Prohibition re advances

6(1) The Minister may, by order, prohibit further advances under a guaranteed loan made to a feeder association if the Minister is of the opinion that the feeder association

(a) is not complying with this Act or the regulations, or

(b) is being operated in an unsound manner.

(2) The Minister shall immediately deliver or send by registered mail a copy of the order to

(a) the feeder association,

(b) the lender, and

(c) the President of Treasury Board and Minister of Finance.

(3) Any advances made by a lender after the order is delivered to or received by the lender and before the order is rescinded are not guaranteed.

(4) The Minister may, with the consent of the President of Treasury Board and Minister of Finance, rescind an order made under this section.

2009 cF-11.1 s6;2013 c10 s33

Security deposit

7 A feeder association shall maintain an account as security for a guaranteed loan with the lender in accordance with the regulations.

Subrogation of rights

8(1) If the President of Treasury Board and Minister of Finance makes a payment to a lender in respect of a default by a feeder association under a guaranteed loan, the President of Treasury Board and Minister of Finance is subrogated, with respect to the amount of that payment,

(a) to all the rights of the lender under any security or negotiable instruments given to the lender by the feeder association,

(b) to any action that the lender has against the feeder association,

(c) to all rights of the feeder association under any security or negotiable instruments given to the feeder association by any of its members, and

(d) to any action that the feeder association has against any of its members.

(2) A payment made by the President of Treasury Board and Minister of Finance under a guarantee on account of a default by a feeder association does not affect any liability of or security given by the feeder association under the guaranteed loan and, notwithstanding that a payment was made under the guarantee, the liability of and the security given, if any, by the feeder association

(a) remains and continues in full force and effect, and

(b) may be enforced against the feeder association by the President of Treasury Board and Minister of Finance.

2009 cF-11.1 s8;2013 c10 s33

Powers

9(1) The Minister may, for the purpose of administering this Act and the regulations under this Act,

(a) enter a place where the Minister reasonably believes that livestock or livestock products in respect of which a guaranteed loan was given are being or have been grown, finished or otherwise dealt with,

(b) enter a place where the Minister reasonably believes the records of a lender or a feeder association are kept,

(c) review the operations of a feeder association,

(d) inspect livestock and livestock products,

(e) inspect the records of the lender or a feeder association and make copies of or excerpts from the records,

(f) remove the records of a lender or feeder association from the place where they are kept, in which case a receipt must be provided and the records returned in a reasonable time, and

Attorney General for Saskatchewan
Appellant

v.

Lemare Lake Logging Ltd. *Respondent*

and

Attorney General of Ontario and Attorney General of British Columbia
Interveners

Indexed as: Saskatchewan (Attorney General) *v.* Lemare Lake Logging Ltd.

2015 SCC 53

File No.: 35923.

2015: May 21; 2015: November 13.

Present: Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law — Cooperative federalism — Division of powers — Bankruptcy and insolvency — Property and Civil Rights — Receiver — Federal paramountcy — Federal legislation authorizes court, upon application of secured creditor, to appoint receiver with power to act nationally — Provincial legislation imposes other procedural and substantive requirements before commencing an action with respect to farm land — Whether provincial legislation constitutionally inoperative when application made to appoint national receiver under federal legislation, by reason of doctrine of federal paramountcy — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 243 — The Saskatchewan Farm Security Act, S.S. 1988-89, c. S-17.1, ss. 9 to 22.

A secured creditor brought an application pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act* for the appointment of a receiver over substantially all of the assets of its debtor, a "farmer" within the meaning of *The Saskatchewan Farm Security Act*. The debtor contested the appointment and argued that the creditor had to comply with Part II of *The Saskatchewan Farm Security Act*, which requires that before commencing an action with

Procureur général de la Saskatchewan
Appelant

c.

Lemare Lake Logging Ltd. *Intimée*

et

Procureur général de l'Ontario et procureur général de la Colombie-Britannique *Intervenants*

Répertorié : Saskatchewan (Procureur général) *c.* Lemare Lake Logging Ltd.

2015 CSC 53

N° du greffe : 35923.

2015 : 21 mai; 2015 : 13 novembre.

Présents : Les juges Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon et Côté.

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Droit constitutionnel — Fédéralisme coopératif — Partage des compétences — Faillite et insolvabilité — Propriété et droits civils — Séquestre — Prépondérance fédérale — Loi fédérale autorisant le tribunal à nommer, à la demande d'un créancier garanti, un séquestre capable d'agir partout au Canada — Loi provinciale imposant d'autres exigences de fond et de procédure avant qu'une action à l'égard d'une terre agricole soit intentée — Lorsque la nomination d'un séquestre national est demandée en vertu de la loi fédérale, la loi provinciale est-elle constitutionnellement inopérante en raison de la doctrine de la prépondérance fédérale? — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3, art. 243 — The Saskatchewan Farm Security Act, S.S. 1988-89, c. S-17.1, art. 9 à 22.

Un créancier garanti a demandé au tribunal, en application du par. 243(1) de la *Loi sur la faillite et l'insolvabilité*, de nommer un séquestre à l'égard de la quasi-totalité de l'actif de son débiteur, un « agriculteur » au sens de la *Saskatchewan Farm Security Act*. Le débiteur a contesté cette demande, soutenant que le créancier devait se conformer à la partie II de la *Saskatchewan Farm Security Act*, qui exige d'une personne, avant d'intenter une action respect to farm land, a person must submit a notice of intention, await the expiry of a 150-day notice period, and engage in a mandatory review and mediation process. The chambers judge found that the provisions in Part II of *The Saskatchewan Farm Security Act* did not conflict with s. 243(1) of the *Bankruptcy and Insolvency Act*. The Court of Appeal found that Part II of *The Saskatchewan Farm Security Act* frustrated the purpose of s. 243(1) of the *Bankruptcy and Insolvency Act* and was therefore inoperative in circumstances where an application is made to appoint a receiver.

Held (Côté J. dissenting): The Court of Appeal's conclusion that Part II of *The Saskatchewan Farm Security Act* is constitutionally inoperative where an application is made to appoint a receiver pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, is set aside.

Per Abella, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ.: The paramountcy analysis requires consideration of whether any overlap between the federal and provincial laws constitutes a conflict sufficient to render the provincial law inoperative. Two kinds of conflict are at play: (1) an operational conflict, where compliance with both the federal and provincial law is impossible; and (2) frustration of purpose, where the provincial law thwarts the purpose of the federal law. The operational conflict branch of the paramountcy doctrine requires that there be "actual conflict" between the federal and provincial legislation. Here, there is no operational conflict because it is possible to comply with both statutes. The issue therefore centres on whether the provincial legislation frustrates the purpose of the federal legislation.

Given the guiding principle of cooperative federalism, which allows for some interplay and overlap between both federal and provincial legislation, paramountcy must be narrowly construed. Courts must take a restrained approach, and harmonious interpretations of federal and provincial legislation should be favoured. If a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to a construction which would bring about a conflict between the two statutes. Absent clear evidence that Parliament intended a broader statutory purpose, courts should avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with provincial legislation.

à l'égard d'une terre agricole, qu'elle donne un avis d'intention, attende l'expiration du délai d'avis de 150 jours et participe à un processus obligatoire d'examen et de médiation. La juge en cabinet a conclu qu'il n'y avait pas de conflit entre les dispositions de la partie II de la *Saskatchewan Farm Security Act* et le par. 243(1) de la *Loi sur la faillite et l'insolvabilité*. La Cour d'appel a conclu que la partie II de la *Saskatchewan Farm Security Act* entravait la réalisation de l'objet du par. 243(1) de la *Loi sur la faillite et l'insolvabilité* et qu'elle était en conséquence inopérante dans le cas d'une demande de nomination d'un séquestre.

Arrêt (la juge Côté est dissidente) : La conclusion de la Cour d'appel, selon laquelle la partie II de la *Saskatchewan Farm Security Act* est constitutionnellement inopérante lorsqu'une demande de nomination d'un séquestre est présentée en application du par. 243(1) de la *Loi sur la faillite et l'insolvabilité*, est infirmée.

Les juges Abella, Cromwell, Moldaver, Karakatsanis, Wagner et Gascon : Dans le cadre de l'analyse fondée sur la doctrine de la prépondérance, il faut déterminer si le chevauchement qui existe entre les lois fédérale et provinciale constitue un conflit suffisamment grave pour rendre inopérante la loi provinciale. Deux types de conflit sont en jeu : (1) un conflit d'application, lorsqu'il est impossible de respecter simultanément la loi fédérale et la loi provinciale; et (2) une incompatibilité d'objet, lorsque la loi provinciale entrave la réalisation de l'objet de la loi fédérale. Le volet relatif au conflit d'application de la doctrine de la prépondérance requiert l'existence d'un « conflit véritable » entre la loi fédérale et la loi provinciale. En l'espèce, il n'y a pas de conflit d'application, parce qu'il est possible pour une personne de se conformer aux deux lois. La question est donc de savoir si la loi provinciale entrave la réalisation de l'objet de la loi fédérale.

Compte tenu du principe directeur du fédéralisme coopératif, qui permet une certaine interaction et le chevauchement entre les lois fédérales et provinciales, la doctrine de la prépondérance doit recevoir une interprétation restrictive. Les tribunaux doivent adopter une approche restrictive et favoriser une interprétation harmonieuse des lois provinciale et fédérale. S'il est légitimement possible d'interpréter une loi fédérale de manière qu'elle n'entre pas en conflit avec une loi provinciale, il faut appliquer cette interprétation de préférence à toute autre qui entraînerait un conflit entre les deux lois. En l'absence d'une preuve claire de l'intention du législateur d'élargir l'objectif de la loi, les tribunaux doivent s'abstenir de donner à l'objet de la loi fédérale une interprétation

Clear proof of purpose is required. The burden a party faces in successfully invoking paramountcy is accordingly a high one; provincial legislation restricting the scope of permissive federal legislation is insufficient on its own.

large qui aboutira à un conflit avec la loi provinciale. Il faut une preuve claire de l'objet. Le fardeau incombant à la partie qui invoque la doctrine de la prépondérance est par conséquent élevé; la preuve qu'une loi provinciale restreint la portée d'une loi fédérale permissive ne suffit pas.

In this case, what the evidence shows is a simple and narrow purpose for s. 243 of the *Bankruptcy and Insolvency Act*: the establishment of a regime allowing for the appointment of a national receiver, thereby eliminating the need to apply for the appointment of a receiver in multiple jurisdictions.

En l'espèce, la preuve ne démontre à l'égard de l'art. 243 de la *Loi sur la faillite et l'insolvabilité* qu'un objet simple et restreint : la création d'un régime permettant la nomination d'un séquestre national, éliminant de ce fait la nécessité de demander la nomination d'un séquestre aux tribunaux de plusieurs ressorts.

Section 243(1) of the *Bankruptcy and Insolvency Act* authorizes a court, upon the application of a secured creditor, to appoint a receiver where such appointment is "just or convenient". Under s. 244(1), a secured creditor who intends to enforce a security on all or substantially all of the inventory, accounts receivable or other property of an insolvent debtor that was acquired for, or used in relation to, a business carried on by the insolvent person, is generally required to send a notice of that intention to the insolvent person. Section 243(1.1) states that, where notice is to be sent under s. 244(1), the appointment of a national receiver cannot be made before the expiry of 10 days after the day on which the secured creditor sends the notice. The national receivership regime under s. 243(1) does not oust a secured creditor's power to have a receiver appointed privately, or by court order under provincial law or any other federal law.

Le paragraphe 243(1) de la *Loi sur la faillite et l'insolvabilité* permet au tribunal, sur demande d'un créancier garanti, de nommer un séquestre s'il est convaincu que cela est « juste ou opportun ». Suivant le par. 244(1), le créancier garanti qui se propose de mettre à exécution une garantie portant sur la totalité ou la quasi-totalité des stocks, des comptes à recevoir ou des autres biens d'un débiteur insolvable acquis ou utilisés dans le cadre des affaires de ce dernier, doit généralement lui en donner préavis. Selon le par. 243(1.1), lorsqu'un préavis doit être donné aux termes du par. 244(1), la nomination d'un séquestre national ne peut être faite avant l'expiration d'un délai de 10 jours après l'envoi de ce préavis. Le régime relatif au séquestre national prévu au par. 243(1) n'a pas pour effet d'écarter le pouvoir du créancier garanti de faire nommer un séquestre, à titre privé ou aux termes d'une ordonnance judiciaire rendue sous le régime d'une loi provinciale ou de toute autre loi fédérale.

Part II of *The Saskatchewan Farm Security Act* is aimed at affording protection to farmers against loss of their farm land. Subject to ss. 11 to 21, s. 9(1)(d) of *The Saskatchewan Farm Security Act* prohibits commencement of any "action" with respect to farm land. This includes an application for the appointment of a receiver under s. 243(1) of the *Bankruptcy and Insolvency Act*. Section 11(1)(a), however, states that, where a mortgagee makes an application with respect to a mortgage on farm land, the court may, on any terms and conditions that it considers just and equitable, order that s. 9(1)(d) does not apply. Before a mortgagee can bring an application under s. 11, a number of preconditions must be fulfilled, including a compulsory and non-waivable 150-day waiting period during which a mandatory review and mediation process occurs. Once the 150-day waiting period is over, the mortgagee may then make an application for an order granting leave to commence the action. On hearing the application, the court must presume that the farmer has a reasonable possibility of meeting his or her obligations

La partie II de la *Saskatchewan Farm Security Act* vise à protéger les agriculteurs contre la perte de leurs terres agricoles. Sous réserve de ses art. 11 à 21, l'al. 9(1)(d) de cette loi proscrit l'introduction de toute « action » relative à des terres agricoles, ce qui inclut la demande de nomination d'un séquestre prévue au par. 243(1) de la *Loi sur la faillite et l'insolvabilité*. Toutefois, suivant l'al. 11(1)(a), lorsqu'un créancier hypothécaire présente une demande relative à une hypothèque grevant une terre agricole, le tribunal peut, par ordonnance, selon les modalités qu'il estime justes et équitables, le soustraire à l'application de l'al. 9(1)(d). Avant de présenter une demande en application de l'art. 11, le créancier hypothécaire doit respecter plusieurs conditions; il doit notamment se soumettre à une période d'attente obligatoire de 150 jours, un délai auquel il ne peut renoncer et pendant lequel il est astreint à un processus obligatoire d'examen et de médiation. À l'expiration de la période d'attente de 150 jours, le créancier hypothécaire peut solliciter une ordonnance autorisant l'introduction de under the mortgage, and that he or she is making a sincere and reasonable effort to meet those obligations.

As a result of the concurrent operation of s. 243(1) of the *Bankruptcy and Insolvency Act* and Part II of *The Saskatchewan Farm Security Act*, a secured creditor wishing to enforce its security interest against farm land must wait 150 days, rather than the 10 days imposed under federal law. The creditor must also comply with the various additional requirements of *The Saskatchewan Farm Security Act*, such as the statutory presumptions described above. That interference with s. 243(1), however, does not, in and of itself, constitute a conflict. A conflict will only arise if such interference frustrates the purpose of the federal regime.

Section 243's purpose is simply the establishment of a regime allowing for the appointment of a national receiver, thereby eliminating the need to apply for the appointment of a receiver in multiple jurisdictions. There is insufficient evidence for casting s. 243's purpose more widely.

There is nothing in the words of s. 243 suggesting that the 10-day waiting period imposed by the provision should be treated as a ceiling rather than a floor. The discretionary nature of the s. 243 remedy — as evidenced by the fact that the provision provides that a court "may" appoint a receiver if it is "just or convenient" to do so — lends further support to a narrower reading of the provision's purpose. A secured creditor is not entitled to appointment of a receiver. Rather, s. 243 is permissive, allowing a court to appoint a receiver where it is just or convenient. Interference with a discretion granted under federal law is not, by itself, sufficient to establish frustration of federal purpose. Nothing in the text of the provision or the *Bankruptcy and Insolvency Act* more generally suggests that s. 243 is meant to be a comprehensive remedy exclusive of provincial law.

Any uncertainty about whether s. 243 was meant to displace provincial legislation like *The Saskatchewan Farm Security Act* is further mitigated by s. 72(1) of the *Bankruptcy and Insolvency Act*, which explicitly recognizes the continued operation of provincial law in the bankruptcy and insolvency context, except to the extent that it is inconsistent with the *Bankruptcy and Insolvency Act*. Moreover, other provisions of the *Bankruptcy and*

l'action. Lorsqu'il instruit la demande, le tribunal doit présumer qu'il existe une possibilité raisonnable que l'agriculteur s'acquitte de ses obligations hypothécaires et qu'il déploie des efforts sincères et raisonnables pour s'acquitter de ces obligations.

En raison de l'application concurrente du par. 243(1) de la *Loi sur la faillite et l'insolvabilité* et de la partie II de la *Saskatchewan Farm Security Act*, le créancier garanti qui souhaite exécuter sa garantie grevant une terre agricole doit attendre 150 jours plutôt que les 10 jours requis par la loi fédérale. Le créancier doit également satisfaire à diverses autres exigences de la *Saskatchewan Farm Security Act*, telles les présomptions légales indiquées précédemment. Or, cette interférence avec le par. 243(1) ne constitue pas en soi un conflit. Ce n'est que si cette interférence entrave la réalisation de l'objet du régime fédéral qu'il y aura conflit.

L'article 243 a simplement pour objet l'établissement d'un régime qui permet la nomination d'un séquestre national, ce qui élimine la nécessité de demander la nomination d'un séquestre aux tribunaux de plusieurs ressorts. Les éléments de preuve ne sont pas suffisants pour que l'on donne une portée plus large à l'objet de l'art. 243.

Rien dans le libellé de l'art. 243 ne laisse croire que la période d'attente de 10 jours qu'impose cet article devrait être considérée comme une période maximale plutôt que minimale. Le caractère discrétionnaire du recours prévu à l'art. 243 — comme en témoigne le fait que, aux termes de la disposition, le tribunal « peut » nommer un séquestre si cela est « juste ou opportun » — vient appuyer une interprétation plus étroite de l'objet de cette disposition. Le créancier garanti n'a pas droit à la nomination d'un séquestre. L'article 243 constitue plutôt une disposition permissive en permettant au tribunal de nommer un séquestre si cela est juste ou opportun. L'atteinte à un pouvoir discrétionnaire conféré par une loi fédérale ne suffit pas en soi pour établir l'existence d'une entrave à la réalisation d'un objectif fédéral. Ni la disposition en cause, ni la *Loi sur la faillite et l'insolvabilité* dans son ensemble, ne permettent de conclure que l'art. 243 se veut un recours exhaustif qui exclut l'application des lois provinciales.

Tout doute quant à savoir si l'art. 243 était censé écarter une loi provinciale comme la *Saskatchewan Farm Security Act* est encore atténué par le par. 72(1) de la *Loi sur la faillite et l'insolvabilité*, lequel reconnaît explicitement que les lois provinciales continuent à s'appliquer dans un contexte de faillite et d'insolvabilité, sauf dans la mesure où elles sont incompatibles avec la *Loi sur la faillite et l'insolvabilité*. En outre, d'autres dispositions de

Insolvency Act further support a more narrow reading of s. 243's purpose. Notably, s. 47 provides a mechanism for the appointment of an interim receiver where there is an urgent need for the appointment of a receiver.

The legislative history of s. 243 of the *Bankruptcy and Insolvency Act* further supports a narrow construction of the provision's purpose — i.e., to avoid a multiplicity of proceedings and the inefficiency resulting from them. Vague and imprecise notions like timeliness or effectiveness cannot amount to an overarching federal purpose that would prevent coexistence with provincial laws.

It is notable that Parliament has recognized that the receivership provision under s. 243 can be subordinated to potentially longer delays in other federal legislation (including the federal *Farm Debt Mediation Act*). Given the presumption that Parliament does not enact related statutes that are inconsistent with one another, courts should avoid an interpretation of a federal statute which does not accommodate similar limitations imposed under a provincial statute. It follows that Parliament intended neither to preclude all notice periods longer than the 10-day notice period in the *Bankruptcy and Insolvency Act* nor to oust legislation which is intended to favour mediation between creditors and farmers.

Furthermore, on this record, there is simply no evidence to support the argument that the 150-day delay or the other conditions in *The Saskatchewan Farm Security Act* frustrate any effectiveness or timeliness concerns. It is the burden of the party invoking paramountcy to not only establish that these are, in fact, the purposes of s. 243, but also that the evidence supports a finding that the provincial law frustrates them in some way. The record is silent in that regard. Parliament's purpose of providing bankruptcy courts with the power to appoint a national receiver is not frustrated by the procedural and substantive conditions set out in the provincial legislation.

There is, as a result, no evidentiary basis for concluding that s. 243 was meant to circumvent the procedural and substantive requirements of the provincial laws where the appointment is sought. The general goals of bankruptcy or receivership cannot be used to trump the specific purpose of s. 243 and to artificially extend the provision's purpose to create a conflict with provincial legislation. Construing s. 243's purpose more broadly

cette loi viennent appuyer une interprétation plus étroite de l'objet de l'art. 243. Notamment, l'art. 47 établit un mécanisme permettant la nomination d'un séquestre intérimaire lorsqu'il est urgent de nommer un séquestre.

L'historique législatif de l'art. 243 de la *Loi sur la faillite et l'insolvabilité* vient par ailleurs étayer une interprétation étroite de l'objet de cette disposition, soit éviter la multiplicité des procédures et l'inefficacité qui en résulte. Les notions vagues et imprécises que sont la possibilité d'agir en temps opportun ou l'efficacité ne peuvent constituer un objectif fédéral général tel qu'il empêcherait la coexistence avec les lois provinciales.

Fait à noter, le législateur fédéral a reconnu que la nomination d'un séquestre au titre de l'art. 243 peut être assujettie à des délais possiblement plus longs prescrits par d'autres lois fédérales (notamment la *Loi sur la médiation en matière d'endettement agricole*). Compte tenu de la présomption selon laquelle le Parlement n'édicte pas de lois connexes incompatibles, les tribunaux doivent s'abstenir de donner à une loi fédérale une interprétation qui n'est pas compatible avec des restrictions semblables imposées par une loi provinciale. Par conséquent, le législateur fédéral n'entendait pas écarter tous les délais de préavis dépassant les 10 jours prescrits par la *Loi sur la faillite et l'insolvabilité* ni les lois visant à favoriser la médiation entre les créanciers et les agriculteurs.

En outre, au vu du dossier, il n'y a tout simplement aucun élément de preuve à l'appui de l'argument selon lequel le délai de 150 jours, ou les autres conditions de la *Saskatchewan Farm Security Act*, font échec à toute préoccupation en matière d'efficacité ou de possibilité d'agir en temps opportun. Il incombe à la partie qui invoque la doctrine de la prépondérance fédérale de démontrer non seulement qu'il s'agit en fait des objectifs de l'art. 243, mais aussi que la preuve permet de conclure que la loi provinciale entrave, d'une façon ou d'une autre, la réalisation de ces objectifs. Le dossier ne révèle rien à cet égard. Les conditions de fond et de procédure prescrites par la loi provinciale n'entravent pas la réalisation de l'objectif du législateur fédéral consistant à habiliter les tribunaux en matière de faillite à nommer un séquestre national.

Rien dans la preuve ne permet donc de conclure que l'art. 243 devait faire échec aux exigences de fond et de procédure énoncées dans les lois en vigueur dans la province où la demande de nomination est présentée. Les objectifs généraux des processus de faillite ou de mise sous séquestre ne peuvent servir à écarter l'objet précis de l'art. 243 et à étendre artificiellement son objet pour créer un conflit avec une loi provinciale. Interpréter plus in the absence of clear evidence, is inconsistent with the requisite restrained approach to paramountcy.

largement l'objet de l'art. 243 en l'absence d'une preuve claire est incompatible avec l'approche restrictive qu'il convient d'adopter à l'égard de la doctrine de la prépondérance.

The conclusion that Part II of *The Saskatchewan Farm Security Act* is constitutionally inoperative where an application is made to appoint a receiver pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, is accordingly set aside.

La conclusion selon laquelle la partie II de la *Saskatchewan Farm Security Act* est constitutionnellement inopérante lorsqu'une demande de nomination d'un séquestre est présentée en application du par. 243(1) de la *Loi sur la faillite et l'insolvabilité* est par conséquent infirmée.

Per Côté J. (dissenting): A yearning for a harmonious interpretation of both federal and provincial legislation cannot lead courts to disregard obvious purposes that are pursued in federal legislation. In the case of s. 243 of the *Bankruptcy and Insolvency Act* ("*BIA*"), Parliament intended to establish a process for appointing national receivers, and intended that process to be timely, sensitive to the totality of circumstances and capable of responding to emergencies. These federal purposes are plainly evident in s. 243 *BIA*, understood in light of the realities and demands of real-time insolvency practice, s. 243's statutory context and its legislative history. To the extent that *The Saskatchewan Farm Security Act* ("*SFSA*") is incompatible with these purposes, there is a frustration of purpose.

La juge Côté (dissidente) : Le souhait d'une interprétation harmonieuse des lois fédérale et provinciale ne saurait conduire les tribunaux à ignorer les objectifs évidents que vise la loi fédérale. Avec l'art. 243 de la *Loi sur la faillite et l'insolvabilité* (« *LFI* »), le législateur fédéral avait l'intention d'établir un processus de nomination d'un séquestre national qui permette d'agir avec célérité, qui tienne compte de l'ensemble des circonstances et qui soit susceptible de répondre aux situations urgentes. Ces objectifs fédéraux sont clairement évidents à l'art. 243 de la *LFI*, considéré à la lumière de la réalité et des exigences des procédures en matière d'insolvabilité, du contexte législatif de cet article et de son historique législatif. Dans la mesure où l'application de la *Saskatchewan Farm Security Act* (« *SFSA* ») compromet ces objectifs, il y a entrave à la réalisation de l'objet de la loi fédérale.

Given the often frenzied rush of insolvency proceedings, secured creditors will frequently have an acute need to have a receiver appointed promptly. Implicit in the 10-day notice period of s. 243 *BIA* is the very notion of urgency.

Compte tenu de la frénésie qui caractérise souvent le déroulement des procédures d'insolvabilité, les créanciers garantis ont fréquemment le besoin pressant d'obtenir sans délai la nomination d'un séquestre. La notion même d'urgence se dégage de la période d'avis de 10 jours prévue à l'art. 243.

In addition, Parliament permits secured creditors to apply for receivership before the expiry of the 10-day notice period in certain circumstances. This is evidence of Parliament's intention to provide secured creditors with a remedy capable of adapting to the often dramatic circumstances of insolvency. The significant discretion vested in the courts suggests that Parliament wished courts to respond to each application on a case-by-case basis in light of the full factual matrix before them. Moreover, the *BIA*'s interim receivership regime confirms the vital importance of timeliness for the national full receivership.

De plus, le législateur fédéral a permis aux créanciers garantis de demander, dans certaines circonstances, la nomination d'un séquestre avant l'expiration du préavis de 10 jours. Cela témoigne de l'intention du législateur de fournir aux créanciers garantis un recours susceptible de s'adapter aux circonstances souvent dramatiques de l'insolvabilité. Le pouvoir discrétionnaire considérable conféré aux tribunaux indique que le législateur souhaitait qu'ils répondent à chaque demande au cas par cas en tenant compte de toutes les circonstances et du contexte factuel porté à leur connaissance. En outre, le régime de nomination du séquestre intérimaire prévu par la *LFI* confirme l'importance cruciale que revêt la célérité pour la nomination d'un séquestre national.

This federal purpose of timeliness can also be discerned from the legislative history of the statutory notice provision. A full purposive analysis must account for the federal objectives that were originally given effect in the

On peut aussi constater l'existence de cet objectif fédéral de célérité en retraçant l'historique législatif du préavis prescrit par la loi. Une analyse téléologique complète doit prendre en compte les objectifs fédéraux statutory scheme. While s. 243 *BIA*'s introduction was prompted by a need for a national full receiver, s. 243 is the product of an incremental evolution. The foundational purposes that have animated federal receivership law since 1992 must form part of any credible account of the federal purpose underlying today's s. 243. If this Court disregards these foundational purposes in its frustration of purpose analysis, the provinces will be left free to mangle the receivership scheme.

On the argument that the special treatment afforded to farmers by the *BIA* must be included in any purposive analysis of s. 243 *BIA*, given that Parliament expressly excluded farmers from involuntary bankruptcy proceedings, one would expect that Parliament would have enacted a similar provision with regard to the appointment of a national receiver under Part XI of the *BIA*. However, there is no such provision in Part XI. In addition, there are stark differences between the federal *Farm Debt Mediation Act* ("*FDMA*") and the *SFSA*, both in their operation and the policy preferences they embody. As a result, the existence of the former cannot be taken as evidence that Parliament intended the *BIA* to coexist with the latter. The scheme of the *FDMA* is quite compatible with the balance struck in s. 243 *BIA*; if the provincial legislation had mirrored the *FDMA*, the conclusion as to frustration of federal purpose would have been different.

Although Part XI of the *BIA* contemplates some degree of interaction and overlap with provincial legislation, the essential question remains whether the operation of Part II of the *SFSA* undermines to a sufficient extent the federal purpose underlying s. 243 *BIA*. Here, if understood in more general terms, the federal purpose is clearly drawn in broad strokes, namely to establish a process for applying for a national receiver that is timely, adaptable in case of emergency and sensitive to the totality of circumstances. If a province wishes to legislate in a way that will affect the federal receivership regime, then it must do so in a manner consistent with that purpose.

In the instant case, the federal purpose has been frustrated by the important obstacles the province has deliberately placed in the way. The notice period in the *SFSA*

auxquels ce régime législatif a donné effet à l'origine. Alors que l'adoption de l'art. 243 de la *LFI* était motivée par la nécessité de prévoir la nomination d'un séquestre national, cette disposition est le fruit d'une évolution graduelle. Les objectifs fondamentaux qui ont animé l'évolution du droit fédéral en matière de mise sous séquestre depuis 1992 doivent être pris en compte si l'on veut dresser un portrait fidèle de l'objet fédéral visé à l'art. 243 actuel. Si notre Cour ignore ces objectifs fondamentaux dans son analyse visant à déterminer s'il y a entrave à la réalisation de l'objet fédéral, les provinces pourront modifier à leur gré le régime de mise sous séquestre.

Au sujet de l'argument voulant qu'il faille, dans toute analyse téléologique de l'art. 243 de la *LFI*, tenir compte du traitement spécial que la *LFI* réserve aux agriculteurs, comme le législateur a expressément soustrait les agriculteurs aux procédures de faillite involontaire, on aurait pu s'attendre à ce qu'il adopte une disposition semblable dans le cas de la nomination d'un séquestre national en vertu de la partie XI de la *LFI*. Or, on ne trouve aucune disposition en ce sens à la partie XI. De plus, il existe des différences marquées entre la *Loi sur la médiation en matière d'endettement agricole* (« *LMEA* ») et la *SFSA*, tant en ce qui concerne leurs modalités d'application que les grands principes que chacune incarne. Par conséquent, l'existence de la première ne saurait être considérée comme une preuve que le législateur souhaitait que la *LFI* coexiste avec la seconde. L'économie de la *LMEA* va dans le sens de l'équilibre établi à l'art. 243 de la *LFI*; si la loi provinciale reflétait la *LMEA*, la conclusion quant à l'entrave à la réalisation de l'objet de la loi fédérale aurait été différente.

Bien que la partie XI de la *LFI* permette un certain degré d'interaction et de chevauchement avec les lois provinciales, la question essentielle reste, à savoir si l'application de la partie II de la *SFSA* porte suffisamment atteinte aux objectifs fédéraux que vise l'art. 243 de la *LFI*. En l'espèce, si on le conçoit de façon plus générale, cet objet fédéral a manifestement été dessiné à grandes lignes, notamment afin d'instaurer un processus de demande de nomination d'un séquestre national qui soit rapide, qui s'adapte aux situations d'urgence et qui tienne compte de l'ensemble des circonstances. Si une province souhaite légiférer d'une façon susceptible d'avoir une incidence sur le régime fédéral de nomination de séquestre, elle doit le faire d'une manière cohérente avec l'objet fédéral en question.

En l'espèce, il y a eu entrave à la réalisation de l'objet fédéral en raison des obstacles importants que la province a délibérément mis en place. Le délai d'avis prévu à la is far longer, and is absolute. The *SFSA* also establishes a series of evidentiary hurdles that are incompatible with Parliament's purpose. It is clear that the provincial legislation cannot operate in real time, and is in fact intended to hinder the timely appointment of a receiver, thereby triggering the application of the doctrine of federal paramountcy.

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SFSA est beaucoup plus long, et il est absolu. Également, la *SFSA* crée au niveau de la preuve une série d'obstacles incompatibles avec l'objectif du Parlement. Il est évident que la loi provinciale ne peut s'appliquer en temps réel et qu'elle est en fait conçue pour décourager la nomination en temps opportun d'un séquestre. La doctrine de la prépondérance fédérale doit donc s'appliquer.

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Century Services Inc. c. Canada (Procureur général), 2010 CSC 60, [2010] 3 R.C.S. 379; *Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3; *Québec (Procureur général) c. Canadian Owners and Pilots Association*, 2010 CSC 39, [2010] 2 R.C.S. 536; *Law Society of British Columbia c. Mangat*, 2001 CSC 67, [2001] 3 R.C.S. 113; *Renvoi relatif à la Loi sur les valeurs mobilières*, 2011 CSC 66, [2011] 3 R.C.S. 837; *Québec (Procureur général) c. Canada (Procureur général)*, 2015 CSC 14, [2015] 1 R.C.S. 693; *Railside Developments Ltd., Re*, 2010 NSSC 13, 62 C.B.R. (5th) 193; *Société de crédit commercial GMAC — Canada c. T.C.T. Logistics Inc.*, 2006 CSC 35, [2006] 2 R.C.S. 123; *Jacob's Hold Inc. c. Canadian Imperial Bank of Commerce* (2000), 52 O.R. (3d) 776; *Banque de Montréal c. Hall*, [1990] 1 R.C.S. 121; *Marine Services International Ltd. c. Ryan (Succession)*, 2013 CSC 44, [2013] 3 R.C.S. 53; *Rothmans, Benson & Hedges Inc. c. Saskatchewan*, 2005 CSC 13, [2005] 1 R.C.S. 188.

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APPEAL involving a decision of the Saskatchewan Court of Appeal (Richards C.J. and Ottenbreit and Whitmore JJ.A.), 2014 SKCA 35, 433 Sask. R. 266, 371 D.L.R. (4th) 663, 11 C.B.R. (6th) 245, [2014] 6 W.W.R. 440, 602 W.A.C. 266, [2014] S.J. No. 164 (QL), 2014 CarswellSask 179 (WL Can.), affirming a decision of Rothery J., 2013 SKQB 278, [2013] 12 W.W.R. 176, [2013] S.J. No. 477 (QL), 2013 CarswellSask 531 (WL Can.). The Court of Appeal's conclusion that Part II of *The Saskatchewan Farm Security Act*, S.S. 1988-89, c. S-17.1, is constitutionally inoperative where an application is made to appoint a receiver pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, is set aside, Côté J. dissenting.

POURVOI concernant une décision de la Cour d'appel de la Saskatchewan (le juge en chef Richards et les juges Ottenbreit et Whitmore), 2014 SKCA 35, 433 Sask. R. 266, 371 D.L.R. (4th) 663, 11 C.B.R. (6th) 245, [2014] 6 W.W.R. 440, 602 W.A.C. 266, [2014] S.J. No. 164 (QL), 2014 CarswellSask 179 (WL Can.), qui a confirmé une décision de la juge Rothery, 2013 SKQB 278, [2013] 12 W.W.R. 176, [2013] S.J. No. 477 (QL), 2013 CarswellSask 531 (WL Can.). La conclusion de la Cour d'appel, selon laquelle la partie II de la *Saskatchewan Farm Security Act*, S.S. 1988-89, c. S-17.1, est constitutionnellement inopérante lorsqu'une demande de nomination d'un séquestre est présentée en application du par. 243(1) de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, c. B-3, est infirmée, la juge Côté est dissidente.

Thomson Irvine and *Katherine Roy*, for the appellant.

Thomson Irvine et *Katherine Roy*, pour l'appelant.

No one appeared for the respondent.

Personne n'a comparu pour l'intimée.

Michael S. Dunn and *Daniel Huffaker*, for the intervener the Attorney General of Ontario.

Michael S. Dunn et *Daniel Huffaker*, pour l'intervenant le procureur général de l'Ontario.

Written submissions only by *R. Richard M. Butler* and *Jean M. Walters*, for the intervener the Attorney General of British Columbia.

Argumentation écrite seulement par *R. Richard M. Butler* et *Jean M. Walters,* pour l'intervenant le procureur général de la Colombie-Britannique.

Jeffrey M. Lee, *Q.C.*, and *Kristen MacDonald*, for the *amicus curiae.*

Jeffrey M. Lee, *c.r.*, et *Kristen MacDonald*, pour l'*amicus curiae.*

The judgment of Abella, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ. was delivered by

Version française du jugement des juges Abella, Cromwell, Moldaver, Karakatsanis, Wagner et Gascon rendu par

[1] ABELLA AND GASCON JJ. — Prior to 2005, receivership proceedings involving assets in more

[1] LES JUGES ABELLA ET GASCON — Avant 2005, la nécessité de nommer différents séquestres dans

[24] The litigation in this case proceeded on the assumption that s. 243 of the *BIA* and Part II of the *SFSA* were validly enacted. Section 243 of the *BIA* falls within Parliament's exclusive power to enact laws in relation to bankruptcy and insolvency, while Part II of the *SFSA* falls within Saskatchewan's power to enact laws in relation to property and civil rights: *Constitution Act, 1867*, ss. 91(21) and 92(13).

[25] The parties essentially accepted the conclusion of the chambers judge and the Court of Appeal about the absence of operational conflict because it is possible to comply with both statutes by obtaining an order under the *SFSA* before seeking the appointment of a receiver under s. 243 of the *BIA*. The creditor can comply with both laws by observing the longer periods required by provincial law. In that regard, the federal law is permissive and the provincial law, more restrictive. This has been regularly considered not to constitute an operational conflict: *Ryan Estate*, at para. 76; *COPA*, at para. 65; *Canadian Western Bank*, at para. 100; *Rothmans, Benson & Hedges Inc.*, at paras. 22-24; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, at para. 35; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 964. The issue before this Court therefore centres on whether the Court of Appeal was right to conclude that the provincial legislation frustrates the purpose of the federal legislation.

[26] To prove that provincial legislation frustrates the purpose of a federal enactment, the party relying on the doctrine "must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose": *COPA*, at para. 66; *Marcotte*, at para. 73; see also *Canadian Western Bank*, at para. 75; *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] 2 S.C.R. 86, at para. 77. Clear proof of purpose is required: *COPA*, at para. 68. The burden a party faces in successfully invoking paramountcy is accordingly a high one; provincial legislation restricting the scope of permissive federal legislation

[24] En l'espèce, on a tenu pour acquis que l'art. 243 de la *LFI* et la partie II de la *SFSA* avaient été validement adoptés. L'article 243 de la *LFI* relève du pouvoir exclusif du Parlement de légiférer en matière de banqueroute et de faillite, alors que la partie II de la *SFSA* relève du pouvoir de la province de la Saskatchewan de légiférer en matière de propriété et de droits civils : *Loi constitutionnelle de 1867*, par. 91(21) et 92(13).

[25] Les parties ont accepté pour l'essentiel les conclusions de la juge en cabinet et de la Cour d'appel quant à l'absence de conflit d'application, parce qu'il est possible pour une personne de se conformer aux deux lois en obtenant une ordonnance en application de la *SFSA* avant de demander la nomination d'un séquestre en vertu de l'art. 243 de la *LFI*. Le créancier peut se conformer aux deux lois en observant les périodes plus longues que prescrit la loi provinciale. À cet égard, la loi fédérale est permissive alors que la loi provinciale est plus restrictive. La Cour a régulièrement considéré que cela ne constituait pas un conflit d'application : *Ryan (Succession)*, par. 76; *COPA*, par. 65; *Banque canadienne de l'Ouest*, par. 100; *Rothmans, Benson & Hedges Inc.*, par. 22-24; *114957 Canada Ltée (Spraytech, Société d'arrosage) c. Hudson (Ville)*, [2001] 2 R.C.S. 241, par. 35; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, p. 964. Notre Cour est donc appelée à trancher la seule question de savoir si la Cour d'appel a eu raison de conclure que la loi provinciale entrave la réalisation de l'objet de la loi fédérale.

[26] Afin de prouver que la loi provinciale entrave la réalisation de l'objet d'une loi fédérale, la partie qui invoque la doctrine de la prépondérance « doit d'abord établir l'objet de la loi fédérale pertinente et ensuite prouver que la loi provinciale est incompatible avec cet objet » : *COPA*, par. 66; *Marcotte*, par. 73; voir également *Banque canadienne de l'Ouest*, par. 75; *Colombie-Britannique (Procureur général) c. Lafarge Canada Inc.*, [2007] 2 R.C.S. 86, par. 77. Il faut une preuve claire de l'objet : *COPA*, par. 68. Le fardeau incombant à la partie qui invoque la doctrine de la prépondérance est par conséquent élevé; une loi provinciale qui restreint la portée d'une

is insufficient on its own: *COPA*, at para. 66; see also *Ryan Estate*, at para. 69.

loi fédérale permissive ne suffit pas en soi pour établir une entrave : *COPA*, par. 66; voir également *Ryan (Succession)*, par. 69.

[27] And, as previously noted, paramountcy must be applied with restraint. In the absence of "very clear" statutory language to the contrary, courts should not presume that Parliament intended to "occupy the field" and render inoperative provincial legislation in relation to the subject: *Canadian Western Bank*, at para. 74, citing *Rothmans, Benson & Hedges Inc.*, at para. 21. As this Court explained in advocating a similar restrained approach to interjurisdictional immunity in *Canadian Western Bank*, at para. 37:

> The "dominant tide" [of allowing for a fair amount of interplay and indeed overlap between federal and provincial powers] finds its principled underpinning in the concern that a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government. In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest. Professor Paul Weiler wrote over 30 years ago that
>
> > the court should refuse to try to protect alleged, but as yet unoccupied, enclaves of governmental power against the intrusions of another representative legislature which has ventured into the area. Instead, the court should try to restrict itself to the lesser but still important role of interpreting statutes of different jurisdictions in the same area, in order to avoid conflict, and applying a doctrine of paramountcy in the few situations which are left.
>
> ("The Supreme Court and the Law of Canadian Federalism" (1973), 23 *U.T.L.J.* 307, at p. 308) [Emphasis in original.]

[27] En outre, comme nous l'avons vu, la doctrine de la prépondérance doit être appliquée avec retenue. En l'absence d'un texte législatif « clair à cet effet », les tribunaux ne devraient pas supposer que le Parlement entendait « occuper tout le champ » et rendre inopérante la loi provinciale en la matière : *Banque canadienne de l'Ouest*, par. 74, citant *Rothmans, Benson & Hedges Inc.*, par. 21. Comme la Cour l'a expliqué en préconisant une telle retenue à l'égard de l'exclusivité des compétences dans *Banque canadienne de l'Ouest*, par. 37 :

> Le fondement logique du « courant dominant » [qui permet passablement d'interaction et même de chevauchement en ce qui concerne les pouvoirs fédéraux et provinciaux] tient à la volonté que les tribunaux privilégient, dans la mesure du possible, l'application régulière des lois édictées par *les deux* ordres de gouvernement. En l'absence de textes législatifs conflictuels de la part de l'autre ordre de gouvernement, la Cour devrait éviter d'empêcher l'application de mesures considérées comme ayant été adoptées en vue de favoriser l'intérêt public. Le professeur Paul Weiler a écrit ce qui suit il y a plus de 30 ans :
>
> > [TRADUCTION] [L]a cour devrait refuser d'essayer de protéger les possibles enclaves, encore inoccupées, du pouvoir gouvernemental contre les ingérences d'une autre assemblée législative représentative qui s'est aventurée dans le domaine. La cour devrait plutôt chercher à s'en tenir au rôle plus modeste, mais néanmoins important qui consiste à interpréter les lois édictées par les différents ressorts dans un même domaine, dans un but d'éviter les conflits, et à appliquer la doctrine de la prépondérance dans les rares cas qui restent.
>
> (« The Supreme Court and the Law of Canadian Federalism » (1973), 23 *U.T.L.J.* 307, p. 308) [En italique dans l'original.]

[28] It is in light of the above principles that we turn to the federal and provincial provisions at issue.

[28] C'est au regard des principes énoncés ci-dessus que nous examinons les dispositions de la loi fédérale et de la loi provinciale en cause.

[29] Section 243(1) is found in Part XI of the *BIA*, dealing with secured creditors and receivers. It authorizes a court, upon the application of a secured

[29] Le paragraphe 243(1) se trouve dans la partie XI de la *LFI*, qui porte sur les créanciers garantis et les séquestres. Il permet au tribunal, sur demande

creditor, to appoint a receiver where such appointment is "just or convenient":

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(*a*) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(*b*) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(*c*) take any other action that the court considers advisable.

[30] In s. 243, courts are given the authority to appoint a receiver with the power to act nationally, thereby eliminating the need to apply to courts in multiple jurisdictions for the appointment of a receiver.

[31] Under s. 244(1), a secured creditor who intends to enforce a security on all or substantially all of the inventory, accounts receivable or other property of an insolvent debtor that was acquired for, or used in relation to, a business carried on by the insolvent person, is generally required to send a notice of that intention to the insolvent person. Section 243(1.1) states that, where notice is to be sent under s. 244(1), the appointment of a national receiver cannot be made before the expiry of 10 days after the day on which the secured creditor sends the notice:

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(*a*) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(*b*) the court considers it appropriate to appoint a receiver before then.

d'un créancier garanti, de nommer un séquestre s'il est convaincu que cela est « juste ou opportun » :

243. (1) Sous réserve du paragraphe (1.1), sur demande d'un créancier garanti, le tribunal peut, s'il est convaincu que cela est juste ou opportun, nommer un séquestre qu'il habilite :

a) à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires;

b) à exercer sur ces biens ainsi que sur les affaires de la personne insolvable ou du failli le degré de prise en charge qu'il estime indiqué;

c) à prendre toute autre mesure qu'il estime indiquée.

[30] L'article 243 accorde au tribunal le pouvoir de nommer un séquestre capable d'agir partout au Canada, ce qui élimine la nécessité de demander la nomination d'un séquestre aux tribunaux de plusieurs ressorts.

[31] Suivant le par. 244(1), le créancier garanti qui se propose de mettre à exécution une garantie portant sur la totalité ou la quasi-totalité des stocks, des comptes à recevoir ou des autres biens d'un débiteur insolvable acquis ou utilisés dans le cadre des affaires de ce dernier, doit généralement lui en donner préavis. Selon le par. 243(1.1), lorsqu'un préavis doit être donné aux termes du par. 244(1), la nomination d'un séquestre national ne peut être faite avant l'expiration d'un délai de 10 jours après l'envoi de ce préavis :

(1.1) Dans le cas d'une personne insolvable dont les biens sont visés par le préavis qui doit être donné par le créancier garanti aux termes du paragraphe 244(1), le tribunal ne peut faire la nomination avant l'expiration d'un délai de dix jours après l'envoi de ce préavis, à moins :

a) que la personne insolvable ne consente, aux termes du paragraphe 244(2), à l'exécution de la garantie à une date plus rapprochée;

b) qu'il soit indiqué, selon lui, de nommer un séquestre à une date plus rapprochée.

[36] Before a mortgagee can bring an application under s. 11, however, s. 12 sets out a number of preconditions. Most notably, the mortgagee must serve a notice of intention on the Farm Land Security Board and on the farmer: s. 12(1). There is then a compulsory and non-waivable 150-day waiting period required before an application can be made: s. 12(1). This notice triggers a mandatory review and mediation process between the mortgagee and the farmer, conducted with the assistance of the board: s. 12(2) to (5). Prior to the expiry of the 150-day waiting period, the board must prepare a report to consider as part of the mortgagee's application to begin the action: ss. 12(12), (13) and 13(b). Once the 150-day waiting period is over, the mortgagee may then make an application for an order granting leave to commence the action: see s. 12(1).

[36] Toutefois, l'art. 12 énonce plusieurs conditions que le créancier hypothécaire doit respecter avant de présenter une demande en application de l'art. 11. Il doit notamment signifier un avis d'intention à la Farm Land Security Board (la « Commission ») et à l'agriculteur : par. 12(1). Avant de présenter une demande, il est ensuite soumis à une période d'attente obligatoire de 150 jours, un délai auquel le débiteur ne peut renoncer : par. 12(1). Cet avis amorce entre le créancier hypothécaire et l'agriculteur un processus obligatoire d'examen et de médiation mené avec l'aide de la Commission : par. 12(2) à (5). Avant l'expiration de la période d'attente de 150 jours, la Commission doit préparer un rapport dont il sera tenu compte dans le cadre de la demande présentée par le créancier hypothécaire en vue d'introduire l'action : par. 12(12), (13) et al. 13(b). À l'expiration de la période d'attente de 150 jours, le créancier hypothécaire peut solliciter une ordonnance autorisant l'introduction de l'action : voir le par. 12(1).

[37] On hearing the application, the court must presume that the farmer has a reasonable possibility of meeting his or her obligations under the mortgage, and that he or she is making a sincere and reasonable effort to meet those obligations: s. 13(a). The mortgagee, in turn, has the statutory burden of proving that either the farmer has no reasonable possibility of meeting these obligations or that he or she is not making a sincere and reasonable effort to do so: s. 18(1). Ultimately, the court must dismiss the application if it is satisfied that it is not "just and equitable" according to the purpose and spirit of the *SFSA* to make the order: s. 19. If the application is dismissed, no further application pursuant to s. 11 or notice pursuant to s. 12 may be made with respect to the mortgage on that farm land for one year: s. 20.

[37] Lorsqu'il instruit la demande, le tribunal doit présumer qu'il existe une possibilité raisonnable que l'agriculteur s'acquitte de ses obligations hypothécaires et qu'il déploie des efforts sincères et raisonnables pour s'acquitter de ces obligations : al. 13(a). De son côté, le créancier hypothécaire a le fardeau légal de démontrer qu'il n'existe aucune possibilité raisonnable que l'agriculteur s'acquitte de ses obligations ou que celui-ci ne déploie pas des efforts sincères et raisonnables pour s'acquitter de ses obligations : par. 18(1). En fin de compte, le tribunal doit rejeter la demande s'il est convaincu qu'il n'est pas [TRADUCTION] « juste et équitable », selon l'objet et l'esprit de la *SFSA*, de prononcer l'ordonnance demandée : art. 19. Si la demande est rejetée, l'hypothèque sur la terre agricole concernée ne peut faire l'objet d'aucune autre demande en application de l'art. 11 ni d'aucun avis suivant l'art. 12, et ce, pendant un an : art. 20.

[38] As a result of the concurrent operation of s. 243(1) of the *BIA* and Part II of the *SFSA*, a secured creditor wishing to enforce its security interest against farm land must wait 150 days, rather than the 10 days imposed under federal law. The creditor must also comply with the various additional

[38] En raison de l'application concurrente du par. 243(1) de la *LFI* et de la partie II de la *SFSA*, le créancier garanti qui souhaite exécuter sa garantie grevant une terre agricole doit attendre 150 jours plutôt que les 10 jours requis par la loi fédérale. Le créancier doit également satisfaire à diverses autres

requirements of the *SFSA*, such as the statutory presumptions described above. That interference with s. 243(1), however, does not, in and of itself, constitute a conflict. A conflict will only arise if such interference frustrates the purpose of the federal regime. This requires inquiring into the purpose of s. 243(1).

exigences de la *SFSA*, telles les présomptions légales indiquées précédemment. Or, cette interférence avec le par. 243(1) ne constitue pas en soi un conflit. Ce n'est que si cette interférence entrave la réalisation de l'objet du régime fédéral qu'il y aura conflit. Il convient donc d'examiner l'objet du par. 243(1).

[39] In this case, the parties disagree about the purpose of s. 243 of the *BIA* and whether it is frustrated by the *SFSA*. According to the Attorney General for Saskatchewan, the main purpose of the receivership power under s. 243 is to allow for a national receiver. In its view, the purpose of Part XI of the *BIA* is to provide for the appointment of a single receiver with authority to act throughout the country, rather than requiring a creditor to apply for a receiver in each province, and to provide a uniform set of standards for all receivers of an insolvent, regardless of the authority for the appointment.

[39] En l'espèce, les parties ne s'entendent pas sur l'objet de l'art. 243 de la *LFI* ni sur la question de savoir si la *SFSA* en entrave la réalisation. Selon le procureur général de la Saskatchewan, le pouvoir en matière de mise sous séquestre de l'art. 243 a pour objet principal de permettre la nomination d'un séquestre national. À son avis, la partie XI de la *LFI* a pour objet de permettre la nomination d'un séquestre unique habilité à agir dans l'ensemble du pays, plutôt que d'obliger le créancier à demander la nomination d'un séquestre dans chaque province, et d'établir un ensemble uniforme de règles applicables à tous les séquestres d'une personne insolvable, quel que soit le fondement de la nomination.

[40] *Amicus*, on the other hand, submits that the appointment of a national receiver is only part of s. 243's broader purpose. According to *amicus*, effective insolvency law requires flexibility and prompt and timely access to remedies such as a receivership, without regard to the idiosyncrasies of provincial law. Section 243 was intended to provide secured creditors with an entitlement to apply for the appointment of a receiver within a certain period of time, and to obtain such appointment exclusively in accordance with the substantive requirements found in the federal law.

[40] Par contre, l'*amicus curiae* fait valoir que la nomination d'un séquestre national n'est qu'un aspect de l'objectif plus général de l'art. 243. Il ajoute qu'une loi efficace en matière d'insolvabilité nécessite une certaine souplesse et doit offrir un accès rapide et en temps opportun à des mesures de redressement comme la mise sous séquestre, sans égards aux particularités d'une loi provinciale. L'article 243 visait à accorder aux créanciers garantis le droit de demander la nomination d'un séquestre dans un délai précis, et d'obtenir cette nomination conformément aux seules exigences de fond de la loi fédérale.

[41] Citing no parliamentary debates or reports concerning the amendments to s. 243 which created the national receivership remedy in 2005, *amicus* relies instead on case law and secondary sources about the importance of timeliness in insolvency proceedings more generally to support his contention that Parliament must have intended to grant secured creditors the right to apply to a court for an order appointing a national receiver subject *only* to a 10-day notice period, a right which provincial legislatures should not be allowed to qualify or restrict: e.g., *Century Services Inc. v. Canada (Attorney General)*,

[41] L'*amicus curiae* n'a pas invoqué les débats parlementaires ou les rapports relatifs aux modifications apportées à l'art. 243, qui ont créé le recours en nomination d'un séquestre national en 2005. Il s'appuie plutôt sur la jurisprudence et les sources secondaires traitant de l'importance d'agir en temps opportun dans les procédures d'insolvabilité de façon plus générale, pour étayer sa prétention selon laquelle le législateur fédéral aurait voulu conférer aux créanciers garantis le droit de demander au tribunal de nommer un séquestre national, sous réserve *uniquement* d'une période de préavis de 10 jours, un

[2010] 3 S.C.R. 379, at para. 58; *Cadillac Fairview Inc., Re* (1995), 30 C.B.R. (3d) 17 (Ont. Ct. (Gen. Div.)), at para. 7; Hon. Justice J. M. Farley, "A Judicial Perspective on International Cooperation in Insolvency Cases" (March 1998), 17 *Am. Bankr. Inst. J.* 12; Fred Myers, "Justice Farley in Real Time", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2006* (2007), 19; United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law* (2005), at p. 12. We note that these cases and sources for the most part relate to restructurings conducted under the *Companies' Creditors Arrangement Act*. The restructuring proceedings under this Act, *not* proceedings under Canadian bankruptcy and insolvency law in general, have been referred to as the "hothouse of real-time litigation": see Richard B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484. "Real-time litigation" is a judicially developed phrase used primarily in restructuring cases: *Edgewater Casino Inc., Re* (2009), 265 B.C.A.C. 274, at para. 21; *Transglobal Communications Group Inc., Re* (2009), 4 Alta. L.R. (5th) 157 (Q.B.), at para. 48. A judicially coined expression, however magnetically phrased, that describes judicial practices in the context of restructurings, can hardly be said to be evidence of the legislative purpose of a national receivership regime.

droit que les législateurs provinciaux ne sauraient assortir de conditions ou de restrictions : p. ex., *Century Services Inc. c. Canada (Procureur général)*, [2010] 3 R.C.S. 379, par. 58; *Cadillac Fairview Inc., Re* (1995), 30 C.B.R. (3d) 17 (C. Ont. (Div. gén.)), par. 7; le juge J. M. Farley, « A Judicial Perspective on International Cooperation in Insolvency Cases » (mars 1998), 17 *Am. Bankr. Inst. J.* 12; Fred Myers, « Justice Farley in Real Time », dans Janis P. Sarra, dir., *Annual Review of Insolvency Law 2006* (2007), 19; Commission des Nations Unies pour le droit commercial international, *Guide législatif sur le droit de l'insolvabilité* (2005), p. 12-13. Nous faisons remarquer que ces décisions et ces sources ont trait, pour la plupart, aux réorganisations menées aux termes de la *Loi sur les arrangements avec les créanciers des compagnies*. Ce sont les procédures en réorganisation en vertu de cette loi, et *non* les procédures en vertu de la législation canadienne en matière de faillite et d'insolvabilité en général, qui ont été qualifiées de [TRADUCTION] « pépinière du contentieux en temps réel » : voir Richard B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans Janis P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 484. L'expression « contentieux en temps réel » consacrée par les tribunaux est employée principalement dans les affaires de réorganisation : *Edgewater Casino Inc., Re* (2009), 265 B.C.A.C. 274, par. 21; *Transglobal Communications Group Inc., Re* (2009), 4 Alta. L.R. (5th) 157 (B.R.), par. 48. Il n'est guère possible d'affirmer que cette expression, si empreinte de magnétisme soit-elle, qui décrit les pratiques judiciaires dans le contexte des réorganisations, puisse correspondre à l'un des objectifs que visait le législateur en créant le régime de séquestre national.

[42] *Amicus* also relies on a 1986 report from the Advisory Committee on Bankruptcy and Insolvency which emphasized the need for prompt access to courts as part of its analysis of specific recommendations stemming from a more general proposal to amend Canada's bankruptcy legislation at that time for the purpose of controlling the appointment and conduct of a receiver of an insolvent debtor: *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and*

[42] L'*amicus curiae* cite également un rapport établi en 1986 par le Comité consultatif en matière de faillite et d'insolvabilité qui, dans le cadre de son analyse des recommandations spécifiques découlant d'une proposition plus générale d'apporter des modifications à la loi canadienne en matière de faillite, soulignait la nécessité de faciliter l'accès aux procédures judiciaires. On voulait à l'époque réglementer la nomination et la conduite du séquestre du débiteur insolvable : *Propositions d'amendements à la*

Insolvency (1986), at pp. 40 and 43-44. This report was issued some 20 years before the 2005 amendments to s. 243 and did not deal with the national receiver.

Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité (1986), p. 43-44 et 46-48. Ce rapport a été publié une vingtaine d'années avant que l'art. 243 ne soit modifié en 2005 et il ne traitait pas du séquestre national.

[43] Finally, *amicus* asserts that timeliness is critical to achieving the particular objectives of receivership in general, which include not only enforcement of the secured party's security interest, but also replacing inefficient management and facilitating the sale of the business as a going concern: see Roderick J. Wood, *Bankruptcy and Insolvency Law* (2009), at pp. 467-69. In his book, however, Professor Wood does not mention timeliness as one of the purposes of s. 243, either in his discussion of the foundations of receivership law generally (c. 17) or in his specific comments on the 2005 and 2007 legislative reforms that led to the amendments to s. 243: pp. 466-67.

[43] Enfin, l'*amicus curiae* affirme que la possibilité d'agir en temps opportun est essentielle pour réaliser les objectifs précis de la mise sous séquestre en général, qui consistent non seulement à permettre au créancier garanti d'exécuter sa garantie, mais aussi à remplacer une direction inefficace et à faciliter la vente de l'entreprise en exploitation : voir Roderick J. Wood, *Bankruptcy and Insolvency Law* (2009), p. 467-469. Dans son ouvrage toutefois, le professeur Wood n'indique pas que la possibilité d'agir en temps opportun soit un des objets de l'art. 243, que ce soit dans l'examen qu'il fait des origines de la mise sous séquestre en général (c. 17) ou dans les observations précises relatives aux réformes législatives de 2005 et 2007 qui ont mené aux modifications apportées à l'art. 243 : p. 466-467.

[44] It is against this backdrop that *amicus* submits that s. 243 must be read. According to *amicus*, this evidence proves that the purpose of s. 243 is to establish an effective national receivership remedy, one which is timely and flexible, and applies uniformly across the country.

[44] C'est dans ce contexte qu'il convient, selon l'*amicus curiae*, d'interpréter l'art. 243. À son avis, ces éléments de preuve démontrent que l'art. 243 a pour objet la création, par la nomination d'un séquestre national, d'un recours efficace qui soit à la fois souple, applicable au moment opportun et uniforme dans tout le pays.

[45] This is, in our respectful view, insufficient evidence for casting s. 243's purpose so widely. As the Court explained in *COPA*, at para. 68, "clear proof of purpose" is required to successfully invoke federal paramountcy on the basis of frustration of federal purpose. The totality of the evidence presented by *amicus* does not meet this high burden. While cases and secondary sources can obviously be helpful in identifying a provision's purpose, the sources cited by *amicus* merely establish promptness and timeliness as general considerations in bankruptcy and receivership processes. The absence of sufficient evidence supporting *amicus*'s claim about the broad purpose of s. 243 is fatal to his claim. What the evidence shows instead is a simple and narrow purpose: the establishment of a

[45] Avec égards, nous estimons que ces éléments de preuve ne sont pas suffisants pour que l'on donne une portée aussi large à l'objet de l'art. 243. Comme l'a expliqué la Cour dans *COPA*, au par. 68, pour invoquer avec succès la doctrine de la prépondérance fédérale parce que la réalisation de l'objet est entravée, il faut « une preuve claire de l'objet ». L'ensemble de la preuve présentée par l'*amicus curiae* n'atteint pas ce seuil élevé. Si les décisions et les sources secondaires peuvent de toute évidence s'avérer utiles pour cerner l'objet d'une disposition, les sources que cite l'*amicus curiae* établissent simplement que la célérité et la possibilité d'agir en temps opportun constituent des considérations générales dans les processus de faillite et de mise sous séquestre. L'absence d'éléments de preuve suffisants

regime allowing for the appointment of a national receiver, thereby eliminating the need to apply for the appointment of a receiver in multiple jurisdictions.

[46] Section 243(1.1) states that, in the case of an insolvent person in respect of whose property a notice is to be sent under s. 244(1), the court may not appoint a receiver under s. 243(1) before the expiry of 10 days after the day on which the secured creditor sends the notice, unless the insolvent person consents or the court considers it appropriate to appoint a receiver sooner. The effect of the provision is to set a minimum waiting period. This does not preclude *longer* waiting periods under provincial law. There is nothing in the words of the provision suggesting that this waiting period should be treated as a ceiling, rather than a floor, nor is there any authority that supports treating the waiting period as a maximum.

[47] In fact, the discretionary nature of the s. 243 remedy — as evidenced by the fact that the provision provides that a court "may" appoint a receiver if it is "just or convenient" to do so — lends further support to a narrower reading of the provision's purpose. A secured creditor is not entitled to appointment of a receiver. Rather, s. 243 is permissive, allowing a court to appoint a receiver where it is just or convenient. Provincial interference with a discretion granted under federal law is not, by itself, sufficient to establish frustration of federal purpose: *COPA*, at para. 66; see also *114957 Canada Ltée*.

[48] This case is thus easily distinguishable from *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, where the Court held that a security interest created pursuant to federal law could not, constitutionally, be subjected to the procedures for enforcement of

quant à la large portée de l'objet de l'art. 243 porte un coup fatal à la thèse de l'*amicus curiae*. Ce qui ressort de la preuve, c'est plutôt un objet simple et restreint : la création d'un régime permettant la nomination d'un séquestre national, éliminant de ce fait la nécessité de demander la nomination d'un séquestre aux tribunaux de plusieurs ressorts.

[46] Selon le par. 243(1.1), dans le cas d'une personne insolvable dont les biens sont visés par le préavis que doit donner le créancier garanti aux termes du par. 244(1), le tribunal ne peut faire la nomination d'un séquestre aux termes du par. 243(1) avant l'expiration d'un délai de 10 jours après l'envoi de ce préavis, à moins que la personne insolvable ne consente à la nomination d'un séquestre à une date plus rapprochée, ou que le tribunal estime indiqué de nommer un séquestre à une date plus rapprochée. Cette disposition a pour effet de fixer une période minimale d'attente, ce qui n'exclut pas des périodes d'attentes *plus longues* prévues par la loi provinciale. Rien dans le libellé de cette disposition ne laisse croire que cette période d'attente devrait être considérée comme une période maximale plutôt que minimale, et aucune source n'indique qu'il s'agirait d'une période maximale.

[47] En fait, le caractère discrétionnaire du recours prévu à l'art. 243 — comme en témoigne le fait que, aux termes de la disposition, le tribunal « peut » nommer un séquestre si cela est « juste ou opportun » — vient appuyer une interprétation plus étroite de l'objet de cette disposition. Le créancier garanti n'a pas droit à la nomination d'un séquestre. L'article 243 constitue plutôt une disposition permissive en permettant au tribunal de nommer un séquestre si cela est juste ou opportun. L'atteinte d'une province à un pouvoir discrétionnaire conféré par une loi fédérale ne suffit pas en soi pour établir l'existence d'une entrave à la réalisation d'un objectif fédéral : *COPA*, par. 66; voir également *114957 Canada Ltée*.

[48] La présente affaire se distingue donc nettement de l'affaire *Banque de Montréal c. Hall*, [1990] 1 R.C.S. 121, où la Cour a statué qu'une sûreté établie en vertu d'une loi fédérale ne pouvait pas, au point de vue constitutionnel, être assujettie

security interests prescribed by provincial legislation. Unlike the self-executing remedy at issue in that case, where the bank could seize the chattel upon default without the need to go to court, the appointment of a s. 243 receiver is not mandatory. More importantly, in contrast with *Hall*, the s. 243 receivership remedy cannot be said to create a "complete code": p. 155. Nothing in the text of the provision or the *BIA* more generally suggests that s. 243 is meant to be a comprehensive remedy, exclusive of provincial law. The provision itself recognizes that a receiver may still be appointed under a security agreement or other provincial or federal laws, and creates no right to the appointment of a national receiver: s. 243(2)(*b*). As this Court observed in *COPA*, at para. 66, "permissive federal legislation, without more, will not establish that a federal purpose is frustrated when provincial legislation restricts the scope of the federal permission".

aux procédures d'exécution des sûretés que prescrit une loi provinciale. Contrairement au recours automatique en exécution dont il était question dans cette affaire, qui permettait à la banque de saisir les biens meubles en cas de défaut de paiement sans devoir s'adresser au tribunal, la nomination d'un séquestre aux termes de l'art. 243 n'est pas obligatoire. Qui plus est, contrairement à ce qu'on a vu dans *Hall*, le recours en nomination d'un séquestre prévu à l'art. 243 ne saurait créer un « code complet » : p. 155. Ni la disposition en cause, ni la *LFI* dans son ensemble, ne permettent de conclure que l'art. 243 se veut un recours exhaustif qui exclut l'application des lois provinciales. La disposition elle-même prévoit qu'un séquestre peut être nommé aux termes d'un contrat de garantie ou sous le régime de toute autre loi fédérale ou provinciale; aucun droit à la nomination d'un séquestre national n'y est créé : al. 243(2)*b*). Comme l'a fait observer notre Cour dans l'arrêt *COPA*, au par. 66, « une loi fédérale permissive, sans plus, ne permettra pas d'établir l'entrave de son objet par une loi provinciale qui restreint la portée de la permissivité de la loi fédérale ».

[49] Any uncertainty about whether s. 243 was meant to displace provincial legislation like the *SFSA* is further mitigated by s. 72(1) of the *BIA*, which states:

> **72.** (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

This too demonstrates that Parliament has explicitly recognized the continued operation of provincial law in the bankruptcy and insolvency context, except to the extent that it is inconsistent with the *BIA*: see *GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc.*, [2006] 2 S.C.R. 123, at paras. 46-47.

[49] Tout doute quant à savoir si l'art. 243 était censé écarter une loi provinciale comme la *SFSA* est encore atténué par le par. 72(1) de la *LFI*, lequel prévoit ce qui suit :

> **72.** (1) La présente loi n'a pas pour effet d'abroger ou de remplacer les dispositions de droit substantif d'une autre loi ou règle de droit concernant la propriété et les droits civils, non incompatibles avec la présente loi, et le syndic est autorisé à se prévaloir de tous les droits et recours prévus par cette autre loi ou règle de droit, qui sont supplémentaires et additionnels aux droits et recours prévus par la présente loi.

Cette disposition démontre elle aussi que le Parlement a explicitement reconnu que les lois provinciales continuent à s'appliquer dans un contexte de faillite et d'insolvabilité, sauf dans la mesure où elles sont incompatibles avec la *LFI* : voir *Société de crédit commercial GMAC — Canada c. T.C.T. Logistics Inc.*, [2006] 2 R.C.S. 123, par. 46-47.

[50] Other provisions of the *BIA* further support a more narrow reading of s. 243's purpose.

[50] D'autres dispositions de la *LFI* viennent appuyer une interprétation plus étroite de l'objet

the Montreal agreement, with which I am sure my hon. friend is familiar, it was arranged that the men would be taken care of so far as possible in a fair and equitable manner. I have no doubt that in whatever rearrangement may take place the railways will endeavour to follow along the lines of the Montreal agreement. I know quite well that this agreement has met with a great deal of opposition from certain men who felt that they were unfairly dealt with, but on the whole it was agreed to as the best arrangement that could be made. It is suggested that if a sixty day notice were inserted it might interfere with the working out of the plan. I hope my hon. friend will think it over; it is almost six o'clock, and I am going to suggest that this clause also stand. Before we rise, however, I should like to ask anyone else who may have an amendment to suggest with regard to section 16 to bring forward that amendment before six o'clock. To carry out that suggestion I will read an amendment which will be moved as subsection (4). It is as follows:

> Where the execution or carrying out of such a measure, plan or arrangement involves the doing of any act which by any statute requires the leave, sanction, assent or approval of the Board of Railway Commissioners for Canada, then, except where otherwise provided in this act, the approval of the said board shall be obtained.

That amendment is entirely in line with what we have suggested, and with some of the suggestions of hon. gentlemen opposite as well. I may add, however, that it was decided upon before those suggestions were made.

Mr. MACKENZIE KING: It is in line with what we have been pressing for.

Mr. MANION: That is quite true; I will divide the honours with my right hon. friend, but at all events it was decided upon before those suggestions were made. If any other members have amendments I should like them to be presented now, so that we may have time to think them over.

Mr. HEENAN: I appreciate the kindness of the minister in letting this section stand, but I want to point out to him again so that he may read it in Hansard that the problem to which he referred in connection with the Montreal agreement, of which I have quite full knowledge, was in connection with one set of employees holding seniority on one road. The problem is complicated now by the fact that there are two different railways, and I think the minister will find that my amendment should be accepted.

Mr. NICHOLSON: I have no amendment to propose but in connection with the one suggested by the hon. member for Kenora-Rainy River I believe a study of the section itself, with all that is involved, will lead my hon. friend to the conclusion that his amendment will need to go much further than it goes at present. I have not time to discuss the matter fully before six o'clock, but with the general agreements that were prevailing between the railway companies and their employees, with the difference in the agreements between one road and its employees and another road and its employees, which in some cases is very substantial, with the agreement extending over a very wide territory in some lines and a small territory in others, I think this will have to be given very careful consideration if the rights of the employees are to be protected. I cannot pursue this question further this evening, but I think the amendment will have to go further.

Section stands.

Progress reported.

At six o'clock the house adjourned without question put, pursuant to standing order.

Thursday, April 20, 1933

The house met at three o'clock.

COMPANIES AND CREDITORS

BILL TO FACILITATE COMPROMISES AND ARRANGEMENTS IN CASES OF INSOLVENCY

Hon. C. H. CAHAN (Secretary of State) moved for leave to introduce Bill No. 77, to facilitate compromises and arrangements between companies and their creditors.

He said: Mr. Speaker, at the present time any company in Canada, whether it be organized under the laws of the Dominion of Canada or under the laws of any of the provinces of Canada, which becomes bankrupt or insolvent is thereby brought under either the Bankruptcy Act or the Winding-up Act. These acts provide for the liquidation of the company under a trustee in bankruptcy in the one case and under a liquidator in the other, and the almost inevitable result is that the organization of the company is entirely disrupted, its good-will depreciated and ultimately lost, and the balance of the assets sold by the trustees or the liquidator for whatever they will bring. There is no mode or method under our laws whereby the creditors of a company may be brought into court and permitted by amicable agreement between themselves to arrange for a settlement or compromise of the debts of the company in such a way as to permit the company effectively to continue its business by its reorganization. Sections 144 and 145 of the Companies Act of Canada provide that the shareholders of a company may meet to adjust the relationship between classes of shares in the company. Several of the provincial acts also contain provisions whereby the shareholders may meet to make compromises and arrangements between the shareholders. Under the British North America Act, bankruptcy and insolvency fall exclusively within the legislative jurisdiction of the parliament of Canada.

At the present time some legal method of making arrangements and compromises between creditors and companies is perhaps more necessary because of the prevailing commercial and industrial depression, and it was thought by the government that we should adopt some method whereby compromises might be carried into effect under the supervision of the courts without utterly destroying the company or its organization, without loss of good-will and without forcing the improvident sale of its assets. Therefore, we have studied carefully the provisions of the English Companies Act of 1929. This act contains a provision to permit such compromises and arrangements with creditors and I should like to read section 153 of that act upon which this bill is based. It reads:

> 153.—(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs.
>
> (2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

In attempting to draft an act which will certainly be within the legislative competence of the parliament of Canada we felt that we should not seemingly entrench upon provincial jurisdiction so far as to provide for compromises between classes of shareholders of provincial companies, and therefore we have provided in this bill, which I am about to introduce, that the provincial law shall apply in respect of provincial companies in so far the the compromise may affect the shareholders, but we provide also for the convening of a meeting of creditors of any company which is bankrupt or insolvent under supervision of the court, so that, if possible, an amicable compromise or arrangement may be arrived at; and, in so far as such compromise or arrangement may necessitate with respect to provincial companies compromises or arrangements between classes of shareholders we have authorized the court to proceed conjointly under this proposed act and the provincial acts for the purpose of convening meetings of shareholders or classes of shareholders.

The bill as drafted is quite simple. It seems to the government very necessary that such a measure should be introduced, and I commend it to the careful consideration of the members of the house.

Motion agreed to and bill read the first time.

QUESTIONS

(Questions answered orally are indicated by an asterisk).

DISMISSAL OF POSTMASTERS

Mr. POULIOT:

1. How many postmasters have been dismissed for political partisanship (a) in the province of Quebec; (b) in all other sections of the country, since November 1, 1932?
2. How many of these postmasters have been replaced temporarily or permanently by a person who had lodged a complaint or given evidence against them?

Mr. SAUVE:

1. (a) 17; (b) 16.
2. 10.

QUESTION PASSED AS ORDER FOR RETURN

ALBERTA POST OFFICES—REVENUE

Mr. LUCAS:

1. What was the total revenue for each of the past five years from post offices at the following points in Alberta, Banff, Camrose, Drumheller, Lethbridge, Medicine Hat, Red Deer, and Wetaskiwin?
2. What remuneration did postmasters receive at each of the above points, for said years, by way of a cash salary?
3. Where postmasters did not receive a cash salary, what remuneration did they receive at each of said points, by way of total commissions, box rents, or any other form of remuneration allowed by the department for each of said years?

informed that it might be made a little clearer, since this resolution is presented under section 9 of the Radio Broadcasting Act. I would ask that the resolution be altered to read:

Resolved that, pursuant to the provisions of the Canadian Radio Act, 1932, the House of Commons hereby approves the purchase of the radio broadcasting stations and equipment of the Canadian National Railways by the Canadian Radio Broadcasting Commission for the sum of $50,000.

If that alteration is accepted I will move the resolution to-morrow. I understand that this requires previous notice, so I give notice now that to-morrow I propose to move this resolution.

Right Hon. W. L. MACKENZIE KING (Leader of the Opposition): As I understand my right hon. friend's motion it relates largely to procedure and does not affect the substance of the resolution. If that is the case I think it will be acceptable.

COMPANIES AND CREDITORS

BILL TO FACILITATE COMPROMISES AND ARRANGEMENTS IN CASES OF INSOLVENCY

Hon. C. H. CAHAN (Secretary of State) moved the second reading of Bill No. 77, to facilitate compromises and arrangements between companies and their creditors.

Hon. ERNEST LAPOINTE (Quebec East): This seems rather an important bill, Mr. Speaker; my hon. friend introduced it towards the end of last week and it was only distributed at the end of the week. I do not think hon. members have had an opportunity to consider it as it should be considered, so I would ask my hon. friend to give us a couple of days to look over the bill.

Mr. CAHAN: I have no objection to allowing the bill to stand, but inasmuch as the principle of the bill is very simple indeed, and I explained it on the introduction of the bill, I was going to suggest that perhaps the house would give second reading and go into committee on the bill. The first section then could be read and I would allow the bill to remain in committee so that members of the house who wished to suggest amendments might have an opportunity of considering them.

Mr. R. B. HANSON (York-Sunbury): I should like to make a suggestion to the minister. This is really a very important bill, and I think those of us who belong to the legal profession will be in accord with the principle. But like my hon. friend from Quebec East (Mr. Lapointe) I may say that I struggled to obtain a copy of this bill and only succeeded in obtaining a copy from the distribution office at noon on Saturday. I would suggest that the bill go to the banking and commerce committee for consideration and report to the house, and then hon. members would have ample time to study the bill much better than could be done in committee of the whole.

Mr. CAHAN: If the principle of the bill is once adopted it simply becomes a question of the verbiage in the different sections. If the bill goes to a committee I think it should go to a special committee of say seven members, but the government felt that all members of the house should have an opportunity of expressing their opinions with regard to this bill if they so desired, and since there is not much doubt as to the principle of the bill being favourably accepted by this house the government thought it might be given second reading. Then it might go to committee of the whole, where one section might be read, after which the committee might report progress. In the meantime, since this is a government measure, the government would be very glad indeed if any hon. members who have suggestions with regard to amendments would send those amendments to me so that I might take them up with the law officers of the crown. In that way I think the progress of the bill would be facilitated.

Mr. HANSON (York-Sunbury): I do not know that I have the right to speak again, but I should like to remind the minister that ever since I have been a member of this house I have been on the banking and commerce committee, and there never has been a bill or amendment of any kind relating to company law that has not been referred to that committee. I see no reason, with all due respect, why there should be any exception with reference to this bill, and I am pressing the suggestion I made a moment ago.

Mr. LAPOINTE: I should like to support the request of the hon. member for York-Sunbury (Mr. Hanson); I think this is a very important bill, and I believe it has been the practice in the past that bills of this kind should be considered by the banking and commerce committee.

Mr. G. G. COOTE (Macleod): I should like to suggest to the Secretary of State (Mr Cahan) that this bill be sent to the banking and commerce committee, who are now carrying on an investigation into the whole question of debts and interest, concerning not only public bodies but private corporations and individuals as well. It seems to me that this bill deals with those very matters, so I think it should be sent to that committee.

Mr. CAHAN: If that is the general opinion of the house, Mr. Speaker, I have no objection to moving that the bill be referred to the committee on banking and commerce after it has been given second reading. My own opinion was that a bill of this kind would receive more efficient treatment if it were dealt with by a select committee.

Mr. LAPOINTE: That is a reflection on the banking and commerce committee.

Mr. CAHAN: No, I do not think it is a reflection on that committee; it simply means that a bill of this kind involves matters of procedure only once its principle is adopted.

Motion agreed to, bill read the second time and referred to the select standing committee on banking and commerce.

SUPPLY

DEPARTMENT OF THE INTERIOR

The house in committee of supply, Mr. MacDonald (Cape Breton South) in the chair.

Interior—salaries, $607,639.50; contingencies, $25,000.

Mr. DUFF: I noticed in the newspapers a few days ago that the officials in one branch of the Interior department had not been paid since some time in March. Will the minister be good enough to tell the committee whether the officials of his department are receiving their salaries regularly like those of other departments.

Hon. T. G. MURPHY (Minister of the Interior): The branch of the department to which I think the hon. gentleman refers is the national development bureau, the officials of which did not receive their cheques on the 15th of this month. When the main estimates were being considered certain reorganization in the department was under review and therefore no item was put in those estimates for that branch of the department, the intention being to include the necessary amount in the supplementary estimates. That explains the non-payment of salaries on the 15th.

Mr. DUFF: Does that mean that they will not get their cheques until the supplementary estimates are voted?

Mr. MURPHY: I should amplify my statement by saying that those employees of that branch who were paid from the civil government vote received their cheques, but those salaries that were charged direct to the vote itself were not paid. Those officials will not receive their cheques until the supplementary estimates have been considered.

Item agreed to.

International boundary commission—expenses connected with the maintenance in a state of effective demarcation of the international boundary, $37,000.

Mr. MACKENZIE (Vancouver): What is the increase for?

Mr. MURPHY: In order properly to answer the question I might read the following statement to the committee:

The treaty of February 24, 1925, made the international boundary commissioners responsible for the permanent maintenance in a state of effective demarcation of the entire international boundary between Canada and the United States and between Canada and Alaska, including that section of the boundary through the St. Lawrence river and great lakes.

Since 1925 the commission has made surveys necessary for locating and marking the boundary at a number of points on the St. Lawrence, Niagara, Detroit and St. Clair rivers. Necessary repairs to a number of reference monuments and the erection and location of others to replace several monuments washed out or otherwise destroyed are to be undertaken in the near future.

That gives a brief resume of the work of the international boundary commission. We are under obligation by these treaties to keep up our work comparably with that carried on by the United States. We are now slightly behind in our program and the extra amount asked for is to enable us to bring our work up to their level.

Mr. REID: May I ask the minister to consider the necessity of marking a boundary between the United States and Canada in the district I have the honour to represent, namely, in the Semiahmoo bay, which is about ten and a half or eleven miles wide. There is no distinguishing mark across the whole length of the bay, with the result that difficulties have arisen in the past in connection with fishing rights. The American fishing concerns have placed traps so close to the Canadian boundary that there have been doubts as to whether they were in Canadian or American waters. I appealed to the Minister of Fisheries and he was good enough to say that he was in favour of some distinguishing mark being placed there. I plead now with the Minister of the Interior. There has never been a mark in that bay and it is impossible to tell, standing on the shore, whether a fish trap is in Canadian or in American waters. Will the minister take the matter under advisement with a view to having a mark placed?

Mr. MACKENZIE (Vancouver): The other afternoon the Prime Minister indicated that some financial bill might come up.

Mr. BENNETT: No, in view of the approaching conference it was thought that it might be left, that it was undesirable to disturb credit by any legislation at present. There is a loan bill; that is on the order paper.

At eleven o'clock the house adjourned without question put, pursuant to standing order.

Tuesday, May 9, 1933

The house met at eleven o'clock.

ROYAL ASSENT

Mr. SPEAKER: I have the honour to inform the house that I have received the following letter:

Ottawa, May 9, 1933.

Sir,—I have the honour to inform you that the Right Honourable Lyman P. Duff, Chief Justice of Canada, acting as deputy of His Excellency the Governor General, will proceed to the Senate chamber to-day at 5 p.m., for the purpose of giving the royal assent to certain bills.

I have the honour to be, sir,

Your obedient servant,

James F. Crowdy,
Assistant Secretary to the Governor General.

REPORTS OF COMMITTEES

REDISTRIBUTION

Hon. H. A. STEWART (Minister of Public Works) presented the first report of the special committee on Bill No. 2, to readjust the representation in the House of Commons and moved that the report be concurred in.

Mr. POULIOT: Mr. Speaker, I would ask the hon. gentleman if this report means that something has been decided. If it means nothing, I have no objection but if it means something to which my electors may object, I must oppose this concurrence.

Mr. STEWART (Leeds): I hope it will mean a good deal more than nothing. It is the intention to get this bill through this session. My hon. friend appeared before the committee this morning and made his representations and he was promised that they would be given consideration. All this report asks for is permission to sit while the house is in session.

Motion agreed to.

[Mr. Bennett.]

RAILWAYS

Mr. J. H. HARRIS (Toronto-Scarborough) presented the third report of the select standing committee on railways, canals and telegraph lines.

STANDING ORDERS

Mr. A. U. G. BURY (East Edmonton) moved concurrence in the second and third reports of the select standing committee on standing orders relative to the suspension of standing order No. 92.

Motion agreed to.

PETITION

Mr. J. E. LAWSON (West York) presented a petition from the municipality of New Toronto, supported by resolutions of councils of fourteen other municipalities, requesting the enacting of contributory unemployment insurance.

Mr. SPEAKER: I would direct the attention of the hon. member for West York (Mr. Lawson) to the fact that the documents he has filed do not constitute a petition.

COMPANIES AND CREDITORS

BILL TO FACILITATE COMPROMISES AND ARRANGEMENTS IN CASES OF INSOLVENCY

The house in committee on Bill No. 77, to facilitate compromises and arrangements between companies and their creditors—Mr. Cahan—Mr. Cotnam in the chair.

Sections 1 and 2 agreed to.

On section 3—Compromise with unsecured creditors.

Mr. BENNETT: The marginal note should read "unsecured" creditors; it reads "insecured."

Mr. COOTE: As very little explanation has been given on this bill; in fact, as I think it was given no explanation on second reading but was simply sent to the committee, I wonder whether the minister would be good enough to explain to this committee the purpose of the bill. I do not believe any explanation has ever been given to the house.

Mr. CAHAN: I thought the bill was quite fully explained on the first reading. Clause 3 provides for a compromise between a debtor company and its unsecured creditors. The gist of the whole bill is this, that any class of creditors of an insolvent or a bankrupt company may by a three-fourths vote among themselves agree to a compromise between the company and that class of its creditors. Each class of creditors who have the same interest may decide by a three-fourths majority with respect to any proposed compromise and, if approved by the court, such compromise becomes effective. It is very simple. I cannot explain it any more clearly than that.

Section agreed to.

Section 4 agreed to.

On section 5—Compromises to be sanctioned by court.

Mr. CAHAN: An objection has been raised that the wording could be made clearer by striking out the words in the tenth line:

Class of creditors, including.

And inserting in lieu thereof the words:

the class of creditors as the case may be, and on.

The suggestion is that it should be made clear that each class of creditors having the same interest shall decide among themselves as to the terms of the compromise, and I think this proposed amendment makes the matter very much clearer.

Mr. RYCKMAN: I move that amendment.

Amendment agreed to.

Section as amended agreed to.

Section 6 agreed to.

On section 7—Scope of act.

Mr. CAHAN: As regards clause 7, the committee on banking and commerce reported in favour of striking out the word "force" and inserting the words "force and effect," but as we have used in another clause of the bill, clause 15, the term "full force and effect," I would suggest that this amendment should read "full force and effect."

Mr. RYCKMAN: I move accordingly.

Amendment agreed to.

Section as amended agreed to.

Sections 8 to 13 inclusive agreed to.

On section 14—In Yukon territory.

Mr. CAHAN: This bill was widely circulated throughout Canada and the question arose that inasmuch as it specifically provided for an appeal from a decision in the Yukon territory, that might seem to imply that there should be no appeal from any provincial court, and it was deemed advisable to make it clear that there may be an appeal from a provincial court to the Supreme Court of Canada in order that the procedure under this measure may be regulated, if necessary, by the same judicial authority, throughout all the provinces. I therefore propose this amendment which will be moved by the Minister of National Revenue:

That section 14 of Bill No. 77 be struck out and the following substituted therefor:

14. An appeal shall, by leave of a judge of the Supreme Court of Canada, lie to that court from the highest court of final resort in or for the province or territory in which the proceeding originated.

2. The Supreme Court of Canada shall have jurisdiction to hear and and to decide according to its ordinary procedure any appeal so permitted and to award costs.

3. No such appeal to the Supreme Court of Canada shall operate as a stay of proceedings unless the judge who permits such appeal shall so order, and to the extent to which he shall order, and the appellant shall not be required to provide any security for costs, but unless he provides security for costs, in an amount to be fixed by the judge permitting the appeal, he shall not be awarded costs in the event of his success upon such appeal.

4. The decision of the Supreme Court of Canada on any such appeal shall be final and conclusive.

This same provision appears in the Bankruptcy Act in section 178 and also in the act with respect to the winding up of companies. I am introducing no new provision. The theory of the Bankruptcy Act with regard to giving security for costs was this, that, though a bankrupt who might have good grounds for an appeal might not be able to provide the security for such an appeal, his right of appeal was maintained, but, in case he gave no security for an appeal to the other party, he could not obtain costs even if the decision on the appeal were given in his favour. That is a principle which has been enacted in other statutes, but particularly in the Bankruptcy Act, and in order to make it clear I am suggesting this amendment which my colleague the Minister of National Revenue will move.

Mr. RYCKMAN: I move accordingly, Mr. Chairman.

Amendment agreed to.

Section as amended agreed to.

Sections 15 to 20 inclusive agreed to.

On the preamble.

Mr. FACTOR: I believe that the provisions of this bill are very beneficial to companies and I am wondering whether it is possible constitutionally or otherwise to extend them to individuals. The minister knows that under

Title agreed to.

Bill reported.

Mr. Deputy Speaker: When shall this bill be read the third time?

Some hon. Members: Now.

Mr. Fulton: Next sitting. May I ask the minister whether he has had a request from British Columbia to expedite this measure in the same way that he had one with regard to the amendment to the Judges Act?

Mr. Garson: Having regard to the fact that the request came back in October and that I have got confirmation only this day from Mr. Pepler, the deputy attorney general, I think it would be desirable. We could not get it through before because the house was not sitting. However, if as the hon. member for Burnaby-Richmond has said, they have been acting in this way for a long while, perhaps we had better legalize what they are doing as soon as possible.

Mr. Knowles: By leave.

Mr. Garson moved the third reading of the bill.

Motion agreed to and bill read the third time and passed.

PENITENTIARIES

TABLING OF REPORT FOR 1952—AVAILABILITY OF COPIES

Hon. Stuart S. Garson (Minister of Justice): On a question of privilege, Mr. Speaker, I wonder if I might clear up a matter which was raised by the hon. member for Greenwood (Mr. Macdonnell). He asked whether I had tabled the report on penitentiaries for 1952. I was sure I had because there is a provision in the act that requires its tabling within a certain period of time, and that is not a provision which I am likely to overlook. In order to comply with that provision, however, I had to table it in photostatic form, in which form it is rather bulky and unhandy. The printed copies are not yet available from the bureau but I understand they will be fairly shortly.

Mr. Macdonnell (Greenwood): May I, as a question of privilege, ask one question? Can the minister tell us when it was tabled? Here we are almost a year from the termination of the period which the report covers and we have not got it yet.

Mr. Garson: I tabled it on the 1st of December, 1952. The explanation for the time lag is that the fiscal year of the penitentiary system ends in March but we have, as my hon. friend knows, penitentiaries and institutions scattered throughout the various provinces of Canada and there has always been that much lag in getting the accounts in, the report prepared, and so on.

Mr. Macdonnell (Greenwood): I have not made my point clear. The minister filed it in December. It is nearly February. Is there a necessary time lag of two and a half months for printing?

Mr. Garson: I did not hear the hon. member.

Mr. Macdonnell (Greenwood): Is there a necessary time lag of two and a half months? Could we blame this on the Minister of Public Works (Mr. Fournier) in any way?

Mr. Fournier (Hull): I do not know, but I am under the impression that under the statutes these reports must be tabled at the next session of parliament within the first fifteen days. That is what applies to my department and other departments, I believe, where the fiscal year ended on the 31st March, 1952. They prepared the report—they could not prepare it before that—and when the session started in November last year the minister, as it was his duty to do, tabled the report on the 1st of December.

Mr. Green: But the question is, why not give us a printed copy?

Mr. Garson: That is the point.

Mr. Fournier (Hull): Do not blame the minister for that.

Mr. Garson: That is the point. Why not a printed copy? The reason for the printed copy not being available is that it does take that length of time to compile all the material and get the report ready. I will not take in too much territory, but I can assure hon. members that certainly there is no more efficient branch in the Department of Justice than the penitentiaries division. It is very well operated and they are excellent men.

Mr. Deputy Speaker: I wonder how much longer I should allow this debate on a question of privilege to go on.

COMPANIES' CREDITORS ARRANGEMENT ACT

LIMITATION TO COMPANIES WITH OUTSTANDING BOND ISSUES

Hon. Stuart S. Garson (Minister of Justice) moved the second reading of Bill No. 45, to amend the Companies' Creditors Arrangement Act, 1933.

Mr. Knowles: Is the minister going to give us a little speech on this one?

Mr. Garson: Mr. Speaker, the Companies' Creditors Arrangement Act was passed in 1933. At that time the Bankruptcy Act did not contain adequate provisions for an arrangement between a corporate debtor and its creditors by which the corporate debtor, by getting an extension of its liabilities, could liquidate them, avoid bankruptcy and retain its identity. In other words, if they were going to come under the Bankruptcy Act at all they had to go into bankruptcy. The Companies' Creditors Arrangement Act was passed to enable these corporate debtors to make an extension of that sort without going into bankruptcy. But it appeared that the Companies' Creditors Arrangement Act was passed without too careful regard for the protection of the trade creditors of mercantile concerns going into an arrangement of that sort under this act, and since the arrangements under the Companies' Creditors Arrangement Act were not in the hands of an official trustee as under the Bankruptcy Act, it was found in a number of cases that the trade creditors' interests were frequently and seriously prejudiced.

As a consequence a bill was introduced in the house in 1938 to repeal the Companies' Creditors Arrangement Act altogether. But this was strongly opposed by the Dominion Mortgage and Investment Association because, amongst other reasons, the laws of the United States prohibit the sale of securities unless there is in existence in relation to them appropriate legislation to enable a majority of stockholders to effect a reorganization of the company if the circumstances seem to demand it. Of two conflicting groups who were in disagreement in respect of the legislation, one was this Dominion Mortgage and Investment Association which desired the retention of the Companies' Creditors Arrangement Act in order to deal with financial companies whose creditors were secured by a trust deed containing a provision for a trustee for such creditors. On the other hand was a group of businessmen who were either trade creditors themselves or were opposed to the trade creditors being mulcted under the same act in respect of mercantile liabilities.

The introduction of the present bill is agreeable to both these groups. When the bill was before the other place, I am informed that both groups appeared and were agreeable to its provisions. With the passage of this bill it will leave companies that have complex financial structures, and a large number of investor creditors, able to use the Companies' Creditors Arrangement Act for the purpose of reorganization. Moreover they will be able to use it efficiently; because as a rule, the terms of their own trust deed provide for a trustee of the creditors whose business it will be to look after their interests properly, a provision which is almost invariably absent in the case of the mercantile creditors. The mercantile companies will be able to use the provision of part III of the new revised Bankruptcy Act, which, unlike the Bankruptcy Act in force in 1933, has a provision whereby companies may apply for an extension to work out their affairs without incurring the stigma of bankruptcy.

Moreover, this provision in part III of the Bankruptcy Act requires the appointment of a trustee in bankruptcy who will look after the interests of the mercantile creditors and who will have supervision of the bankruptcy branch, which proceedings under the Companies' Creditors Arrangement Act do not now have.

I have a very large number of examples of abuses of the existing act but I will not burden the house with them unless anyone wants an example given.

I do not think there can be great opposition to this because it seems to be an arrangement—the arrangement set out in this bill—which adequately protects the mercantile creditor, adequately protects the position of the investor creditor, and is not at all unfair to the corporate debtor in either case.

Mr. J. M. Macdonnell (Greenwood): This is a measure, as the minister has indicated, which has to do with the mechanics of reorganization. I think it can be said, following his explanation, that the proposed amendment will leave the Bankruptcy Act and this act complementary to each other in a way which I think will be efficient. It will facilitate corporate reconstruction when it is necessary and also remove the occasions of abuses which at one time were rather freely practised.

The matter was discussed at length in the Senate committee. Present there were representatives of those who are, I think, most familiar with this. I do not think there can be any suggestion that, as it stands now, it will be anything harsh or oppressive, or anything which can be used in an unscrupulous manner by debtors who wish to escape their creditors.

In other words, Mr. Speaker, I think the amendment is sound.

Motion agreed to, bill read the second time, and the house went into committee thereon, Mr. Beaudoin in the chair.

IN THE MATTER OF A REFERENCE CONCERNING THE CONSTITUTIONAL VALIDITY OF THE COMPANIES' CREDITORS ARRANGEMENT ACT.

1934
*March 27, 28, 29.
*June 6.

Constitutional law—The Companies' Creditors Arrangement Act, 1933, 23-24 Geo. V, c. 36 (Dom.)—Constitutional validity—"Bankruptcy and Insolvency" (B.N.A. Act, s. 91 (21)).

The Companies' Creditors Arrangement Act, 1933, 23-24 Geo. V, c. 36, is *intra vires* of the Parliament of Canada. The matters dealt with come within the domain of "bankruptcy and insolvency" within the intendment of s. 91 (21) of the *B.N.A. Act*.

*PRESENT:—Duff C.J. and Rinfret, Lamont, Cannon, Crocket and Hughes JJ.

85044—4½

1934

REFERENCE *re* COMPANIES' CREDITORS ARRANGEMENT ACT.

The Act discussed with regard to its aim, its features, its comparison with existing bankruptcy or insolvency legislation, and the history of bankruptcy and insolvency law.

REFERENCE to the Supreme Court of Canada for hearing and consideration pursuant to the authority of s. 55 of the *Supreme Court Act* (R.S.C., 1927, c. 35) of the following question:

> Is *The Companies' Creditors Arrangement Act, 1933,* 23-24 Geo. V, chapter 36, *ultra vires* of the Parliament of Canada, either in whole or in part, and, if so, in what particular or particulars, or to what extent?

L. E. Beaulieu K.C. and *F. P. Varcoe K.C.* for the Attorney-General for Canada.

C. Lanctôt K.C. and *L. St. Laurent K.C.* for the Attorney-General for Quebec.

I. A. Humphries K.C. for the Attorney-General for Ontario.

The judgment of Duff C.J. and Rinfret, Crocket and Hughes JJ. was delivered by

DUFF C.J.—The history of the law seems to show clearly enough that legislation in respect of compositions and arrangements is a natural and ordinary component of a system of bankruptcy and insolvency law.

Under the *Bankruptcy Act,* as it now exists, proposals for compositions and arrangements cannot be dealt with before a receiving order or assignment has been made. This, however, was not always the case. Under the *Bankruptcy Act* of 1919, a proposal for composition or arrangement could be made prior to an assignment or receiving order.

The *Winding-up Act* contains brief provisions, in sections 65 and 66, which, in substance, differ very little indeed from the legislation now before us; although this, no doubt, is subject to the important qualification, that the provisions of the *Winding-up Act* apply only in the case of a company which is in course of being wound up. Similar provisions affecting the subject matter of this legislation are to be found in Canadian legislation before and after Confederation.

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The powers conferred upon the court under the *Companies' Creditors Arrangement Act, 1933,* come into operation when a compromise or arrangement is proposed between a "company which is bankrupt or insolvent or which has committed an act of bankruptcy within the meaning of the *Bankruptcy Act* or which is deemed insolvent within the meaning of the *Winding-up Act,*" and its "unsecured creditors or any class of them." The important difference, as already observed, between the provisions of the *Companies' Creditors Arrangement Act* and those of the *Bankruptcy Act* itself in relation to compromises and arrangements is that the powers of the first named Act may be exercised notwithstanding the fact that no proceedings have been taken under the *Bankruptcy Act* or the *Winding-up Act.* The Act, however, creates powers, which can be exercised in case, and only in case, of insolvency .

Furthermore, the aim of the Act is to deal with the existing condition of insolvency, in itself, to enable arrangements to be made, in view of the insolvent condition of the company, under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation. As Lord Cave impliedly states in *Royal Bank of Canada* v. *Larue* (1), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament."

Matters normally constituting part of a bankruptcy scheme, but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

The argument mainly pressed upon us in opposition to the validity of the legislation was that

> It does not endeavour to treat equally all contracts of debts between the debtor and his creditors but allows the interest of some of them to be sacrificed in the interest of the company and of other classes of creditors.

(1) [1928] A.C. 187.

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We think an adequate answer to this objection is put forward in the argument on behalf of the Attorney-General for the Dominion. Apart altogether from the judicial control over the proceedings, there is the circumstance that the legislation applies to insolvent companies only; and, consequently, that it is within the power of any creditor to apply for a winding-up order or a receiving order. It seems difficult, therefore, to suppose that the purpose of the legislation is to give sanction to arrangements in the exclusive interests of a single creditor or of a single class of creditors and having no relation to the benefit of the creditors as a whole. The ultimate purpose would appear to be to enable the court to sanction a compromise which, although binding upon a class of creditors only, would be beneficial to the general body of creditors as well as to the shareholders. We think it is not unimportant to note the circumstance to which our attention was called by counsel for the Attorney-General for the Dominion that the court may order shareholders to be summoned although they are not authorized to vote.

The judgment of Lamont and Cannon JJ. was delivered by

CANNON J.—This is a reference by the Governor General in Council submitting for hearing and consideration of this Court the following question:

> Is *The Companies' Creditors Arrangement Act, 1933,* 23-24 Geo. V, chapter 36, *ultra vires* of the Parliament of Canada, either in whole or in part, and, if so, in what particular or particulars, or to what extent?

This Act is designed to apply to insolvent or bankrupt companies; and it is contended on behalf of the Dominion that Parliament could pass this legislation under section 91, par. 21, which gives it paramount jurisdiction to make laws concerning bankruptcy and insolvency. The provinces represent that in enacting it Parliament disregarded their exclusive jurisdiction under section 92, par. 13, in relation to property and civil rights in the province.

The whole argument before us was finally directed to one point: Are the proceedings contemplated by the Act, in pith and substance, *bankruptcy* or *insolvency* enactments within the fair and ordinary meaning of these words? One of the features which distinguishes this Act from the *Bankruptcy Act* now in force is that, under the latter, a composition or arrangement cannot be proceeded with before a receiving order or assignment has been made. Another difference is that under the *Bankruptcy Act* the secured creditor is dealt with on the footing that he may realize his security or value or surrender the same; it is only in respect of what he claims apart from the security that he is affected by the composition or arrangement. It was pointed out also that similar provisions giving binding effect to this approval by a certain majority of creditors are found in our legislation before and after Confederation.

The Insolvent Act of 1864, 27-28 Vict., ch. 17, sec. 9;

The Insolvent Act of 1869, Canada, 32-33 Vict., ch. 16, secs. 94 *et seq.;*

The Insolvent Act of 1875, Canada, 38 Vict., c. 16, secs. 54 *et seq.*

As far as Lower Canada is concerned, it may be of interest to note that chapter 87 of the Consolidated Statutes of Lower Canada, 1859, allowed the issue of a *capias* if the debtor "had refused to compromise or arrange with his creditors, or to make a *cession de biens,*" and provides that the debtor may be discharged if, when the affidavit for *capias* was made, he had "not refused to compromise or arrange with his creditors."

Moreover, I find that, before and since Confederation, arrangements with the creditors have always been of the very essence of any system of bankruptcy or insolvency legislation. Civil rights and the sanctity of contracts are certainly affected by clause 5 under which a minority of creditors would be bound by the vote of a majority in number representing three-fourths in value of creditors present and voting, either in person or by proxy, if the agreement or compromise to which they agreed be sanctioned by the court. I find that this feature existed long before Confederation and was at that time generally accepted.

Pardessus, Droit Commercial, vol. 3, éd. 1843, p. 92, no. 1232, says:

1232. Les créanciers d'un failli ont presque toujours intérêt à faire avec lui un arrangement quelconque, plutôt que d'éprouver les lenteurs et les embarrass d'une union qui finit souvent par consumer la fortune du débiteur. Mais, comme rarement tous sont d'accord, et qu'il est naturel de présumer qu'un grand nombre prendra les arrangements les plus convenables à l'intérêt commun, on a cru devoir faire céder la volonté de la

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minorité à celle de la majorité; les créanciers présents ont donc été admis à décider pour les absents.

Cette minorité, ces absents, doivent au moins avoir l'assurance que de mûres réflexions ont dirigé ceux dont le voeu doit devenir une loi pour eux. Tel est l'objet des règles prescrites pour la validité du concordat.

Under number 1236, classes or categories having different interests are already recognized by this author, and he adds (No. 1237):

Le concordat est valablement consenti par la majorité des créanciers présents, pourvu que les sommes dues aux personnes qui forment cette majorité égalent les trois quarts de la totalité des créances vérifiées et affirmées, ou admises par provision, dues à des créanciers ayant droit de prendre part à la délibération du concordat.

Therefore, the very clause objected to in our Act of 1933 seems to be copied from the law of bankruptcy as it existed in France in 1843, when this work was published.

Under our system and the English *Bankruptcy Act* of 1914, bankruptcy legislation deals with the proceedings necessary for the distribution, under judicial authority, of the property of an insolvent person among his creditors. It assumes the commission of an "act of bankruptcy" followed by a petition to the court for a receiving order for the protection of the estate. The property of the debtor then vests in an official receiver. The debtor must submit a statement of affairs to the official receiver who calls a meeting of the creditors. The debtor is examined; and *if no composition or scheme of arrangement is approved,* he is adjudged bankrupt; and his property becomes divisible among his creditors and vests in a trustee.

Therefore, if the proceedings under this new Act of 1933 are not, strictly speaking, "bankruptcy" proceedings, because they had not for object the sale and division of the assets of the debtor, they may, however, be considered as "insolvency proceedings" with the object of preventing a declaration of bankruptcy and the sale of these assets, if the creditors directly interested for the time being reach the conclusion that an opportune arrangement to avoid such sale would better protect their interest, as a whole or in part. Provisions for the settlement of the liabilities of the insolvent are an essential element of any insolvency legislation and were incorporated in our *Insolvent Act of 1864;* and such a deed of composition and discharge could be validly made either before, pending or after proceedings upon an assignment, or for the compulsory liquidation of the estate of the insolvent. What was considered as being within the scope of the word "insolvency" when it was used in section 91 of the *B.N.A. Act* is to be found in the preamble of the 1864 Insolvency Act, which reads:

> Whereas it is expedient that provision be made for the settlement of the estates of insolvent debtors, for *giving effect to arrangements between them and their creditors,* and for the punishment of fraud.

See also: *Cushing* v. *Dupuy* (1); *Royal Bank of Canada* v. *Larue* (2).

I therefore reach the conclusion that arrangements as provided for by this Act are and have been, before and since Confederation, an essential component part of any system devised to protect the creditors of insolvents and, at the same time, help the honest debtor to rehabilitate himself and obtain a discharge.

I would, therefore, answer the question submitted to us in the negative.

The question submitted is answered in the negative.

Solicitor for the Attorney-General of Canada: *W. Stuart Edwards.*

Solicitor for the Attorney-General of Quebec: *Charles Lanctôt.*

Solicitor for the Attorney-General of Ontario: *I. A. Humphries.*

Century Services Inc. *Appellant*

v.

Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada *Respondent*

Indexed as: Century Services Inc. *v.* Canada (Attorney General)

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

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

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

Century Services Inc. *Appelante*

c.

Procureur général du Canada au nom de Sa Majesté la Reine du chef du Canada *Intimé*

Répertorié : Century Services Inc. *c.* Canada (Procureur général)

2010 CSC 60

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

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

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

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

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

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

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by

La compagnie débitrice a déposé une requête sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* ») et obtenu la suspension des procédures dans le but de réorganiser ses finances. Parmi les dettes de la compagnie débitrice au début de la réorganisation figurait une somme due à la Couronne, mais non versée encore, au titre de la taxe sur les produits et services (« TPS »). Le paragraphe 222(3) de la *Loi sur la taxe d'accise* (« *LTA* ») crée une fiducie réputée visant les sommes de TPS non versées. Cette fiducie s'applique malgré tout autre texte législatif du Canada sauf la *Loi sur la faillite et l'insolvabilité* (« *LFI* »). Toutefois, le par. 18.3(1) de la *LACC* prévoyait que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, les fiducies réputées établies par la loi en faveur de la Couronne ne s'appliquaient pas sous son régime.

Le juge siégeant en son cabinet chargé d'appliquer la *LACC* a approuvé par ordonnance le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars. Toutefois, il a également ordonné à la compagnie débitrice de retenir un montant égal aux sommes de TPS non versées et de le déposer séparément dans le compte en fiducie du contrôleur jusqu'à l'issue de la réorganisation. Ayant conclu que la réorganisation n'était pas possible, la compagnie débitrice a demandé au tribunal de lever partiellement la suspension des procédures pour lui permettre de faire cession de ses biens en vertu de la *LFI*. La Couronne a demandé par requête le paiement immédiat au receveur général des sommes de TPS non versées. Le juge siégeant en son cabinet a rejeté la requête de la Couronne et autorisé la cession des biens. La Cour d'appel a accueilli l'appel pour deux raisons. Premièrement, elle a conclu que, après que la tentative de réorganisation eut échoué, le juge siégeant en son cabinet était tenu, en raison de la priorité établie par la *LTA*, d'autoriser le paiement à la Couronne des sommes qui lui étaient dues au titre de la TPS, et que l'art. 11 de la *LACC* ne lui conférait pas le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne. Deuxièmement, la Cour d'appel a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur, le juge siégeant en son cabinet avait créé une fiducie expresse en faveur de la Couronne.

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell : Il est possible de résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* en les interprétant d'une manière qui tienne compte adéquatement de l'historique de la *LACC*, de la fonction de cette loi parmi

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

l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et des principes d'interprétation de la *LACC* reconnus dans la jurisprudence. L'historique de la *LACC* permet de distinguer celle-ci de la *LFI* en ce sens que, bien que ces lois aient pour objet d'éviter les coûts sociaux et économiques liés à la liquidation de l'actif d'un débiteur, la *LACC* offre plus de souplesse et accorde aux tribunaux un plus grand pouvoir discrétionnaire que le mécanisme fondé sur des règles de la *LFI*, ce qui rend la première mieux adaptée aux réorganisations complexes. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence permettant aux créanciers de savoir s'ils ont la priorité dans l'éventualité d'une faillite. Le travail de réforme législative contemporain a principalement visé à harmoniser les aspects communs à la *LACC* et à la *LFI*, et l'une des caractéristiques importantes de cette réforme est la réduction des priorités dont jouit la Couronne. Par conséquent, la *LACC* et la *LFI* contiennent toutes deux des dispositions neutralisant les fiducies réputées établies en vertu d'un texte législatif en faveur de la Couronne, et toutes deux comportent des exceptions expresses à la règle générale qui concernent les fiducies réputées établies à l'égard des retenues à la source. Par ailleurs, ces deux lois considèrent les autres créances de la Couronne comme des créances non garanties. Ces lois ne comportent pas de dispositions claires et expresses établissant une exception pour les créances relatives à la TPS.

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

Les tribunaux appelés à résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* ont été enclins à appliquer l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* et à trancher en faveur de la *LTA*. Il ne convient pas de suivre cet arrêt. C'est plutôt la *LACC* qui énonce la règle applicable. Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Il semble découler de la logique interne de la *LACC* que la fiducie réputée établie à l'égard de la TPS est visée par la renonciation du législateur à sa priorité. Il y aurait une étrange asymétrie si l'on concluait que la *LACC* ne traite pas les fiducies réputées à l'égard de la TPS de la même manière que la *LFI*, car cela encouragerait les créanciers à recourir à la loi la plus favorable, minerait les objectifs réparateurs de la *LACC* et risquerait de favoriser les maux sociaux que l'édiction de ce texte législatif visait justement à recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

prévenir. Le paragraphe 222(3) de la *LTA*, une disposition plus récente et générale que le par. 18.3(1) de la *LACC*, n'exige pas l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. En tout état de cause, par suite des modifications apportées récemment à la *LACC* en 2005, l'art. 18.3 a été reformulé et renuméroté, ce qui en fait la disposition postérieure. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS. Le conflit entre la *LTA* et la *LACC* est plus apparent que réel.

L'exercice par les tribunaux de leurs pouvoirs discrétionnaires a fait en sorte que la *LACC* a évolué et s'est adaptée aux besoins commerciaux et sociaux contemporains. Comme les réorganisations deviennent très complexes, les tribunaux chargés d'appliquer la *LACC* ont été appelés à innover. Les tribunaux doivent d'abord interpréter les dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour établir leur pouvoir de prendre des mesures dans le cadre d'une procédure fondée sur la *LACC*. À cet égard, il faut souligner que le texte de la *LACC* peut être interprété très largement. La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. L'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Il s'agit de savoir si l'ordonnance contribuera utilement à la réalisation de l'objectif d'éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. Ce critère s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. En l'espèce, l'ordonnance du juge siégeant en son cabinet qui a suspendu l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS contribuait à la réalisation des objectifs de la *LACC*, parce qu'elle avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et favorisait une transition harmonieuse entre la *LACC* et la *LFI*, répondant ainsi à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*, mais il n'existe aucun hiatus entre ces lois étant donné qu'elles s'appliquent de concert et que, dans les deux cas, les créanciers examinent le régime de distribution prévu par la *LFI* pour connaître la situation qui serait la leur en cas d'échec de la réorganisation. L'ampleur du pouvoir discrétionnaire conféré au tribunal par la *LACC* suffit pour établir une passerelle vers une liquidation opérée sous le régime de la *LFI*. Le juge siégeant en son cabinet pouvait donc rendre l'ordonnance qu'il a prononcée.

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

L'ordonnance du juge siégeant en son cabinet n'a pas créé de fiducie expresse en l'espèce, car aucune certitude d'objet ne peut être inférée de cette ordonnance. La création d'une fiducie expresse exige la présence de certitudes quant à l'intention, à la matière et à l'objet. Lorsque le juge siégeant en son cabinet a accepté la proposition que les sommes soient détenues séparément dans le compte en fiducie du contrôleur, il n'existait aucune certitude que la Couronne serait le bénéficiaire ou l'objet de la fiducie, car il y avait un doute quant à la question de savoir qui au juste pourrait toucher l'argent en fin de compte. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à l'argent, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question.

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

Le juge Fish : Les sommes perçues par la débitrice au titre de la TPS ne font l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité, mais il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il s'agit d'un exercice délibéré du pouvoir discrétionnaire de légiférer. Par contre, en maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, les tribunaux ont protégé indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. Dans le contexte du régime canadien d'insolvabilité, il existe une fiducie réputée uniquement lorsqu'une disposition législative crée la fiducie et qu'une disposition de la *LACC* ou de la *LFI* confirme explicitement l'existence de la fiducie. La *Loi de l'impôt sur le revenu*, le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* renferment toutes des dispositions relatives aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*, mais le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions est confirmé à l'art. 37 de la *LACC* et au par. 67(3) de la *LFI* en termes clairs et explicites. La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne confirme pas l'existence de la fiducie dans la *LFI* ou la *LACC*, ce qui témoigne de son intention de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

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

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

La juge Abella (dissidente) : Le paragraphe 222(3) de la *LTA* donne préséance, dans le cadre d'une procédure relevant de la *LACC*, à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Cette disposition définit sans équivoque sa portée dans des termes on ne peut plus clairs et n'exclut que la *LFI* de son champ d'application. Les termes employés révèlent l'intention claire du législateur que le par. 222(3) l'emporte en cas de conflit avec toute autre loi sauf la *LFI*. Cette opinion est confortée par le fait que des modifications ont été apportées à la *LACC* après l'édiction du par. 222(3) et que, malgré les demandes répétées de divers groupes, le par. 18.3(1) n'a pas été modifié pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. Cela indique que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

Cette conclusion est renforcée par l'application d'autres principes d'interprétation. Une disposition spécifique antérieure peut être supplantée par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale. Le paragraphe 222(3) accomplit cela de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » sauf la *LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3). Selon l'alinéa 44*f*) de la *Loi d'interprétation*, le fait que le par. 18.3(1) soit devenu le par. 37(1) à la suite de l'édiction du par. 222(3) de la *LTA* n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure ». Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi autre que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1), ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent, il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

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APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith JJ.A.), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, reversing a judgment of Brenner C.J.S.C., 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

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

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

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

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

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, Tysoe et Smith), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, qui a infirmé une décision du juge en chef Brenner, 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, qui a rejeté la demande de la Couronne sollicitant le paiement de la TPS. Pourvoi accueilli, la juge Abella est dissidente.

Mary I. A. Buttery, *Owen J. James* et *Matthew J. G. Curtis*, pour l'appelante.

Gordon Bourgard, *David Jacyk* et *Michael J. Lema*, pour l'intimé.

Version française du jugement de la juge en chef McLachlin et des juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell rendu par

[1] LA JUGE DESCHAMPS — C'est la première fois que la Cour est appelée à interpréter directement les dispositions de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). À cet égard, deux questions sont soulevées. La première requiert la conciliation d'une disposition de la *LACC* et d'une disposition de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), qui, selon des juridictions inférieures, sont en conflit l'une avec l'autre. La deuxième concerne la portée du pouvoir discrétionnaire du tribunal qui surveille une réorganisation. Les dispositions législatives pertinentes sont reproduites en annexe. Pour ce qui est de la première question, après avoir examiné l'évolution des priorités de la Couronne en matière d'insolvabilité et le libellé des diverses lois qui établissent ces priorités, j'arrive à la conclusion que c'est la *LACC*, et non la *LTA*, qui énonce la règle applicable. Pour ce qui est de la seconde question, je conclus qu'il faut interpréter les larges pouvoirs discrétionnaires conférés au juge en tenant compte de la nature réparatrice de la *LACC* et de la législation sur l'insolvabilité en général. Par conséquent, le tribunal avait le pouvoir

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

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

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

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

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

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

[60] Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by

3.3 *Pouvoirs discrétionnaires du tribunal chargé de surveiller une réorganisation fondée sur la LACC*

[57] Les tribunaux font souvent remarquer que [TRADUCTION] « [l]a *LACC* est par nature schématique » et ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). Par conséquent, [TRADUCTION] « [l]'histoire du droit relatif à la LACC correspond à l'évolution de ce droit au fil de son interprétation par les tribunaux » (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (C. Ont. (Div. gén.)), par. 10, le juge Farley).

[58] Les décisions prises en vertu de la *LACC* découlent souvent de l'exercice discrétionnaire de certains pouvoirs. C'est principalement au fil de l'exercice par les juridictions commerciales de leurs pouvoirs discrétionnaires, et ce, dans des conditions décrites avec justesse par un praticien comme constituant [TRADUCTION] « la pépinière du contentieux en temps réel », que la *LACC* a évolué de façon graduelle et s'est adaptée aux besoins commerciaux et sociaux contemporains (voir Jones, p. 484).

[59] L'exercice par les tribunaux de leurs pouvoirs discrétionnaires doit évidemment tendre à la réalisation des objectifs de la *LACC*. Le caractère réparateur dont j'ai fait état dans mon aperçu historique de la Loi a à maintes reprises été reconnu dans la jurisprudence. Voici l'un des premiers exemples :

> [TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu'elle fournit un moyen d'éviter les effets dévastateurs, — tant sur le plan social qu'économique — de la faillite ou de l'arrêt des activités d'une entreprise, à l'initiation des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

(*Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57, le juge Doherty, dissident)

[60] Le processus décisionnel des tribunaux sous le régime de la *LACC* comporte plusieurs aspects. Le tribunal doit d'abord créer les conditions propres à permettre au débiteur de tenter une réorganisation.

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

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

Il peut à cette fin suspendre les mesures d'exécution prises par les créanciers afin que le débiteur puisse continuer d'exploiter son entreprise, préserver le statu quo pendant que le débiteur prépare la transaction ou l'arrangement qu'il présentera aux créanciers et surveiller le processus et le mener jusqu'au point où il sera possible de dire s'il aboutira (voir, p. ex., *Chef Ready Foods Ltd. c. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), p. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, par. 27). Ce faisant, le tribunal doit souvent déterminer les divers intérêts en jeu dans la réorganisation, lesquels peuvent fort bien ne pas se limiter aux seuls intérêts du débiteur et des créanciers, mais englober aussi ceux des employés, des administrateurs, des actionnaires et même de tiers qui font affaire avec la compagnie insolvable (voir, p. ex., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, par. 144, la juge Paperny (maintenant juge de la Cour d'appel); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (C.S.J. Ont.), par. 3; *Air Canada, Re*, 2003 CanLII 49366 (C.S.J. Ont.), par. 13, le juge Farley; Sarra, *Creditor Rights*, p. 181-192 et 217-226). En outre, les tribunaux doivent reconnaître que, à l'occasion, certains aspects de la réorganisation concernent l'intérêt public et qu'il pourrait s'agir d'un facteur devant être pris en compte afin de décider s'il y a lieu d'autoriser une mesure donnée (voir, p. ex., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (C.S.J. Ont.), par. 2, le juge Blair (maintenant juge de la Cour d'appel); Sarra, *Creditor Rights*, p. 195-214).

[61] Quand de grandes entreprises éprouvent des difficultés, les réorganisations deviennent très complexes. Les tribunaux chargés d'appliquer la *LACC* ont ainsi été appelés à innover dans l'exercice de leur compétence et ne se sont pas limités à suspendre les procédures engagées contre le débiteur afin de lui permettre de procéder à une réorganisation. On leur a demandé de sanctionner des mesures non expressément prévues par la *LACC*. Sans dresser la liste complète des diverses mesures qui ont été prises par des tribunaux en vertu de la *LACC*, il est néanmoins utile d'en donner brièvement quelques exemples, pour bien illustrer la marge de manœuvre que la loi accorde à ceux-ci.

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

[62] L'utilisation la plus créative des pouvoirs conférés par la *LACC* est sans doute le fait que les tribunaux se montrent de plus en plus disposés à autoriser, après le dépôt des procédures, la constitution de sûretés pour financer le débiteur demeuré en possession des biens ou encore la constitution de charges super-prioritaires grevant l'actif du débiteur lorsque cela est nécessaire pour que ce dernier puisse continuer d'exploiter son entreprise pendant la réorganisation (voir, p. ex., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (C. Ont. (Div. gén.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, conf. (1999), 12 C.B.R. (4th) 144 (C.S.); et, d'une manière générale, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 93-115). La *LACC* a aussi été utilisée pour libérer des tiers des actions susceptibles d'être intentées contre eux, dans le cadre de l'approbation d'un plan global d'arrangement et de transaction, malgré les objections de certains créanciers dissidents (voir *Metcalfe & Mansfield*). Au départ, la nomination d'un contrôleur chargé de surveiller la réorganisation était elle aussi une mesure prise en vertu du pouvoir de surveillance conféré par la *LACC*, mais le législateur est intervenu et a modifié la loi pour rendre cette mesure obligatoire.

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

[63] L'esprit d'innovation dont ont fait montre les tribunaux pendant des procédures fondées sur la *LACC* n'a toutefois pas été sans susciter de controverses. Au moins deux des questions que soulève leur approche sont directement pertinentes en l'espèce : (1) Quelles sont les sources des pouvoirs dont dispose le tribunal pendant les procédures fondées sur la *LACC*? (2) Quelles sont les limites de ces pouvoirs?

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

[64] La première question porte sur la frontière entre les pouvoirs d'origine législative dont dispose le tribunal en vertu de la *LACC* et les pouvoirs résiduels dont jouit un tribunal en raison de sa compétence inhérente et de sa compétence en equity, lorsqu'il est question de surveiller une réorganisation. Pour justifier certaines mesures autorisées à l'occasion de procédures engagées sous le régime de la *LACC*, les tribunaux ont parfois prétendu se fonder sur leur compétence en equity dans le but

purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

de réaliser les objectifs de la Loi ou sur leur compétence inhérente afin de combler les lacunes de celle-ci. Or, dans de récentes décisions, des cours d'appel ont déconseillé aux tribunaux d'invoquer leur compétence inhérente, concluant qu'il est plus juste de dire que, dans la plupart des cas, les tribunaux ne font simplement qu'interpréter les pouvoirs se trouvant dans la *LACC* elle-même (voir, p. ex., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, par. 45-47, la juge Newbury; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 31-33, le juge Blair).

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

[65] Je suis d'accord avec la juge Georgina R. Jackson et la professeure Janis Sarra pour dire que la méthode la plus appropriée est une approche hiérarchisée. Suivant cette approche, les tribunaux procédèrent d'abord à une interprétation des dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d'une procédure fondée sur la *LACC* (voir G. R. Jackson et J. Sarra, « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2007* (2008), 41, p. 42). Selon ces auteures, pourvu qu'on lui donne l'interprétation téléologique et large qui s'impose, la *LACC* permettra dans la plupart des cas de justifier les mesures nécessaires à la réalisation de ses objectifs (p. 94).

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

[66] L'examen des parties pertinentes de la *LACC* et de l'évolution récente de la législation me font adhérer à ce point de vue jurisprudentiel et doctrinal : dans la plupart des cas, la décision de rendre une ordonnance durant une procédure fondée sur la *LACC* relève de l'interprétation législative. D'ailleurs, à cet égard, il faut souligner d'une façon particulière que le texte de loi dont il est question en l'espèce peut être interprété très largement.

[67] The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company . . . on the application of any person interested in the

[67] En vertu du pouvoir conféré initialement par la *LACC*, le tribunal pouvait, « chaque fois qu'une demande [était] faite sous le régime de la présente loi à l'égard d'une compagnie, [. . .] sur demande

matter, . . . subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

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

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

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

d'un intéressé, [. . .] sous réserve des autres dispositions de la présente loi [. . .] rendre l'ordonnance prévue au présent article » (*LACC*, par. 11(1)). Cette formulation claire était très générale.

[68] Bien que ces dispositions ne soient pas strictement applicables en l'espèce, je signale à ce propos que le législateur a, dans des modifications récentes, apporté au texte du par. 11(1) un changement qui rend plus explicite le pouvoir discrétionnaire conféré au tribunal par la *LACC*. Ainsi, aux termes de l'art. 11 actuel de la *LACC*, le tribunal peut « rendre [. . .] sous réserve des restrictions prévues par la présente loi [. . .] toute ordonnance qu'il estime indiquée » (L.C. 2005, ch. 47, art. 128). Le législateur semble ainsi avoir jugé opportun de sanctionner l'interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence.

[69] De plus, la *LACC* prévoit explicitement certaines ordonnances. Tant à la suite d'une demande initiale que d'une demande subséquente, le tribunal peut, par ordonnance, suspendre ou interdire toute procédure contre le débiteur, ou surseoir à sa continuation. Il incombe à la personne qui demande une telle ordonnance de convaincre le tribunal qu'elle est indiquée et qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue (*LACC*, par. 11(3), (4) et (6)).

[70] La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. Toutefois, l'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Sous le régime de la *LACC*, le tribunal évalue l'opportunité de l'ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi. Il s'agit donc de savoir si cette ordonnance contribuera utilement à la réalisation de l'objectif réparateur de la *LACC* — à savoir éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. J'ajouterais que le critère de l'opportunité s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. Les tribunaux

Court of King's Bench of Alberta

Citation: Razor Energy Corp (Re), 2024 ABKB 553

Date: 20240919
Docket: 2401 02680
Registry: Calgary

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

And In the Matter of the Plan of Compromise or Arrangement of Razor Energy Corp, Razor Holdings GP Corp, and Blade Energy Services Corp

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Reasons for Decision
of the
Honourable Justice Douglas R. Mah

A. Background

[1] Within the ambit of ***CCAA***[1] proceedings, a creditor (Conifer Energy Inc) of the debtor corporation (Razor Energy Corp) seeks an Order under s 11 for payment of post-filing obligations and a priming charge to secure that payment.

[2] Here is a brief factual synopsis:

- Razor and Conifer are oil and gas producers. Conifer operates the Judy Creek Gas Conservation Plant where Conifer, under an ownership and operating agreement (OOA) with Razor, received and processed a major portion of Razor's gas production.
- Razor and Conifer, along with others, are owners of the gas plant. The OOA requires Razor to pay its share of the plant's operating costs and to pay for ongoing processing services in respect of its gas processed there. There are 8

[1] ***Companies' Creditors Arrangement Act,*** RSC, 1985, c C-36 as am.

other owners who have ownership interests in the functional units comprising the facility.

- In December 2023, after Razor defaulted in its obligations under the OOA, Conifer physically locked Razor out of the gathering system at 16 separate points within the South Swan Hills Gas Gathering System, thus preventing processing of about two-thirds of Razor's gas.
- Conifer was unable to completely lock out Razor because the configuration of the infrastructure did not allow Conifer to do so without adversely affecting third-party interests. Conifer set-off and continues to set-off the revenue from the one-third of Razor's gas that continues to be processed against Razor's obligations.
- Razor filed a Notice of Intention to Make a Proposal (NOI) under the ***BIA***[2] in January 2024, thus invoking the statutory stay provided in s 69(1)(a) of the ***BIA***.
- Justice Lema in a February 21, 2024 decision reported as ***Blade Energy Services Corp (Re)***, 2024 ABKB 100 determined that Conifer's lockout action was contrary to the statutory stay so far as any pre-NOI amounts were concerned, but not any post-NOI amount owing. He determined that Conifer continues to enjoy any contractual remedies it may have with regard to unpaid post-NOI obligations.
- Following Justice Lema's decision, Conifer and Razor were unable to reach terms by which Razor could revert to full access to the plant. Razor had determined that it could continue to carry on business even without access to the Judy Creek plant. Thus, the lockout of the two-thirds of Razor's output continues and the set-off by Conifer of the revenue from the remaining one-third also continues.
- On February 28, 2024 Razor converted its NOI proceedings into a ***CCAA*** proceeding, engaging a new stay under s 11.02. There have been extensions applied for and granted. The current stay period expires on October 13, 2024. The amounts sought to be paid (or secured) relate to the period on and after February 28, 2024 or the "post-filing" period.
- Razor advises that its plan in the ***CCAA*** proceedings takes the form of a pending "Corporate Transaction" with a third-party purchaser which, according to Razor's affiant (Mr. Bailey, affidavit of September 6, 2024 at para 6), will come together on or about September 20, 2024 and will result in Conifer being paid the post-filing arrears in full. For reasons of commercial confidentiality, the details of the Corporate Transaction have not been disclosed.
- It is Conifer's surmise (affidavit of Ms. Wilkins affirmed September 3, 2024 at para 16) that Razor's interest in the Judy Creek gas plant and South Swan Hills Unit form part of the assets under sale in the Corporate Transaction.
- Razor continues to not pay Conifer under the OOA. Razor says it is insolvent and unable to do so. Conifer says that Razor is getting a "free ride" with respect to the one-third of gas output that continues to be processed at the Judy Creek plant and with regard to its ownership obligations. Furthermore, Conifer advises that

[2] ***Bankruptcy and Insolvency Act***, RSC 1985, c B-3 as am.

Razor's obligations to another owner, CNRL, are now being allocated by CNRL to Conifer, thus jeopardizing Conifer's financial status.

- The amount owed to Conifer by Razor for the post-filing period as of September 2, 2024 for services is $1.89 million, including Razor's share of the plant's operating costs. The debt is escalating at a rate of $250,000 per month after set-off. The amount reallocated by CNRL to Conifer in respect of Razor is more than $4.15 million which includes approximately $360,000 for post-filing amounts charged by CNRL.

B. Principles underlying the *CCAA*

[3] The Supreme Court of Canada in ***Century Services Inc v Canada (Attorney General),*** 2010 SCC 60, by its majority at paras 57-60, set out the foundational precepts of decision-making under the ***CCAA***:

- The ***CCAA*** is "skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred." Thus, ***CCAA*** decisions are often based on discretionary grants of jurisdiction. Judicial discretion in this regard must be exercised in furtherance of the ***CCAA***'s purposes.
- The purpose of the ***CCAA*** is remedial "in the purest sense" in providing a means whereby the devastating social and economic effects of bankruptcy or creditor-initiated termination of ongoing business operations can be avoided while a Court-supervised attempt to reorganize the financial affairs of the debtor company is undertaken.
- The Court engaged in judicial decision-making under the ***CCAA*** must "first of all provide the conditions under which the debtor can attempt to reorganize." This can be achieved by staying enforcement action to allow the debtor's business to continue, preserving the *status quo* while the debtor readies itself to present the restructuring or reorganization plan to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed.
- The Court must be cognizant of and weigh all stakeholder interests and the public interest that may come into play in any decision of whether to allow a particular action.

[4] I consider this application against the backdrop of the above principles.

C. Conifer's Position

[5] Conifer seeks this Order from the Court:

- requiring Razor to pay Conifer all amounts owing under the OOA for the post-filing period;
- requiring Razor to pay Conifer all post-filing amounts owed by Razor to CNRL that CNRL intends to seek from Conifer;

Debts not released by order of discharge

178 (1) An order of discharge does not release the bankrupt from

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;

(a.1) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting therefrom;

(b) any debt or liability for alimony or alimentary pension;

(c) any debt or liability arising under a judicial decision establishing affiliation or respecting support or maintenance, or under an agreement for maintenance and support of a spouse, former spouse, former common-law partner or child living apart from the bankrupt;

(d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others;

(e) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim;

(f) liability for the dividend that a creditor would have been entitled to receive on any provable claim not disclosed to the trustee, unless the creditor had notice or knowledge of the bankruptcy and failed to take reasonable action to prove his claim;

(g) any debt or obligation in respect of a loan made under the *Canada Student Loans Act*, the *Canada Student Financial Assistance Act* or any enactment of a province that provides for loans or guarantees of loans to students where the date of bankruptcy of the bankrupt occurred

(i) before the date on which the bankrupt ceased to be a full- or part-time student, as the case may be, under the applicable Act or enactment, or

(ii) within seven years after the date on which the bankrupt ceased to be a full- or part-time student;

(g.1) any debt or obligation in respect of a loan made under the *Apprentice Loans Act* where the date of bankruptcy of the bankrupt occurred

(i) before the date on which the bankrupt ceased, under that Act, to be an eligible apprentice within the meaning of that Act, or

(ii) within seven years after the date on which the bankrupt ceased to be an eligible apprentice; or

(h) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (g.1).

Court may order non-application of subsection (1)

(1.1) At any time after five years after the day on which a bankrupt who has a debt referred to in paragraph (1)(g) or (g.1) ceases to be a full- or part-time student or an eligible apprentice, as the case may be, under the applicable Act or enactment, the court may, on application, order that subsection (1) does not apply to the debt if the court is satisfied that

(a) the bankrupt has acted in good faith in connection with the bankrupt's liabilities under the debt; and

(b) the bankrupt has and will continue to experience financial difficulty to such an extent that the bankrupt will be unable to pay the debt.

Claims released

(2) Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.

R.S., 1985, c. B-3, s. 178 R.S., 1985, c. 3 (2nd Supp.), s. 28 1992, c. 27, s. 64 1997, c. 12, s. 105 1998, c. 21, s. 103 2000, c. 12, s. 18 2001, c. 4, s. 32 2004, c. 25, s. 83 2005, c. 47, s. 107 2007, c. 36, s. 54 2014, c. 20, s. 484

407 ETR Concession Company Limited *Appellant*

v.

Superintendent of Bankruptcy *Respondent*

and

Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General for Saskatchewan, Attorney General of Alberta, Michael Dow, Gwendolyn Miron and Peter Teolis *Interveners*

Indexed as: 407 ETR Concession Co. *v.* Canada (Superintendent of Bankruptcy)

2015 SCC 52

File No.: 35696.

2015: January 15; 2015: November 13.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Division of powers — Federal paramountcy — Bankruptcy and insolvency — Property and civil rights — Highway toll debt owed to creditor constituted claim provable in debtor's bankruptcy — Debtor obtained absolute discharge in bankruptcy — Federal legislation governing bankruptcy providing for debtor's release from all claims provable in bankruptcy upon discharge — Whether provincial legislation providing for continuing suspension of debtor's driver's permit until payment of toll debt constitutionally inoperative by reason of doctrine of federal paramountcy — Test for determining whether operational conflict exists — Whether federal and provincial legislation can operate side by side without conflict — Whether operation of provincial law frustrates purpose of federal law — Bankruptcy and

407 ETR Concession Company Limited *Appelante*

c.

Surintendant des faillites *Intimé*

et

Procureur général de l'Ontario, procureure générale du Québec, procureur général de la Colombie-Britannique, procureur général de la Saskatchewan, procureur général de l'Alberta, Michael Dow, Gwendolyn Miron et Peter Teolis *Intervenants*

Répertorié : 407 ETR Concession Co. *c.* Canada (Surintendant des faillites)

2015 CSC 52

N° du greffe : 35696.

2015 : 15 janvier; 2015 : 13 novembre.

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

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

Droit constitutionnel — Partage des compétences — Prépondérance fédérale — Faillite et insolvabilité — Propriété et droits civils — Dette de péage routier envers un créancier constituant une réclamation prouvable lors de la faillite du débiteur — Libération absolue de faillite accordée au débiteur — Loi fédérale sur la faillite prévoyant qu'à sa libération, le débiteur est libéré de toutes réclamations prouvables en matière de faillite — La loi provinciale prévoyant le maintien de la suspension du permis de conduire du débiteur jusqu'à ce qu'il acquitte la dette de péage est-elle inopérante du point de vue constitutionnel en raison de la doctrine de la prépondérance fédérale? — Analyse permettant de déterminer s'il existe un conflit d'application — La loi fédérale et la loi provinciale peuvent-elles coexister sans conflit? — L'application de

Insolvency Act, R.S.C. 1985, c. B-3, s. 178(2) — Highway 407 Act, 1998, S.O. 1998, c. 28, s. 22(1), (4).

Ontario's Highway 407 is an open-access private highway operated by 407 ETR Concession Company Limited ("ETR"). The *Highway 407 Act, 1998* ("*407 Act*") governs the operation of Highway 407 and empowers ETR to enforce the payment of tolls. Under s. 22(1) of the *407 Act*, if a person fails to pay a toll debt, ETR may notify the Registrar of Motor Vehicles. Under s. 22(4), upon receipt of this notice, the Registrar must refuse to issue or renew the debtor's vehicle permit until he or she is notified by ETR that the debt and related fees and interest have been paid.

As a result of M's failure to pay his toll debt, ETR notified the Registrar and the Registrar refused to renew M's permits. M obtained a discharge from bankruptcy. His Statement of Affairs listed ETR as an unsecured creditor. Pursuant to s. 178(2) of the *Bankruptcy and Insolvency Act* ("*BIA*"), a discharge from bankruptcy releases a debtor from claims that are provable in bankruptcy. M sought an order that his toll debt had been released by his discharge and an order compelling the Ministry of Transportation to issue his vehicle permits. The motions judge concluded that s. 22(4) of the *407 Act* was not in conflict with the *BIA* and he had no jurisdiction, absent a conflict, to order the reinstatement of M's vehicle permits. M settled his dispute with ETR but the Superintendent of Bankruptcy filed an appeal. Applying the doctrine of federal paramountcy, the Court of Appeal declared s. 22(4) inoperative to the extent that it conflicted with the *BIA*'s purpose of giving a discharged bankrupt a fresh start.

Held: The appeal should be dismissed. Section 22(4) of the *407 Act* is constitutionally inoperative to the extent that it is used to enforce a provable claim that has been discharged pursuant to s. 178(2) of the *BIA*.

Per Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ.: The companion appeal, *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, contains full discussion of the principles of the doctrine of federal paramountcy, as well as the purposes and relevant provisions of the *BIA*. Like in the companion appeal, there is no dispute here concerning the independent validity of the provincial and federal

la loi provinciale entrave-t-elle la réalisation de l'objet de la loi fédérale? — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3, art. 178(2) — Loi de 1998 sur l'autoroute 407, L.O. 1998, c. 28, art. 22(1), (4).

L'autoroute 407 de l'Ontario est une autoroute privée ouverte au public qui est exploitée par 407 ETR Concession Company Limited (« ETR »). La *Loi de 1998 sur l'autoroute 407* (« *Loi 407* ») en régit l'exploitation et habilite ETR à recouvrer le paiement des péages. Si une personne n'acquitte pas une dette de péage, le par. 22(1) de la *Loi 407* permet à ETR d'en aviser le registrateur des véhicules automobiles. Dès qu'il reçoit cet avis, le registrateur doit, aux termes du par. 22(4), refuser de délivrer ou de renouveler le certificat d'immatriculation de véhicule du débiteur jusqu'à ce qu'il soit avisé par ETR du paiement de la dette et des frais, droits et intérêts y afférents.

Comme M n'a pas payé sa dette de péage, ETR en a avisé le registrateur, qui a refusé de renouveler les certificats d'immatriculation de M. M a obtenu une libération de faillite. Il a affirmé dans son bilan qu'ETR était une créancière non garantie. Selon le par. 178(2) de la *Loi sur la faillite et l'insolvabilité* (« *LFI* »), la libération de faillite libère un débiteur des réclamations prouvables en matière de faillite. M a demandé une ordonnance déclarant que sa libération l'avait libéré de sa dette de péage, ainsi qu'une ordonnance enjoignant au ministère des Transports de lui délivrer ses certificats d'immatriculation. Le juge de première instance a conclu que le par. 22(4) de la *Loi 407* n'entrait pas en conflit avec la *LFI* et qu'en l'absence d'un conflit, il n'était pas compétent pour ordonner le rétablissement des certificats d'immatriculation de véhicule de M. M a réglé son différend avec ETR, mais le surintendant des faillites a formé un appel. Appliquant la doctrine de la prépondérance fédérale, la Cour d'appel a déclaré le par. 22(4) inopérant dans la mesure où il entrait en conflit avec l'objectif de la *LFI* de permettre au failli libéré de prendre un nouveau départ.

Arrêt : Le pourvoi est rejeté. Le paragraphe 22(4) de la *Loi 407* est inopérant du point de vue constitutionnel dans la mesure où il est utilisé pour recouvrer une réclamation prouvable dont le débiteur a été libéré en application du par. 178(2) de la *LFI*.

Les juges Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner et Gascon : L'arrêt connexe *Alberta (Procureur général) c. Moloney*, 2015 CSC 51, [2015] 3 R.C.S. 327, contient une analyse complète des principes de la doctrine de la prépondérance fédérale ainsi que des objectifs et des dispositions applicables de la *LFI*. Tout comme dans le pourvoi connexe, il n'y a aucun désaccord en l'espèce au sujet de la validité de la loi laws. Section 22 of the *407 Act* and s. 178 of the *BIA* were validly enacted by their respective governments. The only question before the Court is whether their concurrent operation results in a conflict.

provinciale et de la loi fédérale indépendamment l'une de l'autre. L'article 22 de la *Loi 407* et l'art. 178 de la *LFI* ont été validement adoptés par leurs ordres de gouvernement respectifs. La seule question soumise à la Cour est de savoir si leur application concurrente engendre un conflit.

The operational conflict branch of the paramountcy test requires determining whether it is possible to apply the provincial law while complying with the federal law. Here, the purpose and the effect of s. 22(4) of the *407 Act* are to allow a creditor, ETR, to enforce the collection of toll debts, which in the context of this appeal constitutes a claim provable in bankruptcy. Pursuant to s. 178(2) of the *BIA*, creditors cease to be able to enforce their provable claims upon the bankrupt's discharge. ETR is faced with a clear prohibition under s. 178(2). Since s. 22(4) provides the creditor with an administrative enforcement scheme, it is impossible for ETR to use that remedy while also complying with s. 178(2). ETR's toll debt is not listed as an exemption under s. 178(1), and the resulting financial liability of the debtor cannot survive his or her discharge. As a result, the *407 Act* says "yes" to the enforcement of a provable claim, while s. 178(2) of the *BIA* says "no". Both laws cannot apply concurrently or operate side by side without conflict. The inconsistency is clear and definite. One law allows what the other precisely prohibits. This operational conflict offends the doctrine of federal paramountcy.

Le volet relatif au conflit d'application de l'analyse fondée sur la doctrine de la prépondérance exige que l'on détermine s'il est possible d'appliquer la loi provinciale tout en se conformant à la loi fédérale. En l'espèce, le par. 22(4) de la *Loi 407* a pour objet et pour effet de permettre à un créancier, ETR, de contraindre le débiteur à payer une dette de péage qui, dans le contexte du présent pourvoi, constitue une réclamation prouvable en matière de faillite. Selon le par. 178(2) de la *LFI*, les créanciers ne peuvent plus exiger le paiement de leurs réclamations prouvables quand le failli a été libéré. ETR est visée par une interdiction claire au par. 178(2). Puisque le par. 22(4) met à la disposition du créancier un mécanisme administratif de recouvrement, il est impossible pour ETR d'exercer ce recours tout en se conformant au par. 178(2). La créance de péage d'ETR ne fait pas partie des exceptions énumérées au par. 178(1), et la responsabilité financière du débiteur qui en découle ne peut survivre à la libération de ce dernier. Par conséquent, la *Loi 407* dit « oui » à l'exécution d'une réclamation prouvable, alors que le par. 178(2) de la *LFI* dit « non ». Les deux lois ne peuvent agir concurremment ou coexister sans conflit. L'incompatibilité est claire et précise. Une loi permet ce que l'autre interdit expressément. Ce conflit d'application est contraire à la doctrine de la prépondérance fédérale.

The language of s. 22(1) of the *407 Act* does not provide a possibility for there to be no operational conflict. Once notified, the Registrar has no choice but to refuse to validate the debtor's vehicle permits and no discretion to terminate the enforcement process. It is not valid to suggest that, to negate the operational conflict that exists here, the debtor can renounce his right under the *BIA* by paying the released debt or by accepting the debt collection mechanism and foregoing his right to a vehicle permit. This would be a situation of single compliance with one of the laws, and renunciation of the operation of the other law by one of the actors involved.

Le libellé du par. 22(1) de la *Loi 407* ne laisse pas une possibilité qu'il n'y ait pas de conflit d'application. Dès qu'il est avisé, le registrateur n'a d'autre choix que de refuser de valider les certificats d'immatriculation de véhicule du débiteur et n'a plus le pouvoir discrétionnaire de mettre fin à la procédure de recouvrement. Il n'est pas valable de prétendre que, pour annuler l'existence d'un conflit d'application en l'espèce, le débiteur peut renoncer au droit que lui confère la *LFI* en payant la dette dont il a été libéré ou en acceptant le mécanisme de recouvrement de créances et en renonçant à son droit à un certificat d'immatriculation. Il s'agirait d'un cas de respect simple d'une des lois, où un des acteurs en cause renonce à l'application de l'autre loi.

The operation of s. 22(4) also frustrates Parliament's purpose of providing discharged bankrupts with the ability to financially rehabilitate themselves. While the intent of s. 178(2) is that the debtor will no longer be encumbered by the burden of pre-bankruptcy indebtedness,

L'application du par. 22(4) entrave aussi la réalisation de l'objectif du Parlement de donner aux faillis libérés la possibilité de se réhabiliter financièrement. Alors que le par. 178(2) vise à délester pour toujours le débiteur du fardeau de l'endettement antérieur à la faillite, le

s. 22(4) allows ETR to continue burdening the discharged bankrupt until full payment of the debt. Had Parliament wished to exempt ETR's toll debt from the bankruptcy process, as well as from the consequences of a discharge, it would have done so expressly in s. 178(1). It did not.

par. 22(4) permet à ETR de continuer d'accabler le failli libéré jusqu'à ce qu'il rembourse entièrement la dette. Si le Parlement avait voulu soustraire la créance de péage d'ETR au processus de faillite et aux effets d'une libération, il l'aurait fait expressément au par. 178(1). Il ne l'a pas fait.

Per McLachlin C.J. and Côté J.: Section 22(1) of the *407 Act* allows Ontario to do indirectly what it is implicitly prohibited from doing under s. 178(2) of the *BIA*. This frustrates the federal purpose of financial rehabilitation that underlies s. 178(2) and is sufficient to trigger the application of the doctrine of federal paramountcy. However, there is no operational conflict. The relevant standard is impossibility of dual compliance and express conflict. In the present case, it is possible to comply with s. 22(1) without defying s. 178(2) in the literal sense of its words. The two laws have different contents and provide for different remedies. They can operate side by side without operational conflict, although there is a frustration of purpose. If a debtor chooses not to drive, the province cannot enforce its claim. If 407 ETR opts not to notify the Registrar, s. 22(4) does not apply. Dual compliance is not impossible.

La juge en chef McLachlin et la juge Côté : Le paragraphe 22(1) de la *Loi 407* autorise l'Ontario à faire indirectement ce que le par. 178(2) de la *LFI* lui interdit implicitement de faire. Cet article 22 entrave la réalisation de l'objet fédéral relatif à la réhabilitation financière que vise le par. 178(2), et cela suffit pour que s'applique la doctrine de la prépondérance fédérale. Toutefois, il n'existe pas de conflit opérationnel. La norme applicable est celle de l'impossibilité de se conformer aux deux textes de loi en raison d'un conflit exprès. En l'espèce, il est possible de se conformer au par. 22(1) sans enfreindre l'exigence littérale du par. 178(2). Les deux lois diffèrent de par leur contenu et par les recours qu'elles offrent. Elles peuvent coexister sans conflit opérationnel même s'il y a entrave à un objectif fédéral. Si un débiteur choisit de ne pas conduire, la province ne peut recouvrer sa créance. Si 407 ETR choisit de ne pas aviser le registrateur, le par. 22(4) ne s'applique pas. Le respect des deux textes de loi n'est pas impossible.

Cases Cited

Cited by Gascon J.

Referred to: *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327; *407 ETR Concession Co. v. Ontario (Registrar of Motor Vehicles)* (2005), 82 O.R. (3d) 703; *Schreyer v. Schreyer*, 2011 SCC 35, [2011] 2 S.C.R. 605; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53; *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161.

Cited by Côté J.

Referred to: *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327.

Jurisprudence

Citée par le juge Gascon

Arrêts mentionnés : *Alberta (Procureur général) c. Moloney*, 2015 CSC 51, [2015] 3 R.C.S. 327; *407 ETR Concession Co. c. Ontario (Registrar of Motor Vehicles)* (2005), 82 O.R. (3d) 703; *Schreyer c. Schreyer*, 2011 CSC 35, [2011] 2 R.C.S. 605; *Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *Marine Services International Ltd. c. Ryan (Succession)*, 2013 CSC 44, [2013] 3 R.C.S. 53; *Colombie-Britannique (Procureur général) c. Lafarge Canada Inc.*, 2007 CSC 23, [2007] 2 R.C.S. 86; *M & D Farm Ltd. c. Société du crédit agricole du Manitoba*, [1999] 2 R.C.S. 961; *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161.

Citée par la juge Côté

Arrêt mentionné : *Alberta (Procureur général) c. Moloney*, 2015 CSC 51, [2015] 3 R.C.S. 327.

Statutes and Regulations Cited

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 178.
Highway 407 Act, 1998, S.O. 1998, c. 28, ss. 1 "owner", 13(3), 15(1), 16(1), 22.
Highway Traffic Act, R.S.O. 1990, c. H.8, s. 51.

Lois et règlements cités

Code de la route, L.R.O. 1990, c. H.8, art. 51.
Loi de 1998 sur l'autoroute 407, L.O. 1998, c. 28, art. 1 « propriétaire », 13(3), 15(1), 16(1), 22.
Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3, art. 178.

APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Simmons and Pepall JJ.A.), 2013 ONCA 769, 314 O.A.C. 152, 118 O.R. (3d) 161, 369 D.L.R. (4th) 385, 7 C.B.R. (6th) 167, 53 M.V.R. (6th) 169, [2013] O.J. No. 5837 (QL), 2013 CarswellOnt 17670 (WL Can.), setting aside the decision of Newbould J., 2011 ONSC 6310, 30 M.V.R. (6th) 137, [2011] O.J. No. 6476 (QL), 2011 CarswellOnt 15701 (WL Can.), and restoring the initial order of the Registrar in Bankruptcy. Appeal dismissed.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Doherty, Simmons et Pepall), 2013 ONCA 769, 314 O.A.C. 152, 118 O.R. (3d) 161, 369 D.L.R. (4th) 385, 7 C.B.R. (6th) 167, 53 M.V.R. (6th) 169, [2013] O.J. No. 5837 (QL), 2013 CarswellOnt 17670 (WL Can.), qui a annulé la décision du juge Newbould, 2011 ONSC 6310, 30 M.V.R. (6th) 137, [2011] O.J. No. 6476 (QL), 2011 CarswellOnt 15701 (WL Can.), et rétabli l'ordonnance initiale du registraire des faillites. Pourvoi rejeté.

J. Thomas Curry, *Andrew Parley*, *Jon Laxer* and *Gregory William MacKenzie*, for the appellant.

J. Thomas Curry, *Andrew Parley*, *Jon Laxer* et *Gregory William MacKenzie*, pour l'appelante.

Peter Southey and *Michael Lema*, for the respondent.

Peter Southey et *Michael Lema*, pour l'intimé.

Josh Hunter and *Daniel Huffaker*, for the intervener the Attorney General of Ontario.

Josh Hunter et *Daniel Huffaker*, pour l'intervenant le procureur général de l'Ontario.

Alain Gingras, for the intervener the Attorney General of Quebec.

Alain Gingras, pour l'intervenante la procureure générale du Québec.

Richard M. Butler, for the intervener the Attorney General of British Columbia.

Richard M. Butler, pour l'intervenant le procureur général de la Colombie-Britannique.

Thomson Irvine, for the intervener the Attorney General for Saskatchewan.

Thomson Irvine, pour l'intervenant le procureur général de la Saskatchewan.

Lillian Riczu, for the intervener the Attorney General of Alberta.

Lillian Riczu, pour l'intervenant le procureur général de l'Alberta.

David Thompson and *Matthew G. Moloci*, for the interveners Michael Dow, Gwendolyn Miron and Peter Teolis.

David Thompson et *Matthew G. Moloci*, pour les intervenants Michael Dow, Gwendolyn Miron et Peter Teolis.

The judgment of Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon was delivered by

GASCON J. —

I. Introduction

[1] Like its companion case, *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, this appeal concerns an alleged conflict between overlapping federal and provincial laws. The question at issue is whether Ontario's *Highway 407 Act, 1998*, S.O. 1998, c. 28 ("*407 Act*"), which sets out a debt enforcement mechanism in favour of the private owner and operator of an open-access toll highway, conflicts with the federal *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which provides that a discharged bankrupt is released from all provable claims.

[2] For the reasons that follow, I find that, like in the companion appeal, the provincial law conflicts with the *BIA*. As a result, it offends the doctrine of federal paramountcy and is inoperative to the extent of the conflict.

II. Facts

[3] Highway 407 is an open-access private highway. The highway was privatized in 1999 and has since been operated by 407 ETR Concession Company Limited ("ETR"). The *407 Act* governs the operation of Highway 407. While Highway 407 is a toll highway, its use is unrestricted. ETR cannot prevent anyone from accessing the highway. There is an electronic system that reads licence plates at the points of entry onto and exit from the highway. Alternatively, highway users can lease a toll device, which is affixed to the vehicle and is read instead of the licence plates. This electronic system records all trips made on the highway. The toll amount is then calculated. A corresponding invoice is delivered to the person in whose name the licence plates for the vehicle are issued, or if there is a toll device, to the lessee of the device.

Version française du jugement des juges Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner et Gascon rendu par

LE JUGE GASCON —

I. Introduction

[1] À l'instar du dossier connexe *Alberta (Procureur général) c. Moloney*, 2015 CSC 51, [2015] 3 R.C.S. 327, le présent pourvoi concerne un conflit allégué entre deux lois fédérale et provinciale qui se chevauchent. La question en litige est de savoir si la *Loi de 1998 sur l'autoroute 407*, L.O. 1998, c. 28 (« *Loi 407* »), de l'Ontario, qui instaure un mécanisme de recouvrement de créances en faveur du propriétaire et exploitant privé d'une autoroute à péage ouverte au public, entre en conflit avec la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, c. B-3 (« *LFI* »), laquelle précise qu'un failli libéré l'est à l'égard de toute réclamation prouvable.

[2] Pour les motifs qui suivent, j'estime que, tout comme dans l'affaire connexe, la loi provinciale entre en conflit avec la *LFI*. Elle contrevient donc à la doctrine de la prépondérance fédérale et est inopérante dans la mesure du conflit.

II. Faits

[3] L'autoroute 407 est une autoroute privée ouverte au public. Privatisée en 1999, elle est exploitée par 407 ETR Concession Company Limited (« ETR »). Son exploitation est régie par la *Loi 407*. Bien que l'autoroute 407 soit une voie à péage, son utilisation ne fait l'objet d'aucune restriction. ETR ne peut empêcher qui que ce soit d'y avoir accès. Un système électronique lit les plaques d'immatriculation aux entrées et aux sorties de l'autoroute. Les utilisateurs de l'autoroute peuvent également louer un appareil à péage, qui est fixé au véhicule et lu au lieu de la plaque d'immatriculation. Ce système électronique enregistre tous les déplacements faits sur l'autoroute. Le montant du péage est alors calculé. Une facture indiquant la somme à payer est envoyée à la personne au nom de qui sont délivrées les plaques d'immatriculation du véhicule ou au locataire de l'appareil à péage si un tel appareil est fixé au véhicule.

takes the position that there is such a conflict, as s. 178(2) of the *BIA* prohibits the enforcement of provable claims after the bankrupt's discharge, while s. 22(4) of the *407 Act* allows ETR to enforce its provable claim despite the discharge. In her concurring reasons, my colleague Côté J. agrees with the Court of Appeal and the appellant. In the companion appeal, I explain why I disagree with her understanding of the application of this first branch of the paramountcy test in a situation like this one.

[24] In my view, the respondent is correct on this issue of operational conflict. Pursuant to s. 178(2) of the *BIA*, creditors cease to be able to enforce their provable claims upon the bankrupt's discharge: *Schreyer v. Schreyer*, 2011 SCC 35, [2011] 2 S.C.R. 605, at para. 21. As I indicate in the companion appeal, it is undisputed that a discharge under s. 178 of the *BIA* releases a debtor, thus preventing creditors from enforcing claims that are provable in bankruptcy. They are deemed to give up their right to enforce those claims. This includes both civil and administrative enforcement. In this case, ETR, the creditor, is faced with a clear prohibition under s. 178(2) of the *BIA*. It cannot enforce its provable claim, which has been released by an order of discharge. Since the debt collection mechanism put in place by s. 22(4) provides the creditor with an administrative enforcement scheme, it is impossible for ETR to use that remedy while also complying with s. 178(2): *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 72; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 46. Indeed, ETR's toll debt is not listed as an exemption under s. 178(1), and the resulting financial liability of the debtor cannot survive his or her discharge. As a result, the *407 Act* says "yes" to the enforcement of a provable claim, while s. 178(2) of the *BIA* says "no", such that the operation of the provincial law makes it impossible to comply with the federal law.

qu'il existe un tel conflit, puisque le par. 178(2) de la *LFI* interdit au créancier d'exiger le paiement des réclamations prouvables après la libération du failli, tandis que le par. 22(4) de la *Loi 407* permet à ETR d'exiger le paiement de sa réclamation prouvable malgré la libération. Dans ses motifs concordants, ma collègue la juge Côté se dit d'accord avec la Cour d'appel et l'appelante. Dans le pourvoi connexe, j'explique pourquoi je suis en désaccord avec sa compréhension du premier volet de l'analyse fondée sur la doctrine de la prépondérance dans une situation comme celle en l'espèce.

[24] À mon avis, l'intimé a raison sur la question du conflit d'application. Selon le par. 178(2) de la *LFI*, les créanciers ne peuvent plus exiger le paiement de leurs réclamations prouvables quand le failli a été libéré : *Schreyer c. Schreyer*, 2011 CSC 35, [2011] 2 R.C.S. 605, par. 21. Comme je l'indique dans le pourvoi connexe, nul ne conteste qu'une ordonnance de libération rendue aux termes de l'art. 178 de la *LFI* libère un débiteur et empêche les créanciers d'exécuter leurs réclamations prouvables en matière de faillite. Ils sont réputés renoncer à leur droit d'exiger le paiement de ces réclamations, tant en matière civile qu'en matière administrative. En l'espèce, ETR, le créancier, est visée par une interdiction claire au par. 178(2) de la *LFI*. Elle ne peut exiger le paiement de sa réclamation prouvable dont le failli a été libéré par une ordonnance de libération. Puisque le mécanisme de perception qu'établit le par. 22(4) met à la disposition du créancier un mécanisme administratif de recouvrement, il est impossible pour ETR d'exercer ce recours tout en se conformant au par. 178(2) : *Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3, par. 72; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, par. 46. En effet, la créance de péage d'ETR ne fait pas partie des exceptions énumérées au par. 178(1), et la responsabilité financière du débiteur qui en découle ne peut survivre à la libération de ce dernier. Par conséquent, la *Loi 407* dit « oui » à l'exécution d'une réclamation prouvable alors que le par. 178(2) de la *LFI* dit « non », si bien que l'application de la loi provinciale exclut toute possibilité de respecter la loi fédérale.

[25] In other words, while the provincial scheme has the effect of maintaining the debtor's liability beyond his or her discharge, the federal law expressly releases him or her from that same liability. Both laws cannot "apply concurrently" (*Western Bank*, at para. 72) or "operate side by side without conflict" (*Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53, at para. 76); a debtor cannot be found liable under the provincial law after having been released from that same liability under the federal law: *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86, at para. 82; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961, at para. 41; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191. I respectfully disagree with my colleague that this conflict is "indirect" or concerns something that is merely "implicitly" prohibited by s. 178(2) of the *BIA* (*Moloney*, para. 92), or that I am resorting to a broad interpretation of s. 178(2) in order to find that an operational conflict exists (para. 36). Under the federal law, the debt is not enforceable; under the provincial law, it is. The inconsistency is clear and definite. One law allows what the other precisely prohibits.

[26] In that regard, unlike my colleague, I do not believe that the language of s. 22(1) provides a possibility for there to be no operational conflict (para. 39). Once the Registrar is notified by ETR, as was the case on the facts on this appeal, s. 22(4) uses mandatory language ("shall"), such that the Registrar has no choice but to refuse to validate the debtor's vehicle permits. From that point in time, the Registrar is left with no discretion to terminate the enforcement process after, for instance, the debtor's discharge in bankruptcy. The Registrar is only required to reinstate the debtor's permits once notified that the debt is paid: ss. 22(6) and 22(7). To suggest that dual compliance with both laws remains possible if ETR declines to pursue its remedy under s. 22 of the *407 Act* would be to turn a blind eye to the factual reality of this case, on the basis of which it was argued. In addition, as I explain in the companion appeal, to suggest that an operational conflict can be avoided in circumstances in

[25] Autrement dit, alors que le régime provincial fait en sorte que l'obligation du débiteur survit à sa libération, la loi fédérale le libère expressément de cette même obligation. Les deux lois ne peuvent « agir concurremment » (*Banque canadienne de l'Ouest*, par. 72) ou « coexister sans conflit » (*Marine Services International Ltd. c. Ryan (Succession)*, 2013 CSC 44, [2013] 3 R.C.S. 53, par. 76); un débiteur ne peut être tenu responsable d'une dette selon la loi provinciale alors qu'il a été libéré de cette même responsabilité suivant la loi fédérale : *Colombie-Britannique (Procureur général) c. Lafarge Canada Inc.*, 2007 CSC 23, [2007] 2 R.C.S. 86, par. 82; *M & D Farm Ltd. c. Société du crédit agricole du Manitoba*, [1999] 2 R.C.S. 961, par. 41; *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, p. 191. Avec égards, je ne suis pas d'accord avec ma collègue pour dire que ce conflit est « indirect » ou qu'il concerne une mesure simplement interdite « implicitement » par le par. 178(2) de la *LFI* (*Moloney*, par. 92), ou que j'ai recours à une interprétation large de ce paragraphe pour conclure à l'existence d'un conflit d'application (par. 36). La loi fédérale interdit le recouvrement de la créance; la loi provinciale le permet. L'incompatibilité est claire et précise. Une loi permet ce que l'autre interdit précisément.

[26] À cet égard, je ne crois pas, contrairement à ma collègue, que le libellé du par. 22(1) laisse une possibilité qu'il n'y ait pas de conflit d'application (par. 39). Dès que le registrateur est avisé par ETR, comme il l'a été d'après les faits de l'espèce, l'obligation exprimée au par. 22(4) (par l'auxiliaire « *shall* » dans la version anglaise et par l'indicatif présent dans la version française) fait en sorte que le registrateur n'a d'autre choix que de refuser de valider les certificats d'immatriculation de véhicule du débiteur. À compter de ce moment, le registrateur n'a plus le pouvoir discrétionnaire de mettre fin à la procédure de recouvrement, par exemple après la libération de faillite du débiteur. Il n'est tenu de rétablir les certificats d'immatriculation du débiteur que s'il est avisé que la dette est payée : par. 22(6) et 22(7). Prétendre qu'il demeure possible pour une personne de se conformer aux deux lois si ETR s'abstient d'exercer le recours que lui offre l'art. 22 de la *Loi 407* reviendrait à fermer les yeux sur la