FORM 27
[RULES 6.3 AND 10.52(1)]

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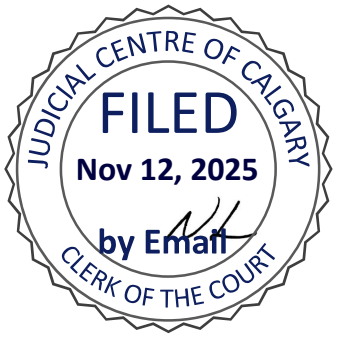

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COURT FILE NO.	25-3009380
COURT	COURT OF KING'S BENCH OF ALBERTA, IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	CALGARY
APPLICANT	IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, RSC 1985, C b-3 AS AMENDED AND IN THE MATTER OF THE BANKRUPTCY OF THE BANKRUPTCY OF 2585929 ALBERTA LTD.
DOCUMENT	**BRIEF OF LAW OF THE TRUSTEE**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BENNETT JONES LLP** Barristers and Solicitors 4500 Bankers Hall East, 855-2nd Street SW Calgary, Alberta T2P 4K7 Attention: Michael W. Selnes / Chyna Brown Telephone No.: 403-298-3311 / 3244 Fax No.: 403-265-7219 Client File No.: 07475.00049

Application Scheduled for November 19, 2025 at 3:00 pm
before The Honourable Justice B. Johnston in the Commercial List

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I. INTRODUCTION

1. This Brief of Law is filed in support of an application (the "**Application**") before the Court of King's Bench of Alberta (the "**Court**") by KSV Restructuring Inc. (the "**Trustee**") in its capacity as the Trustee in Bankruptcy of 2585929 Alberta Ltd. ("**ResidualCo**").

2. The Application is for, among other things, an order:

   (a) declaring service of the Application good and sufficient, and abridging the time for notice of the Application to the time actually given, if necessary;

   (b) declaring the Trustee's interpretation of paragraphs 5(e) and 11(e) of the reverse vesting order in this action dated April 19, 2024 (the "**RVO**") to be correct and directing the Trustee to administer ResidualCo's estate (the "**Estate**") in accordance with the Trustee's interpretation;

   (c) alternatively, amending paragraphs 5(e) and 11(e) as outlined below in the First Report;

   (d) declaring the TCP Analysis and the TCP Plan to be valid and directing the Trustee to implement the TCP Plan as defined and proposed in the First Report of the Trustee dated November 10, 2025 (the "**First Report**");

   (e) declaring the PUC Analysis and the PUC Plan to be valid and directing the Trustee to implement the PUC Plan as defined and proposed in the First Report;

   (f) approving the Trustee's proposed interim distributions of funds held and collected by the Trustee for the benefit of ResidualCo's stakeholders, and authorizing and directing the Trustee to make such distributions as proposed in the First Report,

   (g) approving the activities of the Trustee as reported in the First Report; and

   (h) such further and other relief as counsel may advise and this Court deems just.

3. Capitalized terms not otherwise defined herein have the meanings ascribed to them in the First Report.

II. FACTS

4. The facts relevant to the Application are set out in detail in the First Report.

III. ISSUES

5. The following issues are before the Court:

(a) Should the Court provide advice and direction to the Trustee:

(i) declaring the Trustee's interpretation of paragraphs 5(e) and 11(e) of RVO is correct or alternatively should the Court amend the RVO as requested;

(ii) declaring the TCP Analysis and TCP Plan to be valid and directing the Trustee to implement the TCP Plan;

(iii) declaring the PUC Analysis and PUC Plan to be valid and directing the Trustee to implement the TCP Plan;

(b) Should the Court approve the Trustee's proposed interim distributions of funds held and collected by the Trustee for the benefit of ResidualCo's stakeholders, including equity claimants, and authorizing and directing the Trustee to make such distributions as proposed in the First Report; and

(c) Should the Court approve the activities of the Trustee as reported in the First Report.

IV. LAW AND ANALYSIS

A. <u>This Court Should Provide the Trustee with Advice and Direction</u>

1. <u>Advice and Direction is Authorized and Warranted</u>

6. Pursuant to section 34 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "**BIA**"), a trustee may apply to this Court[1] for directions regarding any matter affecting the administration of a bankrupt's estate and this Court shall give in writing any

[1] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended [**BIA**], s 192(1)(d) and (j).

directions that it determines proper in the circumstances.[2] Where a trustee is unsure of the proper procedure to be followed when administering an estate, the trustee may seek the advice of the court through an application for directions.[3]

7. Applications for directions are available for a broad variety of matters, including the payment of taxes.[4] In *Trident*, Justice Neufeld held that:

> From time to time, the trustee or receiver may also seek approval to make interim distributions to creditors having provable claims and advice and direction regarding matters such as the validity of securities, the priorities among creditors and the interim or final distribution of estate proceeds.[5]

8. In this case there is a complex intersection of tax law and insolvency law and as a result, a potentially significant amount of taxes are likely owing for which the Trustee could be deemed liable if insufficient amounts are withheld and disbursed to the Canada Revenue Agency (the "**CRA**"). It is therefore fair and reasonable that the Trustee have this Court's oversight and direction prior to distributing funds to creditors and equity claimants. As outlined at paragraph 1.1.1(v) of the First Report, these include:

(a) the Second Interim Distribution to proven creditors who were not paid as part of the initial distribution on August 30, 2024;

(b) the Interest Distribution; and

(c) the Interim Equity Distribution.

(collectively the "**Interim Distributions**").

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[2] BIA, s 34(1).
[3] *Minden's Ltd, Re*, 1933 CarswellOnt 36, 14 CBR 395.
[4] *Weatherwax, Re*, 1940 CarswellOnt 63, 22 CBR 96.
[5] *Orphan Well Association v Trident Exploration Corp*, 2022 ABKB 839 at para 21.

2. The Trustee's Interpretation of the RVO is Correct

(a) Law Regarding Interpretation of Orders

9. The meaning of an order is determined by the court that issued it.[6] As Chief Justice Bauman explained, an order is not interpreted in a vacuum; rather, its meaning is discerned by examining the pleadings, the language of the order itself, and the circumstances in which it was granted. This ensures that the order is understood in the context of the proceeding that produced it.

10. In *Manseau & Perron Inc*,[7] Justice Brooker applied the same principles, affirming that interpretation turns on the order's text read alongside the materials and circumstances that informed its issuance. Reading the order in this integrated way supports the Trustee's position that the RVO should not be parsed narrowly or in isolation, but rather understood in light of the factual and procedural foundation presented to the Court.

11. Justice Renke in *Alberta Health Services v Alberta (Information and Privacy Commissioner)*[8] further held that a court order must be read as a whole, reconciling apparent inconsistencies where possible, giving effect to specific terms over general ones, and consulting extrinsic evidence only where genuine ambiguity exists. If the relevant provisions of the RVO cannot be harmonized on their face, the Court should look to the supporting materials and surrounding circumstances to resolve this ambiguity.

12. These principles are reinforced in the insolvency context. In insolvency proceedings, court orders should be interpreted by reading them as a whole, in the context of the pleadings, the arguments made by the parties, the factual and legal context in which the order was made, and the intention of the court that granted the order.[9]

13. Applying these authorities, the RVO must be interpreted by considering the materials that supported its granting; namely, the pleadings, affidavits, and Proposal Trustee reports, together with the order as a whole. Specific provisions should be given effect over general language, and the overall circumstances and purpose of the order must guide the analysis.

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[6] *Kakavelakis v Boutsakis*, 2017 BCCA 396 at paras 66-67 citing *Sutherland v Reeves*, 2014 BCCA 222 at para 31.
[7] *Manseau & Perron Inc v ThyssenKrupp Industrial Solutions (Canada) Inc*, 2018 ABQB 949.
[8] *McCarty v McCarty*, 2016 ABQB 91 at para 22 aff'd in *Alberta Health Services v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 263 at para 29.
[9] *Re Delta 9 Cannabis Inc*, 2024 ABKB 657 at para 54.

Where, as here, the provisions governing the RVO cannot be fully reconciled on their face, the resulting ambiguity triggers the Court's authority to consult the surrounding materials to discern the intended operation of the RVO.

14. This purposive and context-driven approach ensures that the RVO is applied in a manner consistent with the Court's intention and the objectives of the restructuring process. It also provides a principled basis for resolving ambiguities in the order.

(b) The Trustee's Interpretation is Correct

15. The Trustee's interpretation of paragraphs 5(e) and 11(e) of the RVO is correct[10]. As currently drafted, paragraph 11(e) provides only that the Distributable Proceeds "vest" in ResidualCo, without any characterization of the nature of those proceeds. Similarly, paragraph 5(e) provides that the shares in AMI Minerals Inc. (the "**AMI Shares**") are cancelled for no consideration.

16. The absence of express characterization of these amounts creates uncertainty under the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (the "**ITA**"), particularly if the receipt of the Distributable Proceeds were to be treated as income rather than proceeds of disposition. This uncertainty could result in tax inefficiency. If the Distributable Proceeds were characterized as a receipt on account of income, ResidualCo could be subject to full income taxation without the ability to offset any capital losses arising from the cancellation of the AMI Shares. Capital losses arising from the Share Cancellation would generally not be available to offset amounts characterized as income, potentially resulting in unnecessary taxation.

17. To address this issue and provide certainty for both ResidualCo and its stakeholders, the RVO should be interpreted to explicitly characterize the Distributable Proceeds as proceeds of disposition of the AMI Shares by reading the order as though the emphasized text was included in the RVO as follows:

(a) 5(e) – Each Equity Interest that is issued and outstanding immediately prior to the Closing Date, together with any agreement, contract, plan, indenture, deed, certificate, subscription rights, conversion rights, pre-emptive rights, options

[10] First Report of KSV Restructuring Inc as Trustee in Bankruptcy, filed November 10, 2025 [**First Bankruptcy Trustee Report**] [**TAB A**].

(including stock options or share purchase or equivalent plans), or other documents or instruments governing or having been created or granted in connection with the share capital of AMI shall be deemed terminated and cancelled for no consideration **other than any consideration received as proceeds of disposition for the cancellation of such shares pursuant to Paragraph 11(e) of the Order**, in accordance with and pursuant to the Reverse Vesting Order; [**Emphasis added**]

(b) 11(e) – AMI shall satisfy the amounts owing under the ResidualCo Notes … using the Purchase Price. … If the aggregate principal amount of the ResidualCo Notes is less than the Purchase Price then any remaining Purchase Price shall vest in ResidualCo **as proceeds of disposition for the cancellation of the AMI Shares**, to be administered by the Proposal Trustee (as trustee of ResidualCo) for the benefit of ResidualCo's creditors (which creditors arise from the assumption of the Transferred Liabilities). [**Emphasis added**]

18. As is evident from the plain language, the RVO contemplates a sequence of actions tied to the closing of the Transaction. However, the order does not expressly state certain outcomes that are implicit in the broader value-maximization strategy of the proceedings. Accordingly, the RVO must be interpreted in light of the pleadings, application materials, Trustee reports, and the overall intention of the Court to effect a value-maximizing restructuring. The Trustee's interpretation faithfully reflects this intended sequence and the effect of the Transaction, ensuring that recoveries for creditors are maximized while also preserving the potential for distributions to equity stakeholders where appropriate.

19. The evidentiary record demonstrates that this interpretation is consistent with the purpose and substance of the RVO.

20. In the Third Churchill Affidavit,[11] the affiant confirms that the Companies acted in good faith and with due diligence throughout the Proposal Proceedings to maximize value for all creditors and stakeholders. The Affidavit notes that procedural waivers were granted to make the sales and investment solicitation process more competitive, thereby enhancing

[11] Affidavit No. 3 of John David Churchill, filed February 27, 2024 [**Third Churchill Affidavit**] [**TAB B**].

recoveries.[12] It further confirms that the Companies conducted a robust, Court-approved process, which elicited the highest and best offer for the Companies' business.[13]

21. Similarly, the Application Approval of a Sale and Reverse Vesting Order[14] and corresponding Brief,[15] consistently emphasized that the requested relief and the RVO were necessary to effectuate the Transaction in a manner that maximized value for all stakeholders, including both creditors and shareholders.

22. The Proposal Trustee Reports further support this interpretation. The Third Trustee Report confirms that under the RVO structure, any remaining Purchase Price after satisfaction of the ResidualCo Notes vests in ResidualCo to be administered by the Proposal Trustee for the benefit of ResidualCo's creditors.[16] It further highlights that the Transaction, and the associated reverse vesting order structure, is beneficial for all stakeholders compared to a bankruptcy scenario, preserving employment, contractual relationships, corporate attributes, and key assets, thereby enhancing realizations for creditors and shareholders.[17] The Third Trustee Report also confirms that no stakeholder is expected to be worse off under this structure, with creditors anticipated to receive full distributions and shareholders receiving distributions in a manner rarely seen in insolvency proceedings.[18] Finally, it emphasizes the necessity of the RVO to ensure the Companies have sufficient capital to complete the Proposal Proceedings.[19]

23. The other Trustee Reports consistently reinforce that the overarching objective throughout the proceedings has been to maximize value for all creditors and stakeholders, providing a continuous evidentiary foundation supporting the Trustee's interpretation of the RVO.[20]

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[12] Third Churchill Affidavit at para 17 [**TAB B**].
[13] Third Churchill Affidavit at para 67 [**TAB B**].
[14] Application for Approval of a Sale and Reverse Vesting Order dated February 27, 2024 at para 42 [**TAB C**].
[15] Brief of the Applicants Approval of Sale and Reverse Vesting Order dated February 27, 2024 at paras 78, 80, and 82 [**TAB D**].
[16] Third Report of the Proposal Trustee February 29, 2024 at para 5.0(2)(h) [**Third Trustee Report**] [**TAB E**].
[17] Third Trustee Report at paras 5.0(4)(h)-(6) [**TAB E**].
[18] Third Trustee Report at para 5.0(5)(c) [**TAB E**].
[19] Third Trustee Report at para 7.0(1)(d) [**TAB E**].
[20] First Report of the Proposal Trustee December 8, 2023 at paras 1.0(2) and 8.0(1) [**TAB F**]; Second Report of the Proposal Trustee January 19, 2024 at para 5.0(1) [**TAB G**]; Fourth Report of the Proposal Trustee Aprill 15, 2024 at para 2.0(2)(b), 3.0(4)(e), and 5.0(1) [**TAB H**].

24. Other NOI proceedings documents,[21] confirm that the Transaction was intended to facilitate the closing of the Badger Transaction or the JMAC Backup Bid and to maximize recoveries for all stakeholders. These documents corroborate that the Companies acted in good faith throughout the Proposal Proceedings, and together, they demonstrate that the Trustee's interpretation of the Transaction aligns with the Court's intention and the substantive purpose of the order.

25. Paragraphs 5(e) and 11(e) must be interpreted in this context, with the understanding that the RVO was structured to achieve the Court's intended outcomes. The Trustee's interpretation is consistent with the substance of the order, the intention of the parties, and the overall objective of maximizing stakeholder recoveries. Accordingly, the Court should confirm that the Trustee's interpretation is correct.

26. If the Court does not grant the proposed amendments, the Trustee understands that up to $3,500,000.00[22] may be payable as taxes on account of the Distributable Proceeds being characterized as regular income rather than proceeds of disposition of AMI Shares.

(c) Alternatively, the RVO should be Amended

27. In the alternative, if the Court is not satisfied that the Trustee's interpretation of paragraphs 5(e) and 11(e) of the RVO is correct or fully resolves the uncertainties regarding the treatment of the Distributable Proceeds, the RVO should be amended to provide clarity and certainty with respect to Canadian income tax treatment.

28. While section 187(5) of the BIA confers a narrow and cautiously exercised power to "review, rescind or vary" orders made under the Court's bankruptcy jurisdiction,[23] courts have recognized that this jurisdiction extends to non-substantive clarifications that make an order accurately reflect the Court's intention, particularly in ongoing insolvency proceedings.[24]

29. The amendments proposed by the Trustee do not reopen the merits of the RVO. Rather, they clarify the language already adopted by the Court so that the RVO continues to function

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[21] Bench Brief of the Applicants: Approval of Settlement Agreement & Backup Bid dated April 8, 2024 at paras 3, 24-25, 41, 52, and 55 [**TAB I**]; Affidavit No. 5 of John David Churchill filed April 9, 2024 at paras 20 and 40 [**TAB J**].
[22] First Bankruptcy Trustee Report at para 5.1(6) [**TAB A**].
[23] BIA, s 185(5).
[24] *HOJ National Leasing Corp, Re*, 2008 ONCA 390, at paras 27-28 and 31-40; *Elias v Hutchinson*, 1981 ABCA 31, at para 31.

in accordance with its restructuring purpose and the Court's supervisory authority over its own orders. The clarifications sought fall squarely within the limited jurisdiction recognized under section 187(5).

30. The availability of non-substantive clarifications is also supported by a harmonious reading of the BIA and CCAA. In *AlphaBow Energy Ltd (Re)*, 2025 ABKB 550, the Court confirmed that, despite the finality of an RVO, the CCAA's broad remedial jurisdiction under section 11 permits amendments necessary to ensure that restructuring orders function as intended.[25] Read together with section 187(5) of the BIA, this supports the Court's limited but meaningful authority to issue clarifying variations to final orders, particularly where, as here, the amendments simply ensure that the RVO continues to reflect the Court's intention and facilitates the restructuring objectives.

31. To address this issue and provide certainty for both ResidualCo and its stakeholders, the Order should be amended to explicitly characterize the Distributable Proceeds as proceeds of disposition of the AMI Shares.

32. The proposed amendments are as follows:

(a) 5(e) – Each Equity Interest that is issued and outstanding immediately prior to the Closing Date, together with any agreement, contract, plan, indenture, deed, certificate, subscription rights, conversion rights, pre-emptive rights, options (including stock options or share purchase or equivalent plans), or other documents or instruments governing or having been created or granted in connection with the share capital of AMI shall be deemed terminated and cancelled for no consideration **other than any consideration received as proceeds of disposition for the cancellation of such shares pursuant to Paragraph 11(e) of the Order**, in accordance with and pursuant to the Reverse Vesting Order; [**Emphasis added**]

(b) 11(e) – AMI shall satisfy the amounts owing under the ResidualCo Notes … using the Purchase Price. … If the aggregate principal amount of the

[25] *AlphaBow Energy Ltd (Re)*, 2025 ABKB 550 at para 32-34.

> ResidualCo Notes is less than the Purchase Price then any remaining Purchase Price shall vest in ResidualCo **as proceeds of disposition for the cancellation of the AMI Shares**, to be administered by the Proposal Trustee (as trustee of ResidualCo) for the benefit of ResidualCo's creditors (which creditors arise from the assumption of the Transferred Liabilities). [**Emphasis added**]

33. These amendments do not create new obligations or rights; rather, they simply clarify the language already in the order thereby providing clarity regarding the tax characterization of the receipt of the Distributable Proceeds. This allows the Trustee, on behalf of ResidualCo, to determine and plan for its tax liabilities prior to making any Interim Equity Distribution to shareholders.

34. As noted above, if the Court does not grant the proposed amendments, the Trustee understands that up to $3,500,000.00 may be payable as taxes on account of the Distributable Proceeds being characterized as regular income rather than proceeds of disposition of AMI Shares.

35. Accordingly, the Trustee seeks an amendment to the RVO to provide certainty and consistency in the tax treatment of the Transaction, which is both reasonable and appropriate given the circumstances.

1. The TCP Analysis

(a) RVO Distribution

36. Under the RVO, the intended sequence of the Transaction is as follows: first, each common share of Athabasca Minerals Inc. ("**AMI Pub Co**") held by a shareholder (as defined above, each an **AMI Share**) is transferred to ResidualCo in exchange for one ResidualCo share (the "**Share Exchange**"); second, all AMI Shares are deemed cancelled for no consideration (the "**AMI Share Cancellation**"); third, certain liabilities of AMI Pub Co (the "**Transferred Liabilities**") are transferred to ResidualCo in consideration for the issuance of ResidualCo Notes (as defined in the RVO); fourth, AMI issues shares to Badger for cash consideration (the "**Cash Proceeds**"); fifth, a portion of the Cash Proceeds is used to fully satisfy the ResidualCo Notes, which are in turn used by ResidualCo to satisfy the Transferred Liabilities; and finally, the balance of the Cash Proceeds (the "**Distributable Proceeds**") vests in ResidualCo to be

administered for the benefit of ResidualCo's creditors (the "**Vesting of Distributable Proceeds**").[26]

(b) Taxable Canadian Property Summary

37. If the AMI Shares constituted "taxable Canadian property" for the purposes of the ITA ("**TCP**") at the time of the Share Exchange, then the Share Exchange would have given rise at the time of the Share Exchange to obligations for ResidualCo (as the acquirer of the AMI Shares) under section 116 of the ITA ("**Section 116 Obligations**") in respect of Shareholders that were not resident in Canada ("**Non-Resident Shareholders**").[27]

38. The AMI Shares will constitute TCP if at any time during the previous 60-month period more than 50% of the fair market value ("**FMV**") of the AMI Shares was derived, directly or indirectly, from any combination of: (i) real or immovable property situated in Canada; (ii) Canadian resources properties; (iii) timber resource properties; or (iv) options in respect of, or interests in, property described in any of (i) to (iii), whether or not the property exists.[28]

39. If the AMI Shares constituted TCP, then the shares of ResidualCo ("**ResidualCo Shares**") should also constitute TCP for 5 years following the Share Exchange.[29] However, notwithstanding the ResidualCo Shares could constitute TCP, the Interim Distributions should not give rise to Section 116 Obligations for ResidualCo (as the "acquirer" of the ResidualCo Shares) as the ResidualCo Shares should constitute "excluded property" for purposes of section 116.[30]

(c) The AMI Shares were TCP

40. The Trustee's valuator confirmed that as of December 31, 2021, which is the quarter-end date with the highest proportion of relevant Canadian real property assets relative to total assets, that approximately 61.9% of the AMI assets were Relevant Canadian Property (as defined in the valuator's report, generally being equivalent to an interest in/derived from Canadian real property). This exceeds the 50% threshold for a single point in time for the 60-

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[26] Transaction Approval and Reverse Vesting Order, filed April 19, 2024 [**TAB K**].
[27] *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 116 [**ITA**].
[28] ITA, s 248(1) "taxable Canadian property".
[29] For example, where the Share Exchange occurred pursuant to s 85.1, s 85.1(1) provides that where the shares so exchanged are TCP to the vendor (here, being AMI), the shares of the purchaser (here, being ResidualCo) so acquired by the vendor are deemed to be, at any time within 60-months after the exchange, TCP.
[30] ITA, s 116(6)(a).

month period preceding the Share Exchange meaning that for the purposes of the Transaction, the AMI Shares constituted TCP.[31]

41. As discussed in the First Report,[32] this creates a withholding and remittance obligation for ResidualCo on behalf of the Non-Resident Shareholders, equal to 25% of the value of the AMI Shares acquired from Non-Resident Shareholders.[33] In a non-bankruptcy scenario, the ITA normally requires this withholding to be paid and remitted to the Receiver General within 30 days after the end of the month in which the purchaser (being ResidualCo) acquired the AMI Shares.[34]

42. To efficiently manage these withholdings and to allow for the administration of the Estate, the Trustee seeks a declaration from this Court that the AMI Shares are TCP, that this TCP analysis (as defined in the First Report) is valid and direction to implement the TCP Plan as discussed below.

2. The TCP Plan

43. As noted in section 6.0 of the First Report, the Trustee has worked with its legal counsel to develop a plan to address the withholding and remittance obligations of ResidualCo under section 116 of the ITA for Non-Resident Shareholders.

44. The TCP Plan is designed to identify Non-Resident Shareholders, particularly those who hold their shares through the Canadian Depository for Securities (the "**CDS**"). Upon identification of the Non-Resident Shareholders, the TCP Plan then creates the mechanism to identify and withhold sufficient funds to cover TCP obligations and to allow for interim distributions to certain eligible equity claimants. The Trustee submits that the TCP Plan is fair and reasonable and ensures that sufficient funds will be held back from its proposed Interim Distributions to ensure that all TCP amounts can be identified and remitted.

45. The Trustee seeks a declaration from this Court that the TCP Plan, as identified in the First Report, is valid and directing the Trustee to implement the TCP Plan as presented without

[31] First Bankruptcy Trustee Report, TCP Valuation Report at Appendix D [**TAB A**].
[32] First Bankruptcy Trustee Report at para 5.2(3) [**TAB A**].
[33] ITA, s 116(5).
[34] ITA, s 116(5).

further obligations for voluntary disclosures under the ITA and upon the completion of which the Trustee shall have no further liability related to TCP obligations.

3. The PUC Analysis

46. As outlined in the First Report, the cancellation of the ResidualCo shares could give rise to deemed dividends under subsection 84(3) of the ITA to the extent that the amounts distributed exceed the paid-up capital ("**PUC**") of the ResidualCo Shares (a "**Deemed Dividend**).[35] Such a Deemed Dividend would give rise to dividend withholding obligations ("**Dividend WHT**") to ResidualCo (as "payer") in respect of Non-Resident Shareholders.[36]

47. Generally, the applicable Dividend WHT rate will be 25% (the "**General WHT Rate**") of the Non-Resident Shareholder's Dividend. However, if desired, the applicable rate may take into account the treaty entitlements of the particular Non-Resident Shareholder (if any) where applicable prescribed forms are obtained certifying their residency and eligibility for treaty benefits (the "**Reduced Treaty WHT Rate**")[37] – for example, we would expect that most U.S. Shareholders would be entitled to a Reduced Treaty WHT Rate of 15%.[38]

48. In order to determine whether a Deemed Dividend is payable by Non-Resident Shareholders, the PUC of the AMI Shares must be determined. The starting point for the calculation of PUC is the stated capital of the AMI Shares for corporate purposes.[39] That number is then reduced in certain circumstances, most notably where shares are issued as the purchase price for property where the sale is accomplished on a tax-deferred basis.

49. The Trustee's legal advisors have completed an analysis that is attached to the First Report (the "**PUC Analysis**"). The PUC Analysis found that there is a range of possible PUC between approximately $14,700,000 – most conservative estimate – and approximately $23,800,000 – least conservative estimate.

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[35] ITA, s 84(3)
[36] ITA, s 212(2).
[37] Where a non-resident person (*i.e.*, not a partnership or a hybrid entity), this would involve receiving Form NR301, Declaration of eligibility for benefits (reduced tax) under a tax treaty with a non-resident person. Where a partnership or a hybrid entity, Forms NR302 or NR303 should be received, respectively.
[38] See, for example, Art. X(2) of the Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital, signed at Washington, DC on September 26, 1980, as amended by the protocols signed on June 14, 1983, March 28, 1984, March 17, 1995, July 29, 1997, and September 21, 2007.
[39] ITA, s 89(1), "paid-up capital".

50. To determine if there is a Deemed Dividend, the assigned value of PUC is subtracted from the Distributed Proceeds. As identified by the Trustee, because the Interim Equity Distribution is $8,000,000, there is not currently a Deemed Dividend payable related to the Interim Equity Distribution. Consequently, there is no 25% withholding obligation by each Non-Resident Shareholder for distributions that are below the $14.7 million threshold (the "**PUC Analysis**"). If it is determined that withholdings are required for any future equity distributions the Trustee will make that determination, acting reasonably, and will notify the transfer agent of any required remittances.

51. To efficiently manage these withholdings and to allow for the administration of the Estate, the Trustee seeks a declaration from this Court that the PUC calculation and PUC Analysis outlined in the First Report are valid.

4. The PUC Plan

52. As outlined in the First Report subject to this Court declaring the PUC Analysis to be valid, the Trustee will not withhold any amounts on account of Non-Resident dividend withholding tax provided that the distributions in cancellation of ResidualCo Shares does not exceed $14.7 million. Should there be an amounts available for distribution in excess of $14.7 million, the Trustee, in its discretion, may withhold and remit such amounts on account of non-resident dividend withholding tax as it reasonably deems required or revert to the Court for further direction.

53. The Trustee seeks a declaration from this Court that the PUC Plan, as identified in the First Report, is valid and directing the Trustee to implement the PUC Plan as presented and upon the completion of which the Trustee shall have no further liability related to PUC obligations.

B. The Interim Distributions are Proper

1. The Remaining Untaxed Funds are Payable to Remaining Creditors and Equity Holders

54. This Court may make an interim distribution where it is satisfied that no creditors will be prejudiced and where there are sufficient holdbacks or reserves for unproven claims.[40] The

[40] *Nuance Pharma Ltd v Antibe Therapetics Inc*, 2025 ONSC 706 at para 23; *Maple Bank GmbH (Re)*, 2017 ONSC 2536 at para 34.

BIA specifically requires that sufficient holdbacks be retained where amounts may be owing under the ITA.[41]

55. Equity claims include a return of capital to shareholders.[42] In a bankruptcy, creditors are not entitled to a dividend in respect of an equity claim until all claims that are not equity claims have been satisfied.[43]

56. As reported by the Trustee, it has already fully distributed funds to 23 of the 26 claims submitted.[44] The Trustee has further finalized the amounts owing for the remaining three claims.[45] Therefore, any remaining funds are to be redistributed to shareholders of ResidualCo as equity claims (after the payment of interest to creditors as discussed below).

57. As noted by the Trustee, in acknowledgement of the potential tax liabilities identified in the First Report, the Trustee is holding back approximately $6,675,608 (the "**Holdback Funds**"), which will be retained by the Trustee until the following has occurred:

(a) filing of tax returns with the CRA and obtaining notices of assessments and payment of any tax obligations including penalties and interest, including remitting any withholding obligations for TCP and/or dividend withholding tax;

(b) payment of ongoing professional fees for Trustee and its advisors, including its legal counsel and ResidualCo's tax accountants; and

(c) the Trustee attending to its discharge pursuant to the BIA and as a final step payment of any remaining interest to creditors and all remaining amounts to equity claimants.

58. If this Court confirms that sufficient funds are included in the Holdback, there is no prejudice to any creditors, including the CRA, if the Trustee completes the Second Interim Distribution, the Interest Distribution, and the Interim Equity Distribution as outlined in the First Report. In contrast, if the Trustee must wait until all tax issues are completely resolved,

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[41] BIA, s 149(4).
[42] BIA, s 2 "equity claim".
[43] BIA, s 140.1.
[44] First Bankruptcy Trustee Report at para 4.0(4.1)(2) [**TAB A**].
[45] First Bankruptcy Trustee Report at para 4.0(4.2)(1) [**TAB A**].

it could result in significant further delay thereby prejudicing those equity shareholders who would otherwise receive an interim distribution for their equity claims.

59. In this instance, it is fair and reasonable to authorize and direct the Second Interim Distribution, the Interest Distribution, and the Interim Equity Distribution.

2. Interest is Payable to Creditors Prior to Equity Distribution

60. Section 143 of the BIA provides for where there is a surplus after payment of the claims as provided in sections 136 to 142, it shall be applied in payment of interest from the date of the bankruptcy at the rate of five percent per annum on all claims proved in the bankruptcy and according to their priority.[46]

61. Equity claims are payable pursuant to section 140.1, which was added to the BIA as a result of the amendments in 2009. Section 143 of the BIA was not modified at that time. In *Rizzo & Rizzo Shoes Ltd (Re)*,[47] the SCC held that it is presumed that the legislator does not intent absurd consequences and an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or it is incompatible with other provisions or with the object of the legislative enactment. Where there are competing plausible constructions, a statute should be interpreted in a way that avoids absurd results.[48]

62. Applying this principle, an interpretation of sections 140.1 and 143 that places equity claims within "the claims as provided by sections 136 to 142" would yield an absurd result. If equity claims are to be paid in priority to post-bankruptcy interest, it would effectively ensure that interest could never be paid to proven creditors under section 143.

63. This approach is consistent with *All Canadian Investment Corporation (Re)*,[49] where the Court held:

> Under the *BIA*, the creditors are entitled to be paid post-filing interest at 5% before any distribution to ACIC's preferred shareholders is made. [emphasis added]

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[46] BIA, s 143.
[47] *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27.
[48] *Blue Mountain Resorts Ltd v Bok*, 2013 ONCA 75 at para 43.
[49] *All Canadian Investment Corporation (Re)*, 2020 BCSC 1683 at para 12.

64. Based on the foregoing, this Court should confirm and direct that interest is payable at the prescribed rate to proven creditors in priority of distributions to equity claimants.

C. The Trustee's Activities Should be Approved

65. This Court may approve the activities of the Trustee as outlined in the First Report where it is satisfied that those activities were necessary for the administration of the Estate and consistent with the Trustee's duties and powers as authorized by this Court and the BIA[50].

66. In this case, the Trustee has worked diligently to administer the Estate and to ensure a proper resolution of the tax issues potentially arising as a result of the successful sales process that generated a 100% distribution to all creditors and a large distribution to equity shareholders. The determination of the tax issues was necessary for the proper administration of ResidualCo's Estate, required the assistance of sophisticated tax and accounting professionals, and all actions taken to date are consistent with the Trustee's duties and powers pursuant to the BIA.

67. There is no known opposition to the Trustee's activities as outlined in the First Report, all of which have been completed under the monitoring of sophisticated Inspectors, and it is fair and reasonable to approve those activities.

V. CONCLUSION

68. For the reasons set out above, the Trustee requests that this Honourable Court grant the relief requested in the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 10th day of November, 2025.

Estimated Time for
Argument: 60 minutes

BENNETT JONES LLP

Per: 

Michael Selnes and Chyna Brown
Counsel for the Applicant,
KSV Restructuring Inc. in its Capacity as
the Trustee of 2585929 Alberta Ltd.

[50] *Re Proex Logistics*, 2025 ONSC 51, at para 40.

VI. TABLE OF AUTHORITIES

1. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended.

2. *Minden's Ltd, Re*, 1933 CarswellOnt 36, 14 CBR 395.

3. *Weatherwax, Re*, 1940 CarswellOnt 63, 22 CBR 96.

4. *Orphan Well Association v Trident Exploration Corp*, 2022 ABKB 839.

5. *Kakavelakis v Boutsakis*, 2017 BCCA 396.

6. *Sutherland v Reeves*, 2014 BCCA 222.

7. *Manseau & Perron Inc v ThyssenKrupp Industrial Solutions (Canada) Inc*, 2018 ABQB 949.

8. *McCarty v McCarty*, 2016 ABQB 91.

9. *Alberta Health Services v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 263.

10. *Re Delta 9 Cannabis Inc*, 2024 ABKB 657.

11. *HOJ National Leasing Corp, Re*, 2008 ONCA 390.

12. *Elias v Hutchinson*, 1981 ABCA 31.

13. *AlphaBow Energy Ltd (Re)*, 2025 ABKB 550.

14. *Income Tax Act*, RSC 1985, c 1 (5th Supp).

15. *Nuance Pharma Ltd v Antibe Therapetics Inc*, 2025 ONSC 706.

16. *Maple Bank GmbH (Re)*, 2017 ONSC 2536.

17. *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27.

18. *Blue Mountain Resorts Ltd v Bok*, 2013 ONCA 75.

19. *All Canadian Investment Corporation (Re)*, 2020 BCSC 1683.

20. *Re Proex Logistics*, 2025 ONSC 51.

VII. COMPENDIUM OF DOCUMENTS

A. First Report of KSV Restructuring Inc as Trustee in Bankruptcy, filed November 10, 2025.

B. Affidavit No. 3 of John David Churchill, filed February 27, 2024.

C. Application for Approval of a Sale and Reverse Vesting Order dated February 27, 2024.

D. Brief of the Applicants Approval of Sale and Reverse Vesting Order dated February 27, 2024.

E. Third Report of the Proposal Trustee February 29, 2024.

F. First Report of the Proposal Trustee December 8, 2023.

G. Second Report of the Proposal Trustee January 19, 2024.

H. Fourth Report of the Proposal Trustee Aprill 15, 2024.

I. Bench Brief of the Applicants: Approval of Settlement Agreement & Backup Bid dated April 8, 2024.

J. Affidavit No. 5 of John David Churchill filed April 9, 2024.

K. Transaction Approval and Reverse Vesting Order, filed April 19, 2024.

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

L.R.C. (1985), ch. B-3

Current to October 14, 2025

Last amended on December 12, 2024

À jour au 14 octobre 2025

Dernière modification le 12 décembre 2024

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

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

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

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

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); (*réclamation relative à des capitaux propres*)

equity interest means

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

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

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

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

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

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

(c) a futures agreement or a futures account; (*garantie financière*)

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

failli Personne qui a fait une cession ou contre laquelle a été rendue une ordonnance de faillite. Peut aussi s'entendre de la situation juridique d'une telle personne. (*bankrupt*)

faillite L'état de faillite ou le fait de devenir en faillite. (*bankruptcy*)

fiducie de revenu Fiducie qui possède un actif au Canada et dont les parts sont inscrites à une bourse de valeurs mobilières visée par les Règles générales à la date de l'ouverture de la faillite, ou sont détenues en majorité par une fiducie dont les parts sont inscrites à une telle bourse à cette date. (*income trust*)

garantie financière S'il est assujetti soit à un intérêt ou, dans la province de Québec, à un droit garantissant le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible, soit à un accord de transfert de titres pour obtention de crédit, l'un ou l'autre des éléments suivants :

a) les sommes en espèces et les équivalents de trésorerie — notamment les effets négociables et dépôts à vue;

b) les titres, comptes de titres, droits intermédiés et droits d'acquérir des titres;

c) les contrats à terme ou comptes de contrats à terme. (*financial collateral*)

huissier-exécutant Shérif, huissier ou autre personne chargée de l'exécution d'un bref ou autre procédure sous l'autorité de la présente loi ou de toute autre loi, ou de toute autre procédure relative aux biens du débiteur. (*sheriff*)

intérêt relatif à des capitaux propres

a) S'agissant d'une personne morale autre qu'une fiducie de revenu, action de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle action et ne provenant pas de la conversion d'une dette convertible;

b) s'agissant d'une fiducie de revenu, part de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle part et ne provenant pas de la conversion d'une dette convertible. (*equity interest*)

localité En parlant d'un débiteur, le lieu principal où, selon le cas :

a) il a exercé ses activités au cours de l'année précédant l'ouverture de sa faillite;

Trustee not obliged to carry on business

32 The trustee is not under obligation to carry on the business of the bankrupt where in his opinion the realizable value of the property of the bankrupt is insufficient to protect him fully against possible loss occasioned by so doing and the creditors or inspectors, on demand made by the trustee, neglect or refuse to secure him against such possible loss.

R.S., c. B-3, s. 15.

Le syndic n'est pas tenu de poursuivre le commerce

32 Le syndic n'est pas tenu de continuer le commerce du failli s'il est d'avis que la valeur réalisable des biens est insuffisante pour le protéger complètement contre la possibilité de pertes occasionnées par la continuation du commerce, et si les créanciers ou les inspecteurs, sur demande faite par le syndic, négligent ou refusent de lui donner des garanties contre la possibilité de pareilles pertes.

S.R., ch. B-3, art. 15.

Reimbursement only of trustee's disbursement advances

33 The court may make an order providing for the sale of any or all of the assets of the estate of the bankrupt, either by tender, private sale or public auction, setting out the terms and conditions of the sale and directing that the proceeds from the sale are to be used for the purpose of reimbursing the trustee in respect of any costs that may be owing to the trustee or of any moneys the trustee may have advanced as disbursements for the benefit of the estate.

R.S., 1985, c. B-3, s. 33; 2005, c. 47, s. 25.

Remboursement des avances du syndic

33 Le tribunal peut rendre une ordonnance visant la vente de la totalité ou d'une partie des avoirs de l'actif du failli, soit par soumission, vente de gré à gré ou enchère publique. Cette ordonnance énonce les conditions de la vente et prescrit que le produit de celle-ci soit utilisé afin de rembourser le syndic de tous frais qui peuvent lui être dus ou de toutes sommes d'argent qu'il peut avoir avancées à titre de débours dans l'intérêt de l'actif.

L.R. (1985), ch. B-3, art. 33; 2005, ch. 47, art. 25.

Trustee may apply to court for directions

34 (1) A trustee may apply to the court for directions in relation to any matter affecting the administration of the estate of a bankrupt and the court shall give in writing such directions, if any, as to it appear proper in the circumstances.

Le syndic peut demander des instructions au tribunal

34 (1) Un syndic peut demander au tribunal des instructions relativement à toute question touchant l'administration de l'actif d'un failli, et le tribunal donne par écrit les instructions, s'il en est, qui peuvent être appropriées aux circonstances.

To report to court after three years

(2) Where an estate has not been fully administered within three years after the bankruptcy, the trustee shall, if requested to do so by the Superintendent, report that fact to the court as soon as practicable thereafter, and the court shall make such order as it considers fit to expedite the administration.

Rapport au tribunal après trois ans

(2) Lorsque l'administration d'un actif n'est pas terminée dans les trois ans qui suivent la faillite, le syndic, si le surintendant lui en fait la demande, présente au tribunal dans les meilleurs délais un rapport à cet effet, et le tribunal rend l'ordonnance qu'il juge opportune aux fins de hâter la liquidation.

Notice to Superintendent's division office

(3) The trustee must send notice to the Superintendent's division office of the day and time when any application for directions made under subsection (1) is to be heard and of the day and time when the trustee intends to report to the court as required by the Superintendent under subsection (2).

R.S., 1985, c. B-3, s. 34; 1992, c. 27, s. 12; 2005, c. 47, s. 26.

Envoi au bureau de la division

(3) Le syndic envoie au bureau de la division un avis de la date et de l'heure de l'audition de la demande d'instructions visée au paragraphe (1) et de la présentation du rapport visé au paragraphe (2).

L.R. (1985), ch. B-3, art. 34; 1992, ch. 27, art. 12; 2005, ch. 47, art. 26.

Redirection of mail

35 (1) Subject to subsection (2), the trustee may, by sending to the Canada Post Corporation

(a) a notice in the prescribed form, and

Réexpédition du courrier

35 (1) Sous réserve du paragraphe (2), le syndic peut, par avis donné à la Société canadienne des postes en la forme prescrite et remise d'une copie du certificat de nomination du syndic, demander qu'on fasse parvenir à lui-même ou à toute personne qu'il désigne le courrier

Postponement of claims of silent partners

139 Where a lender advances money to a borrower engaged or about to engage in trade or business under a contract with the borrower that the lender shall receive a rate of interest varying with the profits or shall receive a share of the profits arising from carrying on the trade or business, and the borrower subsequently becomes bankrupt, the lender of the money is not entitled to recover anything in respect of the loan until the claims of all other creditors of the borrower have been satisfied.

R.S., c. B-3, s. 110.

Renvoi des réclamations d'un bailleur de fonds

139 Lorsqu'un prêteur avance de l'argent à un emprunteur, engagé ou sur le point de s'engager dans un commerce ou une entreprise, aux termes d'un contrat, passé avec l'emprunteur, en vertu duquel le prêteur doit recevoir un taux d'intérêt variant selon les profits ou recevoir une partie des profits provenant de la conduite du commerce ou de l'entreprise, et que subséquemment l'emprunteur devient failli, le prêteur n'a droit à aucun recouvrement du chef d'un pareil prêt jusqu'à ce que les réclamations de tous les autres créanciers de l'emprunteur aient été acquittées.

S.R., ch. B-3, art. 110.

Postponement of wage claims of officers and directors

140 Where a corporation becomes bankrupt, no officer or director thereof is entitled to have his claim preferred as provided by section 136 in respect of wages, salary, commission or compensation for work done or services rendered to the corporation in any capacity.

R.S., c. B-3, s. 111.

Renvoi des réclamations pour gages des dirigeants et administrateurs

140 Dans le cas où une personne morale devient en faillite, aucun dirigeant ou administrateur de celle-ci n'a droit à la priorité de réclamation prévue par l'article 136 à l'égard de tout salaire, traitement, commission ou rémunération pour travail exécuté ou services rendus à cette personne morale à quelque titre que ce soit.

S.R., ch. B-3, art. 111.

Postponement of equity claims

140.1 A creditor is not entitled to a dividend in respect of an equity claim until all claims that are not equity claims have been satisfied.

2005, c. 47, s. 90; 2007, c. 36, s. 49.

Réclamations relatives à des capitaux propres

140.1 Le créancier qui a une réclamation relative à des capitaux propres n'a pas droit à un dividende à cet égard avant que toutes les réclamations qui ne sont pas des réclamations relatives à des capitaux propres aient été satisfaites.

2005, ch. 47, art. 90; 2007, ch. 36, art. 49.

Claims generally payable rateably

141 Subject to this Act, all claims proved in a bankruptcy shall be paid rateably.

R.S., c. B-3, s. 112.

Réclamations généralement payables au prorata

141 Sous réserve des autres dispositions de la présente loi, toutes les réclamations établies dans la faillite sont acquittées au prorata.

S.R., ch. B-3, art. 112.

Partners and separate properties

142 (1) Where partners become bankrupt, their joint property shall be applicable in the first instance in payment of their joint debts, and the separate property of each partner shall be applicable in the first instance in payment of his separate debts.

Associés et biens distincts

142 (1) Dans le cas où des associés deviennent en faillite, leurs biens communs sont applicables en premier lieu au paiement de leurs dettes communes, et les biens distincts de chaque associé sont applicables en premier lieu au paiement de ses dettes distinctes.

Surplus of separate properties

(2) Where there is a surplus of the separate properties of the partners, it shall be dealt with as part of the joint property.

Surplus des biens distincts

(2) Lorsqu'il existe un surplus des biens distincts, il en est disposé comme partie des biens communs.

Surplus of joint properties

(3) Where there is a surplus of the joint property of the partners, it shall be dealt with as part of the respective

Surplus des biens communs

(3) Lorsqu'il existe un surplus des biens communs, il en est disposé comme partie des biens distincts respectifs en

separate properties in proportion to the right and interest of each partner in the joint property.

Different properties

(4) Where a bankrupt owes or owed debts both individually and as a member of one or more partnerships, the claims shall rank first on the property of the individual or partnership by which the debts they represent were contracted and shall only rank on the other estate or estates after all the creditors of the other estate or estates have been paid in full.

Costs out of joint and separate properties

(5) Where the joint property of any bankrupt partnership is insufficient to defray any costs properly incurred, the trustee may pay such costs as cannot be paid out of the joint property out of the separate property of the bankrupts or one or more of them in such proportion as he may determine, with the consent of the inspectors of the estates out of which the payment is intended to be made, or, if the inspectors withhold or refuse their consent, with the approval of the court.

R.S., c. B-3, s. 113.

Interest from date of bankruptcy

143 Where there is a surplus after payment of the claims as provided in sections 136 to 142, it shall be applied in payment of interest from the date of the bankruptcy at the rate of five per cent per annum on all claims proved in the bankruptcy and according to their priority.

R.S., c. B-3, s. 114.

Right of bankrupt to surplus

144 The bankrupt, or the legal personal representative or heirs of a deceased bankrupt, is entitled to any surplus remaining after payment in full of the bankrupt's creditors with interest as provided by this Act and of the costs, charges and expenses of the bankruptcy proceedings.

R.S., 1985, c. B-3, s. 144; 2004, c. 25, s. 71.

Proceeds of liability insurance policy on motor vehicles

145 Nothing in this Act affects the right afforded by provincial statute of any person who has a claim against the bankrupt for damages on account of injury to or death of any person, or injury to property, occasioned by a motor vehicle, or on account of injury to property being carried in or on a motor vehicle, to have the proceeds of

proportion du droit et de l'intérêt de chaque associé dans les biens communs.

Actifs différents

(4) Lorsque le failli a ou a eu des dettes, à la fois à titre individuel et comme membre d'une ou de plusieurs sociétés de personnes, les réclamations prennent rang d'abord contre les biens du particulier ou de la société de personnes, par qui ont été contractées les dettes que représentent ces réclamations, et ne peuvent prendre rang contre l'autre ou les autres actifs qu'après que tous les créanciers de cet autre ou de ces autres actifs ont été intégralement payés.

Les frais sont acquittés sur les biens indivis et les biens distincts

(5) Lorsque l'actif commun d'une société de personnes en faillite est insuffisant à payer les frais régulièrement subis, le syndic peut payer les frais, qui ne peuvent être acquittés sur les biens communs, sur les biens distincts de ces faillis, ou de l'un ou de plusieurs d'entre eux, selon telle proportion qu'il peut déterminer, avec le consentement des inspecteurs des actifs sur lesquels il a l'intention de faire tel paiement, ou, si ces inspecteurs négligent de donner ou refusent leur consentement, alors avec l'approbation du tribunal.

S.R., ch. B-3, art. 113.

Intérêts à compter de la date de la faillite

143 Lorsqu'il existe un surplus après le paiement des réclamations, ainsi qu'il est prévu aux articles 136 à 142, ce surplus est appliqué au paiement des intérêts à partir de la date de la faillite, au taux de cinq pour cent par an sur toutes les réclamations établies dans la faillite, selon leur priorité.

S.R., ch. B-3, art. 114.

Droit du failli au surplus

144 Le failli, les héritiers ou le représentant légal personnel d'un failli décédé, ont droit de recevoir tout surplus qui reste après paiement en entier de ses créanciers, avec l'intérêt prescrit par la présente loi, et après qu'ont été acquittés les frais, charges et dépens des procédures de faillite.

L.R. (1985), ch. B-3, art. 144; 2004, ch. 25, art. 71.

Produit de l'assurance-garantie sur véhicule automobile

145 La présente loi n'a pas pour effet de porter atteinte au droit, conféré par une loi provinciale, d'une personne qui a une réclamation contre le failli pour dommages-intérêts par suite de blessures causées à une personne ou du décès d'une personne, ou par suite d'un dommage à un bien, occasionné par un véhicule automobile, ou par

the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, if the sum

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

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

(d) the *Excise Tax Act*;

(e) the *Excise Act, 2001*;

(f) the *Customs Act*;

(g) the *Air Travellers Security Charge Act*;

(h) the *Underused Housing Tax Act*; **[2022, c. 10, s. 173]**

(i) the *Select Luxury Items Tax Act*; **[2022, c. 10, s. 173]**

(j) the *Digital Services Tax Act*; and

(k) the *Global Minimum Tax Act*.

c) toute loi provinciale dont l'objet est semblable à celui de la *Loi de l'impôt sur le revenu*, ou qui renvoie à cette loi, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle somme :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale a institué un régime provincial de pensions au sens de ce paragraphe;

d) la *Loi sur la taxe d'accise*;

e) la *Loi de 2001 sur l'accise*;

f) la *Loi sur les douanes*;

g) la *Loi sur le droit pour la sécurité des passagers du transport aérien*;

h) la *Loi sur la taxe sur les logements sous-utilisés*; **[2022, ch. 10, art. 173]**

i) la *Loi sur la taxe sur certains biens de luxe*; **[2022, ch. 10, art. 173]**

j) la *Loi sur la taxe sur les services numériques*;

k) la *Loi sur l'impôt minimum mondial*.

No dividend allowed

(4) Unless the trustee retains sufficient funds to provide for payment of any claims that may be filed under legislation referred to in subsection (3), no dividend is to be declared until the expiry of three months after the trustee has filed all returns that the trustee is required to file.

R.S., 1985, c. B-3, s. 149; 1992, c. 1, s. 20; 1997, c. 12, s. 91; 2005, c. 47, s. 92; 2007, c. 36, s. 51; 2009, c. 33, s. 26; 2022, c. 5, s. 12; 2022, c. 10, s. 137; 2022, c. 10, s. 173; 2024, c. 15, s. 99; 2024, c. 17, s. 83; 2024, c. 17, s. 111.

Aucun dividende

(4) À moins que le syndic ne retienne des fonds suffisants pour pourvoir au paiement de toute réclamation qui peut être produite sous l'autorité des textes législatifs visés au paragraphe (3), aucun dividende ne peut être déclaré avant l'expiration des trois mois suivant le dépôt par le syndic de toutes les déclarations à déposer.

L.R. (1985), ch. B-3, art. 149; 1992, ch. 1, art. 20; 1997, ch. 12, art. 91; 2005, ch. 47, art. 92; 2007, ch. 36, art. 51; 2009, ch. 33, art. 26; 2022, ch. 5, art. 12; 2022, ch. 10, art. 137; 2022, ch. 10, art. 173; 2024, ch. 15, art. 99; 2024, ch. 17, art. 83; 2024, ch. 17, art. 111.

Right of creditor who has not proved claim before declaration of dividend

150 A creditor who has not proved his claim before the declaration of any dividend is entitled on proof of his claim to be paid, out of any money for the time being in the hands of the trustee, any dividend or dividends he may have failed to receive before that money is applied to

Droit d'un créancier qui n'a pas prouvé sa réclamation avant la déclaration du dividende

150 Un créancier qui n'a pas prouvé sa réclamation avant la déclaration d'un dividende a droit, sur preuve de cette réclamation, au paiement, sur tout montant d'argent qui se trouve alors entre les mains du syndic, d'un ou de plusieurs dividendes qu'il n'a pas reçus, avant

condition, and any judge so authorized shall be deemed a judge or registrar, as the case may be, of the court having jurisdiction in bankruptcy, and references to the court, to the judge of the court or to the registrar apply to that district, county or other judge according to the terms of his authority.

R.S., c. B-3, s. 156.

réserve de toute restriction ou condition; tout juge ainsi autorisé est réputé un juge ou un registraire, selon le cas, du tribunal exerçant juridiction en matière de faillite; lorsque mention est faite du tribunal, du juge du tribunal ou du registraire, cette mention s'applique à ce juge de district, de comté ou autre, dans la mesure de son autorité.

S.R., ch. B-3, art. 156.

Authority of the Courts

Seal of court

187 (1) Every court shall have a seal describing the court, and judicial notice shall be taken of the seal and of the signature of the judge or registrar of the court in all legal proceedings.

Court not subject to be restrained

(2) The courts are not subject to be restrained in the execution of their powers under this Act by the order of any other court.

Power of judge in chambers

(3) Subject to this Act and to the General Rules, the judge of a court may exercise in chambers the whole or any part of his jurisdiction.

Periodical sittings

(4) Periodical sittings for the transaction of the business of courts shall be held at such times and places and at such intervals as the court directs.

Court may review, etc.

(5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

Enforcement of orders

(6) Every order of a court may be enforced as if it were a judgment of the court.

Transfer of proceedings to another division

(7) The court, on satisfactory proof that the affairs of the bankrupt can be more economically administered within another bankruptcy district or division, or for other sufficient cause, may by order transfer any proceedings under this Act that are pending before it to another bankruptcy district or division.

Trial of issue, etc.

(8) The court may direct any issue to be tried or inquiry to be made by any judge or officer of any of the courts of

Autorité des tribunaux

Sceau du tribunal

187 (1) Tout tribunal doit avoir un sceau le désignant; le sceau et la signature du juge ou du registraire de ce tribunal sont admis d'office dans toutes les procédures judiciaires.

Les tribunaux ne sont soumis à aucune restriction

(2) Dans l'exercice des pouvoirs que leur confère la présente loi, les tribunaux ne sont soumis à aucune restriction provenant d'une ordonnance d'un autre tribunal.

Pouvoir du juge en chambre

(3) Sous réserve des autres dispositions de la présente loi et des Règles générales, le juge d'un tribunal peut exercer en chambre la totalité ou partie de sa juridiction.

Sessions périodiques

(4) Des sessions périodiques pour l'expédition des affaires des tribunaux sont tenues aux dates, heures, lieux et intervalles que prescrit chacun de ces tribunaux.

Le tribunal peut réviser, etc.

(5) Tout tribunal peut réviser, rescinder ou modifier toute ordonnance qu'il a rendue en vertu de sa juridiction en matière de faillite.

Exécution d'ordonnances

(6) Toute ordonnance du tribunal peut être exécutée comme si elle était un jugement du tribunal.

Renvoi dans une autre division

(7) Sur preuve satisfaisante que les affaires du failli peuvent être administrées d'une manière plus économique dans un autre district ou dans une autre division de faillite, ou pour un autre motif suffisant, le tribunal peut, par ordonnance, renvoyer des procédures, que prévoit la présente loi et qui sont pendantes devant lui, à un autre district ou à une autre division de faillite.

Instruction des causes, etc.

(8) Le tribunal peut ordonner l'instruction de tout litige ou la tenue de toute enquête par un juge ou fonctionnaire

office of that person as a true copy of a document found among the records in his control or possession is evidence of the contents of those documents.

R.S., c. B-3, s. 160.

conforme, ou par un successeur en fonctions d'une telle personne, comme étant une copie conforme d'un document trouvé dans les archives dont il a la garde ou la possession, constitue la preuve du contenu de ces documents.

S.R., ch. B-3, art. 160.

Death of bankrupt, witness, etc.

191 In case of the death of the bankrupt or the spouse or common-law partner of a bankrupt or of a witness, whose evidence has been received by any court in any proceedings under this Act, the deposition of the deceased person, purporting to be sealed with the seal of the court, or a copy thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to.

R.S., 1985, c. B-3, s. 191; R.S., 1985, c. 31 (1st Supp.), s. 76(E); 2000, c. 12, s. 19.

Décès du failli, d'un témoin, etc.

191 En cas de décès du failli, de l'époux ou conjoint de fait d'un failli ou d'un témoin dont la déposition a été reçue par un tribunal dans des procédures intentées sous le régime de la présente loi, la déposition de la personne ainsi décédée, paraissant avoir été scellée du sceau du tribunal, ou une copie de cette déposition paraissant avoir été ainsi scellée, est admissible comme preuve des dépositions qui y sont faites.

L.R. (1985), ch. B-3, art. 191; L.R. (1985), ch. 31 (1er suppl.), art. 76(A); 2000, ch. 12, art. 19.

Powers of Registrar

Powers of registrar

192 (1) The registrars of the courts have power and jurisdiction, without limiting the powers otherwise conferred by this Act or the General Rules,

(a) to hear bankruptcy applications and to make bankruptcy orders if they are not opposed;

(b) to hold examinations of bankrupts or other persons;

(c) to grant orders of discharge;

(d) to approve proposals where they are not opposed;

(e) to make interim orders in cases of urgency;

(f) to hear and determine any unopposed or *ex parte* application;

(g) to summon and examine the bankrupt or any person known or suspected to have in his possession property of the bankrupt, or to be indebted to him, or capable of giving information respecting the bankrupt, his dealings or property;

(h) to hear and determine matters relating to proofs of claims whether or not opposed;

(i) to tax or fix costs and to pass accounts;

(j) to hear and determine any matter with the consent of all parties;

Pouvoirs du registraire

Pouvoirs du registraire

192 (1) Les registraires des divers tribunaux possèdent les pouvoirs et la juridiction, sans restriction des pouvoirs que confèrent autrement la présente loi ou les Règles générales :

a) d'entendre des requêtes en faillite et de rendre des ordonnances de faillite, lorsqu'elles ne sont pas contestées;

b) d'interroger des faillis ou d'autres personnes;

c) de rendre les ordonnances de libération;

d) d'approuver des propositions concordataires, lorsqu'elles ne sont pas contestées;

e) de rendre des ordonnances provisoires dans les cas d'urgence;

f) d'entendre et de décider toute demande non contestée ou *ex parte*;

g) de sommer et d'interroger le failli ou toute personne connue comme ayant en sa possession ou soupçonnée d'avoir en sa possession des biens du failli ou de lui être endettée, ou d'être en état de donner des renseignements concernant le failli, ses opérations ou ses biens;

h) d'entendre et de décider les demandes relatives à des preuves de réclamations, qu'elles soient contestées ou non;

TAB 2

1933 CarswellOnt 36
Ontario Supreme Court, In Bankruptcy

Minden's Ltd., Re

1933 CarswellOnt 36, 14 C.B.R. 395

In re Minden's Limited

Ex parte Sapera Brothers Limited

Sedgewick, J.

Judgment: January 31, 1933

Counsel: *H. S. Rosenberg*, for Sapera Brothers Limited, a creditor.
J. W. Pickup, and *S. J. Birnbaum*, for the trustee.
J. M. Bullen, for the trustee in its personal capacity.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts
Related Abridgment Classifications
Bankruptcy and insolvency
XIV Administration of estate
XIV.4 Sale of assets
Headnote
Bankruptcy --- Administration of estate — Sale of assets — Fraudulent sale by trustee — Sale to spouse of bankrupt
Assets of Debtor — Business Continued, to Receive Offer from Debtor — Offer Received from Wife of Large Shareholder of Debtor — Interim Injunction Restraining Acceptance — Other Offers — Inspectors — Trial of Issue — Injunction Continued Restraining Acceptance of Wife's Offer — Directions to Trustee.
A receiving order was made against the debtor company in December, 1932, and on January 9, 1933, the trustee was elected and inspectors appointed. The voting control of the meeting was in hands friendly to the debtor company or to Louis Minden, the substantial if not the sole owner of the shares of the debtor company. A resolution was passed at the creditors' meeting authorizing the trustee to keep the business going for about twenty-four hours to allow the debtor company to make an offer. R. J. Sapera, a representative of Sapera Brothers Limited, a creditor, was present at the meeting. At the inspectors' meeting an offer was brought in from Anna Minden, wife of Louis Minden. Mr. Sapera, although later excluded from the meeting as not being entitled to be present, for a time was present at the meeting of the inspectors and objected to the acceptance of the offer. The first offer of Anna Minden was withdrawn and another made, in which she agreed to pay all costs, all preferred claims, and to pay ordinary creditors eight cents on the dollar. No opportunity was given to others to tender. It was known to some of the inspectors that Louis Minden, about the day the petition for receiving order was filed, had offered the Montreal creditors fifteen cents on the dollar of their claims, which was refused. The inspectors, by resolution, authorized the acceptance of Anna Minden's second offer, subject to the receipt of a guarantee from Louis Minden and upon receipt of such guarantee, the delivery up of possession of the assets to the purchaser. The guarantee received the following morning was not in form satisfactory to the trustee, but before anything further was done, Sapera Brothers Limited obtained an interim injunction, later continued till the trial of an issue, restraining the acceptance and completion of the offer, and January 23, 1933, was appointed for the trial. On continuing the injunction to the trial, the Court recommended that tenders should be asked for. The trustee and inspectors met to consider the tenders which the Court had recommended should be called for, the deposit cheque, on the inspectors' direction, having been returned to Anna Minden. Louis Minden was a new tenderer. The inspectors on January 19, 1933, met and decided to accept Louis Minden's offer, although it appeared it was an offer which was changed after the inspectors had met to consider the tenders that were in. On this date the matter again came before the Court and an interim injunction was granted.

On January 23, 1933, the trial of the issue was not proceeded with, as it was considered the Anna Minden offer was out of the way. On January 27, 1933, the trustee asked for directions, having received a letter from the solicitor for Anna Minden claiming that she was entitled to have her purchase completed. The Court ordered the trial of the issue originally directed as to Anna Minden's claim.
On the trial of the issue, the Court held there was no acceptance of the Anna Minden offer, and that in the circumstances and as their instructions from the creditors dealt only with an offer by the debtor company, the inspectors should be restrained from accepting the offer.
The trustee asked for directions as to how it should proceed respecting the offers in its hands. The Court expressed the view, although not attempting to fetter honest discretion in the matter, that it would be advisable to give any persons who had already tendered an opportunity to put in new tenders.

***Sedgewick, J.*:**

1 Sapera Brothers Limited were creditors of Minden's Limited, against which a receiving order was made in the latter part of December, 1932. Canadian Credit Men's Trust Association was appointed custodian and the meeting of creditors to elect a trustee and inspectors was held on January 9, 1933.

2 It was apparent to anyone attending the meeting of creditors that the voting control of the meeting was in the hands of friends of the debtor, or perhaps rather friends of Louis Minden, who was the substantial, if not the sole, owner of the shares of the debtor, and was, to all intents and purposes, except as to legal liability, the debtor. Mr. R. J. Sapera, a representative of the applicants, Sapera Brothers Limited, was present at the meeting. After the trustee and inspectors were elected, a resolution was passed authorizing the trustee to keep the business going for about twenty-four hours to allow the debtor to make an offer. As a matter of fact, the only offer that the debtor could make would be a proposal for an extension or for a composition. The inspectors met in the afternoon of January 9, the creditors' meeting having been held in the morning. Mr. Sapera and his counsel, Mr. Rosenberg, were present at the beginning of the inspectors' meeting. After some discussion, an offer was brought in from Anna Minden, the wife of Louis Minden. Mr. Sapera strongly objected to the acceptance of the offer. Just what occurred does not appear, but at any rate an inspector called attention of the trustee's representative to the presence of Mr. Sapera and Mr. Rosenberg; certainly they were not entitled to be at the meeting, and they were then excluded. After that the inspectors dealt further with Mr. Louis Minden and Mr. Pearlstein, his solicitor.

3 The first offer put in, in the name of Anna Minden, was withdrawn and another offer made which was in a form which I took occasion to pass some strictures on in the case of *In re Hyatt* (1933), 13 C.B.R. 263 ; that is, an offer in which the purchaser agrees to pay all costs, pay all preferred claims, and to pay the ordinary creditors a certain sum on the dollar of their proved claims. In this case the amount offered was eight cents on the dollar. There was no suggestion that anyone else should be asked to tender; no opportunity was given to others to tender. Of course, that was impossible if the Anna Minden offer was to be accepted on that day.

4 A question as to an asset of $8,600 was raised at the meeting. The custodian had put this sum in as an asset. The inspectors took the explanation of Mr. Louis Minden as to whether the sum in question was an asset or not. Mr. Louis Minden was the person who would have to pay the amount if the amount in question was an asset of the company. The custodian had, in preparing the statement, gone over the accounts receivable and, with the assistance of the bookkeeper of the debtor and after such investigation as he could make as to the accounts which were real live accounts, he allocated the receivables into good, bad and doubtful. Mr. Louis Minden, however, before making the affidavit proving the statement of affairs of the company, as president of the company, put a great many of the accounts allocated as good and doubtful into doubtful and bad, with the result that he showed outstanding receivables of approximately $14,000, as being worth $3,750, which was the amount of the bank's claim against the company secured by assignment of receivables.

5 It was known to the inspectors, except perhaps Mr. Muir, and it apparently was mentioned at the meeting of inspectors, that on December 27, about the day on which the petition for a receiving order was filed, Mr. Louis Minden and Mr. Pearlstein, in Montreal, offered the Montreal creditors fifteen cents on the dollar of their claims, and certainly Mr. Nagley knew that this offer was refused by all of the Montreal creditors at the meeting.

6 In this situation the inspectors passed a resolution authorizing the trustee to accept Anna Minden's second offer, subject to receiving a guarantee of payment by Louis Minden and that, upon receiving such guarantee, the trustee was to deliver up possession of the assets to the purchaser. On the following morning the trustee received a form of guarantee from Louis Minden, which the trustee's representative said was not in satisfactory form, and the trustee did not accept the offer. Before anything further was done, Sapera Brothers Limited moved for an interim injunction to restrain the acceptance and completion of the offer. I gave an interim injunction which, at a later date, namely, Friday, January 13, 1933, in the presence of counsel for Sapera Brothers Limited, and for the trustee, and for Anna Minden, I continued till the trial of an issue, and I appointed Monday, January 23, as the date for the trial of the issue.

7 At the time of continuing the injunction to the trial, I recommended to the trustee that tenders should be asked for. It was stated to the Court that the effect of my order would be the withdrawal of the Anna Minden offer.

8 The matter next came before me on Thursday, January 19. It appeared then that the Anna Minden offer was out of the way, and the trustee and inspectors had met to consider the tenders which I had recommended, as above mentioned, should be called for. I must say that I had no notion that these tenders would be dealt with before the date of the trial of the issue; but, apparently, the inspectors took the position that the Anna Minden offer was out of the way. Her deposit cheque had been returned by the trustee on the direction of the inspectors, and Louis Minden, who was the guarantor for payment of her tender, was a new tenderer for the assets.

9 On Thursday, January 19, the inspectors met and had decided to accept an offer made by Louis Minden, and apparently that was an offer which was changed after the inspectors had met to consider the tenders that were in. An opportunity was apparently not given to other tenderers to amend their tenders. I thereupon gave an interim injunction returnable the following morning, and on that morning, after some discussion, I adjourned the matter until January 23, and on the 23rd I was ready for the trial of the issue; but at that time everyone seemed to consider the Anna Minden offer was out of the way and that no issue need be tried. There was some discussion about how the inspectors should deal with the offers before them, but that is not important at the present time.

10 Nothing more happened until Friday, January 27, when counsel for the trustee appeared and asked for the direction of the Court in view of a letter written by the solicitor for Anna Minden claiming that Anna Minden was entitled to have her purchase carried out. Counsel for Sapera Brothers Limited and for Anna Minden were present at the hearing, and I then directed that the matter stand over until Monday, January 30 and I would then try the issue originally directed as to Anna Minden's claim. That issue came on for trial on January 30 and 31.

11 I am satisfied, on the evidence, that the trustee did not accept the Anna Minden offer. The only possible ground for finding any acceptance would be that there was a delivery of possession to an agent of the purchaser. I heard the evidence on that point, and I am satisfied that there was no such delivery by any person having authority by virtue of anything he did to bind the trustee and inspectors. In any event, if there was any such delivery, there was a delivery back of possession by the representative of Anna Minden the next day.

12 I am also satisfied that, in the circumstances existing at the time of the first meeting of inspectors, the inspectors ought not to have accepted the offer of Anna Minden. They could not reasonably come to the conclusion that they were instructed to do so by the meeting of creditors, which only dealt with an offer by the debtor. They knew that they were elected by Minden proxies; they accepted explanations given by Louis Minden as being sufficient to satisfy them that an asset of $8,600 was not an asset; they knew that any sale to the Mindens would be against the wishes of a substantial body of creditors; they knew that Louis Minden had offered fifteen cents on the dollar of claims less than two weeks before; and, while I acquit Mr. McIntosh and Mr. Muir of any intention to do anything wrong (I believe them to have been doing what they thought to be the best thing to be done), and while I believe that the trustee had no notion or intention of favouring the Mindens at the expense of any creditor, yet I think a sale to Anna Minden at that time and in those circumstances could not stand. It seems to me that the inspectors, Muir and McIntosh at least, were misdirecting themselves as to their duties and responsibilities in the circumstances

then existing. Nagley was not called to give evidence. I should think that he would have a good deal more to explain as to his conduct than McIntosh and Muir.

13 Mr. Liebman gave evidence, but I could not find from his evidence that he was exercising any discretion at all; he was simply agreeing with the others.

14 I must, therefore, find that the injunction was properly given and that the proceedings taken by Sapera Brothers Limited were justified and that they are entitled to their costs out of the estate.

15 The trustee has asked for the direction of the Court as to how it shall proceed with respect to the offers now in its hands. I do not think I need to give any direction, except to say that, in my judgment, it would be advisable to give any persons who have previously tendered an opportunity to put in new tenders. There is one tender now which is open until Thursday of this week and which is apparently the best tender yet received. It is proper to remark, however, that this tender was received after the time for receiving tenders had expired, and, I fancy, after this tenderer knew what was in the other offers; and that is why I make the suggestion that those who have already tendered might be given another chance. It may be, however, that there is not time for this or that the inspectors are satisfied that it is of no use. I am not attempting to fetter their honest discretion in the matter.

16 The trustee, of course, will be entitled to its costs out of the estate.

TAB 3

1940 CarswellOnt 63
Ontario Supreme Court, In Bankruptcy

Weatherwax, Re

1940 CarswellOnt 63, 22 C.B.R. 96

In re Andrew Weatherwax

Urquhart J.

Judgment: October 28, 1940

Counsel: *J. D. F. Ross*, for the trustee.
G. A. Gale, for the Town of Orillia.
Alex. Forbes, for Shields, purchaser of assets.
C. G. French, for Mrs. Weatherwax, wife of the debtor.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
X Priorities of claims
X.3 Claims for municipal taxes and public utilities rates
Equity
III Equitable doctrines
III.6 Marshalling
Headnote
Bankruptcy --- Priorities of claims — Claims for municipal taxes and public utilities rates — Preferred claims — Entitlement to preferred status
Bankruptcy --- Priorities of claims — Claims for municipal taxes and public utilities rates — Preferred claims — Entitlement to preferential lien
Bankruptcy --- Priorities of claims — Claims for municipal taxes and public utilities rates
Equity --- Equitable doctrines — Marshalling
Municipal Taxes — Property Sold by Debtor but Assessment Continued in Debtor's Name — No Appeal from Assessment — Whether Estate Liable for Taxes — Whether Claim for Taxes Preferred or Ordinary — Directions — Subrogation — The Assessment Act, R.S.O. 1937, Ch. 272, Secs. 74, 99, 114(11) — The Bankruptcy Act, Secs. 42, 125, 9 C.B.R. 111, 261.
The debtor had been the owner for many years prior to 1935 of property in the Town of Orillia where he carried on business. On January 21, 1935 the debtor conveyed the property to one Mulligan and received back an agreement for sale which was assigned on January 18, 1936 by the debtor to his wife. The property in question was a business block of stores, offices and apartments and included one store occupied by the debtor. Under the agreement the debtor was to manage the property and he continued to occupy his store as usual. Although notices of assessment were given to the debtor in all the years including 1940, no appeal from the assessments was taken by the debtor. The insurance was carried in the debtor's name. On May 2, 1940 the debtor made an authorized assignment. On May 6, 1940 the municipal tax bills were sent out for the year 1940 and were payable on or before June 14, 1940. On May 21, 1940 notice under sec. 114(11) of *The Assessment Act* was served on the trustee for land taxes for part of the year 1938, for the year 1939 and for the year 1940.
A motion for directions was brought by the trustee respecting the claim submitted by the Town of Orillia for $1,832.68 for land taxes and claiming the right to be paid therefor in full from the proceeds of the sale of assets of the debtor. It was argued on behalf of the trustee that as the debtor had not been the owner of the property at the time of the making of the assessments for the years in question or at the time when the taxes fell due that the estate was not liable. It was also argued that the assessor had failed in his duty.

Held that where a former owner properly assessed disposes of the property, and allows himself for his own purpose to continue to be assessed without appeal, he is personally liable for the land taxes. In the present instance the debtor would have been personally liable to pay the taxes in question, and this obligation was now a liability of the estate.
[*In re Partridge Rubber Co.* (1928), 10 C.B.R. 42, 3 Can. Abr. 731, 946 or Abr. Bkcy. Cas. 583, 798; *Stamford v. Davidson*, [1936] O.W.N. 43, 1936 Can. Abr. 1027 and *North Bay v. Gordon*, [1934] O.R. 376 referred to].
Held, further, that where the right to distrain is not available to a municipality at the date of the commencement of the bankruptcy, sec. 114(11) of *The Assessment Act* cannot assist the municipality. In the present instance with respect to the land taxes for the year 1940, the municipality is an ordinary creditor only, the right to distrain for these taxes not having been available to the municipality at the date mentioned. However with respect to the land taxes for the years 1938 and 1939 the right to distrain was available to the municipality, and by virtue of service of the notice under sec. 114(11) of *The Assessment Act* the municipality is a preferred creditor. The same consideration would prevail with respect to the business taxes.
[*In re General Fireproofing Co. of Can.*, 18 C.B.R. 159, [1937] S.C.R. 150, 1937 Can. Abr. 59, and *In re D. W. McIntosh* (1940), 21 C.B.R. 245, referred to].
Directions were given accordingly, and having regard to the facts certain further directions were given as to subrogation of the trustee to the rights of the municipality with respect to the matter.

***Urquhart J.*:**

1 Application by Mark McLeod Tew, the trustee in bankruptcy of the debtor, under sec. 42 of *The Bankruptcy Act* [9 C.B.R. 111], a section which permits the trustee at any time to apply to the Court for directions in relation to any matter affecting the administration of the estate, for directions in regard to the claim submitted to the said trustee by the Town of Orillia for land taxes amounting to $1,832.68, which amount was claimed by the town in full from the proceeds of the sale of assets of the said Andrew Weatherwax; and for an order directing the trustee as to the course that should be adopted with respect to the said claim.

2 Weatherwax, who carried on business at Orillia, made an authorized assignment in bankruptcy on May 2, 1940. The present trustee was appointed at a meeting held on May 15, 1940.

3 On or about May 6, 1940, the Town of Orillia sent out the bills for the taxes, which were due in 1940 and payable on or before June 14, 1940. By sec. 318 of *The Municipal Act*, R.S.O. 1937, ch. 266, however, taxes are due on January 1 of the year in which they are payable.

4 Weatherwax was assessed in respect of the property, but the assessment, I understand, does not show whether he is assessed as owner or tenant. He was merely assessed.

5 On May 21, 1940, the tax collector and treasurer of the Town of Orillia served upon the trustee a notice given in pursuance of the provisions of sec. 114(11) of *The Assessment Act*, R.S.O. 1937, ch. 272, claiming the following sums as land taxes: for part of the year 1938, including interest and penalties, $371.86; for the year 1939, including interest and penalties, $767.89; for the year 1940, not including interest and penalties, $692.93, total $1,832.68; and certain business taxes for the years 1939 and 1940, amounting to $152.30, and made up of 1939 taxes $79.38, 1940 taxes $72.92, about which the parties allege that there is no dispute.

6 The debtor, prior to 1935, had been for many years the owner of the business block for which he was assessed for the three years in question herein, and, of course, he would be rightly assessed for the years prior to 1935. On January 21, 1935, the debtor conveyed the property to one James Mulligan (who was not represented on the motion) and he received back an agreement for sale to secure a loan by Mulligan of $18,500, which loan was used to pay off a number of existing encumbrances. The agreement of sale has now been paid down to approximately $15,000, principal payments having been made monthly. The property is a block of store buildings in the Town of Orillia on the south side of Mississauga Street, and included one store occupied by the debtor for his own business premises as a merchant. There were also in the same block other stores and certain offices and residential apartments which were rented to other people.

7 The agreement from Mulligan to Weatherwax was not registered. In 1935 the assessor made his rounds, but, no doubt observing no change in existing conditions, he assessed the block as usual to the debtor. This assessment was correct because either under the agreement for sale Weatherwax would be the equitable owner of the block and therefore properly assessed as owner, or the situation would be that the deed to Mulligan and the agreement back operated as an implied mortgage from the debtor to Mulligan. In either case the debtor was the actual owner subject to the interest of Mulligan for repayment of the moneys due under the agreement for sale, and he and not Mulligan would be properly assessed in 1935.

8 On January 18, 1936, Weatherwax, the debtor, executed an assignment of his agreement for sale with Mulligan in favour of his wife. This assignment vests in Mrs. Weatherwax all the interest of the debtor in the agreement with Mulligan, and Mrs. Weatherwax agreed to pay and discharge all moneys due to Mulligan.

9 I am advised that the agreement further stipulated that Weatherwax was to manage the building and the tenancies thereof at a reasonable salary later to be agreed upon and adjusted. This assignment of agreement was not registered, and so when the assessor made his rounds in 1936 there was again apparently no outward change of conditions and Weatherwax was again assessed for the whole block. He continued to occupy his store in the usual way and carry on his business as usual, so that there would be nothing to put the assessor on his guard that there had been any change in conditions or circumstances surrounding the ownership of the property.

10 There was no further disposition of the property by either the debtor or his wife until April, 1939, when a part of the southerly part was conveyed to an independent person by Mulligan for the purpose of building a theatre. In this conveyance both Weatherwax and his wife joined to release their interest. The offer to purchase, I am advised, was originally entered into and signed by the debtor himself.

11 Not only was the building assessed in the intervening years and in 1940 to the debtor, but insurance was and has been carried in his name. Although notices of assessment were always given to the debtor in all the years, including the year 1939, he never at any time appealed to the Court of Revision to have the assessment rectified and the property assessed in the name of his wife, the proper owner who should have been assessed therefor, nor did the debtor ever appeal against the said assessments.

12 On or about June 15, 1940, a neighbour, Richard A. Shields, agreed to purchase the assets of the business for $3,500. Mrs. Weatherwax says that Shields' purchasing of the business was procured through the efforts of the debtor.

13 The trustee now comes into Court and strenuously argues through counsel that as the debtor did not own the property at the time the assessments were made, or at the time in which the taxes fell due, he is not liable for taxes.

14 The question of the liability for taxes of an owner who was once assessed and who has parted with the property and continues to allow himself to be assessed without appealing to the Court of Revision, and allowing the assessment roll to be confirmed, presents a very difficult problem.

15 In his argument the trustee alleges that the assessor failed in his duty in not ascertaining the true state of affairs. However, I do not see how the assessor can be blamed in a case of this sort. In 1935, Weatherwax under the conditions I have described above, was properly assessed as owner. There was nothing since 1935 put upon the register at the Registry Office which would indicate to anybody making a search that there had been any change. Also there was nothing from outside appearances in any subsequent year which would indicate to the assessor any change of conditions and thus put him on his guard. The debtor continued to manage the property; he continued to carry on his business in the same store as he had for many years; he had in the previous year not protested or appealed against the assessment; so that it seems to me that the assessor would be justified in assuming that there had been no actual change, and therefore he would be justified in continuing the assessment as before without any further inquiry. I presume he would consider it a superfluous task to inquire about what was obvious and about what had been allowed to stand unchallenged by Mr. Weatherwax. There would be nothing to arouse his suspicions that I can see, and I cannot find any fault on his part which would in any way affect the assessment.

16 It may be that the debtor had some purpose in continuing the assessment in the manner in which he did. Possibly his wife has money and he might not have wanted her separate estate to be the subject of attack by suit if the taxes were not paid. That this is more than probable is the fact that, as hereinafter appears, she had a substantial interest in the property and also claims as a creditor of the estate for arrears of rent.

17 I am of opinion that where a former owner properly assessed disposes of the property and allows himself for his own purpose to continue to be assessed without appeal, he is personally liable for the land taxes: *In re Partridge Rubber Co.* (1928), 10 C.B.R. 42, 3 Can. Abr. 731, 946.

18 In that case the debtor company allowed itself for several years to be assessed in respect of lots which lay alongside the company's property and actually belonged to one of the shareholders. There was some indefinite understanding that the shareholder would sell to the company if the company wished to have the lots. The lots were assessed to the debtor company as owners with the knowledge of the president, and, in fact, the company paid taxes for three or four years on same. It was not discovered until after the bankruptcy that the company was not the registered owner, and it was proved, as in the present case, that notices were delivered to the debtor and the debtor did not appeal. Fisher J., at p. 43, refers to sec. 73 of *The Assessment Act*, and says that the plain meaning of this section is that "notwithstanding any defect or error and whether the assessment was legal or illegal the roll as finally passed is binding (see *Foster v. Tp. of St. Joseph* (1917), 39 O.L.R. 114, 22 Can. Abr. 1006)".

19 There is, however, a decision which appears to be to the contrary, namely, that of J. A. McEvoy J., in *Tp. of Stamford v. Davidson*, [1936] O.W.N. 43, 1936 Can. Abr. 1027. In that case an action was brought by the township to recover from two executors of a former owner then deceased, and from one of them personally, three years' taxes on lands which had been once owned by the deceased in his lifetime. The lands in question had been assessed in the name of the individual defendant personally during the years in question and not in the name of the executors, although the lands had for several years been owned by and registered in the name of the defendant executors. The defendants contended that the assessment against the individual defendant was null and void and that as the executors had not been assessed as owners they were not liable for payment of taxes, and McEvoy J. gave effect to that contention on the ground that the liability for payment of taxes under sec. 97 (now sec. 99 of *The Assessment Act*, R.S.O. 1937, ch. 272), is only upon the owner or tenant originally assessed therefor, and that notwithstanding sec. 73 (now sec. 74) the municipality has no right of action against any person, although assessed, who is not the owner of the lands. This case is quite different from the *Partridge* case in that a person who had had no ownership in the land at any time was assessed and therefore he could not be brought under the term "owner or tenant originally assessed therefor". Also, the *Partridge* case apparently was not cited to McEvoy J., and I believe that if the two do actually come into conflict, the former should be followed.

20 For the trustee, counsel also cited a case in the Court of Appeal, *City of North Bay v. Gordon*, [1934] O.R. 376, in which case several persons having adjoining lots of land placed the management and sale of them in the hands of an agent and the latter for convenience called the whole property "The Broadview Syndicate" and through some negligence on the part of the city officials, the property was assessed in that name. The municipality sued the owners of the lots. It was held that the owners were not liable since by sec. 97 (now sec. 99) of *The Assessment Act* taxes due on any lot were recoverable as a debt from any owner or tenant originally assessed therefor, or from any subsequent owner, and that the original owners who still owned the lots were never assessed.

21 While this case might appear to overrule the decision in the *Partridge* case, there is in it the difference that the owners were not assessed but that a non-existing body was assessed; and also there are expressions of opinion by both Riddell J.A. and Middleton J.A. which seem to indicate that if a man is wrongly assessed and had an opportunity of complaining, then sec. 74 would apply, and the roll would "bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, or any defect, error or mis-statement in the notice required by s. 52 of this Act, or the omission to deliver or transmit such notice." (See p. 381). Riddell J.A. at p. 379, says:

> The only parties that can be sued are those originally assessed or a subsequent owner — here the person originally assessed is 'The Broadview Syndicate' — there has been no subsequent owner, the original ownership persisting, consequently, the only person suable is 'The Broadview Syndicate'.
>
> Admitting that these defendants might have been sued had it been proved that they were 'The Broadview Syndicate' — and it is not necessary to express any opinion as to that point — it has not been proved that these defendants are 'The Broadview Syndicate' but the reverse.

22 This case is based on facts which are quite different from those of the case at bar, and are quite unique, and the judgment of Fisher J. in the *Partridge* case is not overruled but rather, if anything, confirmed. So I am of opinion that the debtor would have been personally liable to pay the taxes in question, and that this obligation is a liability of the estate.

23 There remains now to be considered the question whether the town is an ordinary unsecured creditor or a preferred or secured creditor. By sec. 114(11) of *The Assessment Act*, R.S.O. 1937, ch. 272, where personal property is liable to seizure for taxes and is in the possession of a trustee in bankruptcy, the tax collector may give a notice to him of the amount due for taxes and in such case the trustee shall pay the amount to the collector in preference and priority to all or any other fees, charges or liens, whatsoever.

24 In *In re General Fireproofing Co. of Can.*, 18 C.B.R. 159, [1937] S.C.R. 150, 1937 Can. Abr. 59, it was decided that the claim of a city for business taxes where the bankruptcy occurred in August and where such a notice was given, took priority over the trustee for his costs and disbursements, the landlord for rent, and other preferred creditors. In the principal judgment of the Court, Davis J. said at p. 169:

> The city's contention is based as already noted, upon sec. 112(11) (now 114(11)) of the Ontario *Assessment Act*, R.S.O. 1927, ch. 238, which it is argued is available to the city by virtue of sec. 125 of *The Bankruptcy Act*. The city's claim is for business taxes. There is no lien or charge upon the property of the taxpayer to secure the payment of business taxes as there is in the ease of land taxes .... The city therefore has to rely upon the provisions of sec. 112(11) of the Ontario *Assessment Act*. This remedy is really a substitute for distress where personal property liable to seizure for taxes, or the undistributed cash proceeds thereof, are taken or held in the course of execution or liquidation.

25 Although this decision dealt with business taxes, it would apply, in my opinion, with equal force to the question of land taxes by virtue of the provisions of sec. 114(1) of *The Assessment Act*, R.S.O. 1937, ch. 272, which gives power to the municipality in addition to other remedies, to distrain for land taxes. But this decision is subject to certain limitations.

26 If the debtor was personally liable for land taxes and the land taxes were due and payable, his goods upon the premises could be distrained therefor, and by giving the aforesaid notice after the bankruptcy had commenced the tax collector would merely substitute the notice for his right to distrain.

27 In *In re D. W. McIntosh Ltd.* (1940), 21 C.B.R. 245, where my view of the matter was adopted by the Court of Appeal in the same report, I pointed out that the decision in the *General Fireproofing* case above cited, would not apply where the bankruptcy had commenced on December 3 of the previous year; although the receiving order had been made on January 16 in the following year and the by-law levying the taxes was passed on February 20 of that year, even though by *The Municipal Act*, as I have pointed out above, the taxes were due on the first day of the new year.

28 In that decision I referred to the words of Duff C.J.C. found in 18 C.B.R. at p. 165, where he says:

> The substance of the matter is that, at the date of the adjudication in bankruptcy, and at the date when the trustee took possession of the effects of the bankrupt, the goods and chattels of the bankrupt affected by the statute were liable to seizure and sale by the municipality to enable the municipality to obtain payment of taxes. ...

29 In the report of the *General Fireproofing* case in the Canada Law Reports, [1937] S.C.R. pp. 157-8, the words "and at the date when the trustee took possession of the effects of the bankrupt" are omitted. I think, however, that the omission does not affect the meaning of the decision in any way.

30 Now, applying these words, which seem to me correctly to set out the law in regard to the matter, to the case at bar, at the time of the bankruptcy, although by statute the taxes for 1940 were due, the tax bills had not yet been issued, nor were the taxes payable. The bankruptcy commenced on May 2 and the tax bills were not issued until May 6, and taxes were not payable until June 14. Therefore, no distress was available in respect of the 1940 taxes until after that date, the day on which they were payable: See *Goldie v. Johns* (1889), 16 O.A.R. 129, 16 Can. Abr. 613.

31 However, the taxes which were overdue from 1938 and 1939 were in both the case of the land and of the business taxes distrainable. I therefore take the reasoning in the *General Fireproofing* case (*supra*) as further elaborated by me in the *McIntosh* case (*supra*) to mean that where distress is not available to the municipality at the date of the commencement of the bankruptcy, sec. 114(11) cannot help the municipality, and therefore, in this case in respect of 1940 taxes, both business and land, the municipality, if it is a creditor at that time — as I think it is by virtue of the statute making taxes due on January 1 of each year — is only an ordinary and not a preferred creditor, distress for these taxes not being available to the municipality at the time of the commencement of the bankruptcy.

32 Although in the *McIntosh* case no reasons were given by the Court of Appeal in deciding the question, I understand that the gist of its decision was that the position of a municipality cannot be improved by the bankruptcy, but that it cannot be made any worse, and, therefore, if the town could not at the date of the bankruptcy distrain, notice under sec. 114(11) if served on the trustee could not improve its position. The municipality did not become a preferred creditor but remained an ordinary creditor.

33 In the case at bar notice was given by the town after the expiration of fourteen days from the date of demand for the taxes, namely, on May 21, 1940, in respect of the 1940 taxes, but to my mind, there being no distress available to the town at that time, the notice was wholly ineffective to bring into play the provisions of sec. 125 of *The Bankruptcy Act*, and sec. 114(11) of the Ontario *Assessment Act* so far as the 1940 taxes are concerned; nor could a new notice if now served by the municipality be effective for the reasons I have stated above.

34 The result is, therefore, that in regard to the realty taxes, by virtue of the notice, the town is a preferred creditor for the sum of $1,139.75, being the taxes for part of the year 1938 and the whole of the year 1939, and is an ordinary creditor for the sum of $692.93 for the taxes for the year 1940, and although the question was not asked in respect of business taxes, the same considerations would prevail, and the town would be a preferred creditor for $79.38 for business taxes of 1939, and an ordinary creditor for the business taxes of 1940, and the trustee should treat same on that basis.

35 Therefore, the claim of the town as a preferred creditor, both for land and business taxes, for the years 1938 and 1939 should be paid by the trustee in priority to any other claim, including the trustee's costs and disbursements, there being no creditors with a higher claim in priority to the town; and the claim of the town in respect of 1940 taxes should rank *pari passu* with those of the ordinary creditors.

36 The wife of the debtor, however, claims that as between her and the trustee, the trustee has agreed to pay all taxes as a preferred claim out of the proceeds of the sale to Shields, and in fact that the sale to Shields was predicated thereon, and that she and a friend and two other relatives of hers and the debtor, as a result of that agreement, have released their claims against the debtor.

37 In support of this contention she has filed two affidavits on the motion in which she alleges that the debtor had negotiated the sale of the property to the purchaser Shields for $3,500 and that both in a statement to the debtor prior to the assignment and later, she is advised that the trustee told the debtor that the land taxes on the whole block as well as the business tax would be paid out of the proceeds of the sale.

38 In one of her affidavits she attempts to show how the said sum of $3,500 was arrived at, viz.:

Amount owing for real estate and business tax	$1,984.98
Half the bank's unsecured claim.....	237.50
Half the amount owing to trade creditors.....	1,075.66
Allowance for Mr. Tew's costs.....	250.00

	$3,548.14

39 She also points out that if the taxes are not paid by the trustee there would actually be a surplus over the amounts required to pay the unsecured creditors in full and the trustee's costs. If the above figures are correct, it may be that there would be such a surplus. She also claims that she has given a release of a claim against the debtor amounting to $4,905.87, that her sister has released a claim for $2,312.71, that a sister of the debtor has also released one for $708.50, and that one Angus Wallace has released his claim of $1,950 and that all these claims have been released upon the understanding that the full amount of taxes would be paid.

40 In reply, Mr. Tew has made as exhibits to his affidavit of October 17, 1940, the correspondence with Mrs. Weatherwax and the other above mentioned creditors in connection with the transaction, and it is quite clear from her letter of June 14, 1940, to the trustee that the arrangement was not as represented by her in her affidavit. To make clear what the transaction was, I quote her letter in full:

> I, the undersigned, Pearl Weatherwax, a creditor of the estate of Andrew Weatherwax in bankruptcy in the amount of $4,905.00, am informed that Andrew Weatherwax has procured a buyer for the stock, fixtures and book debts from you for the sum of $3,500 on condition that the claims of myself, Angus Wallace, Lena Weatherwax, and Dorothy Cantelon are withdrawn as against the estate of Andrew Weatherwax in bankruptcy. I understand also that out of the said proceeds you are paying all business tax to the Town of Orillia and *such proportion of the real estate taxes as you are able to persuade it to accept, so as to divert payment of the remainder of the real estate taxes to the property itself*, and also all legal costs and expenses in connection with this whole transaction. I also understand that you are surrendering to Mrs. Weatherwax any claims you might have to the Pontiac car which you allege to be owned by Andrew Weatherwax and also all claim by way of a quit claim deed to Mrs. Weatherwax with respect to the real estate.
>
> In consideration of the above arrangement I hereby agree to withdraw my claim as filed with you in the sum of $4,905.00 on the terms as above set out, but provided that should you not be able to effect a successful arrangement with the Town of Orillia with respect to payment of taxes, and the above arrangement thereby becomes abortive, it is understood that I may be at liberty to file and prefer my claim as originally filed against the estate of the said Andrew Weatherwax.

41 Somewhat similar letters were written by Wallace and by the debtor's sister and the wife's sister in releasing their respective claims. Her letter suggests that the sale was conditional on the above claims being withdrawn as against the estate, but rather belies the rest of her contention.

42 The trustee offered the town the sum of $300 on land taxes as the fair proportion of such taxes due on the property actually occupied by the debtor, but the town refused it, insisting on its whole claim for real estate taxes. Why the trustee only offered $300 I do not know, for it is obvious from the tax bills filed that the amount due for such premises was considerably more than that amount and probably amounted to the $516.33 alleged by Mrs. Weatherwax in her affidavit as being the proportion due in respect of such premises for the three years in question.

43 In his affidavit the trustee denied any such conversations with the debtor as the debtor's wife alleges about the payment of taxes or the liability therefor, and he points out that the debtor has sworn in his questionnaire that he owed no taxes (*inter alia*) on his business premises. In his affidavit the trustee demonstrates that the method of ascertaining the purchase price was not or could not be that alleged by Mrs. Weatherwax. He did, however, have it in his mind that the proportionate amount due

to the town for the taxes on the premises actually occupied by the debtor would be about $200. Someone told him later that he was mistaken, and that it might be $300 and he was prepared to pay that amount.

44 In paragraph 12 of his latest affidavit, that sworn to October 17, 1940, the trustee explains how the sale was arrived at; and I am inclined to believe the version of the trustee as against that of the debtor's wife, because a large part of her version was based on hearsay only and also because there were great inaccuracies in her affidavit as compared with her letter of release above mentioned.

45 I do not suppose it can matter to the purchaser whether or not the taxes are paid out of the estate or whether or not the creditors who have released are paid their *pro rata* share of the proceeds. It is obvious, however, that the trustee cannot give the quit-claim deed stipulated in the release and agreement with Mrs. Weatherwax for reasons which will follow.

46 Although it was not argued before me, I have considered the question of whether the doctrine of marshalling would apply to this case.

47 The simple definition of marshalling is that it "is an equitable doctrine whereby a person, who has two funds for payment of his claim, is prevented from coming upon one of them so as to disappoint another claimant who has that fund alone to resort to": 4 C.E.D. 292.

48 See also definition in "Re Steacy" (1917), 39 O.L.R. 548, at p. 550.

49 As was expressed in *Aldrich v. Cooper* (1803), 8 Ves. 382, at 395, 32 E.R. 402: "... a person having two funds shall not by his election disappoint the party having only one fund; and equity, to satisfy both, will throw him who has two funds, upon that, which can be affected by him only; to the intent that the only fund, to which the other has access, may remain clear to him."

50 Superficially, this definition seems to apply to the situation in the present case. The town has two funds to resort to, namely, it has the lands and the right to sell them (a substantial right as Mulligan advanced $18,000 in respect of them in 1935); and it has a claim on the moneys in the hands of the trustee.

51 The other claimant, namely, the creditors of the debtor as represented by the trustee can resort to the moneys in hand only.

52 Consequently it might be argued that it is fair that the town should resort to its lien on the lands by means of a tax sale and should only be allowed to resort to the moneys in hand in the case of a deficiency which there would not likely be. This would seem to be particularly just in the present case where, if the moneys in hand are taken by the town, the actual owner of the real estate may escape the taxation in part.

53 However, in Halsbury, 2nd ed., vol. XIII, p. 179, para. 165, I find it laid down that in order that the doctrine of marshalling may be applied as regards claims by creditors, it is generally necessary (1) that they shall be against a single debtor; if one creditor has a claim against C and D, and another has a claim against D only, the latter cannot require the former to resort to C unless the liability is such that D can throw the primary liability on C, as where C and D are principal and surety: See *Ex parte Kendall* (1811), 17 Ves. 514, at 520; (2) that the two funds be at the disposal of the debtor; (3) that the two funds should be in existence at the time the question of marshalling arises.

54 While it seems to me just and equitable that the town should satisfy its claim under the circumstances out of the land, which is ample security for the claim, rather than out of the moneys in hand, which are the only recourse of the creditors, yet it seems to me that all of these above three exceptions, and especially the first and last, apply to prevent the equitable relief of marshalling being extended to the trustee. The town in the present case has a personal claim against the debtor, but its claim of lien against the lands is against another party; hence there is not a common debtor but there are in reality two debtors. Also while tax arrears are now in their third year, a tax sale cannot be held for a year or more, and I think the Court cannot ask the town to wait upon a tax sale for money due it in respect of 1938 and 1939 taxes, even assuming that all things in respect of the tax sale are regular.

55 This question of marshalling was discussed and explained in *In re Hingston-Smith Arms Co. and MacPherson Estate* (1924), 5 C.B.R. 41, [1924] 2 W.W.R. 1081, 34 Man. R. 312, 3 Can. Abr. 789, under exactly the opposite set of circumstances

from the case at bar, where the landlord (the landowner) sought to compel the town to resort to the personal assets of the tenant (who was primarily liable for taxes as between himself and the landlord) before exercising its lien on the land.

56 Mathers C.J.K.B., (Manitoba) pp. 45-46, said:

> The other branch of the landlords' claim depends upon the applicability of the equitable doctrine of marshalling securities. It is said that the city has two funds to which it can have recourse for the payment of the taxes, one, the estate of the tenant now in the possession of the trustee in bankruptcy, and the other, the real estate of the landlord; that as between the landlord and the tenant the tenant was bound to pay the taxes and that the Court will now compel the city to have recourse to the tenant's estate before endorsing its lien against the real estate of the landlord. The doctrine of marshalling is applied for the purpose of regulating rights as between creditors. When one holds security upon two properties owned by a common debtor and a junior creditor holds security upon only one of them the Court will say to the superior creditor that he must first have recourse to the fund on which the junior creditor's security does not attach so that the latter may not suffer by having his security destroyed while the superior creditor has another fund belonging to the common debtor out of which his claim may be satisfied. *Dominion Lumber and Fuel Co. v. Gelfand* (1916), 26 Man. R. 350, 10 W.W.R. 751, 34 W.L.R. 624, 26 Cyc. 927, 932; *The 'Chioggia'*, [1898] P. 1, 66 L.J.P. 174, 77 L.T. 472, 46 W.R. 253, 8 Asp. M.C. 352, 14 T.L.R. 27.
>
> The doctrine of marshalling is inapplicable unless there are two funds owned by one debtor, both of which are subject to a charge of one creditor and one only which is subject to a subsequent charge of another. The facts of the present case do not bring it within that rule. There are two funds to which the city may have recourse, but there the analogy ends. The funds are not owned by a common debtor of the city and the landlord, one is the property of the landlord and the other of the trustee in bankruptcy. I know of no case where the doctrine of marshalling has been extended to circumstances such as these.

57 It is with considerable regret therefore that I find that I cannot compel the town to wait and resort to a tax sale for the land taxes due it for 1938 and 1939 and its *pro rata* share of 1940 taxes and leave the moneys on hand for the ordinary creditors.

58 If the trustee has to pay land taxes on the whole property, it is not fair that he should not have recourse against the real owner and/or the lands to recoup himself for the amount he is forced to pay over that which the tenant would have to pay for the part of the premises occupied by him.

59 In ordering the payment of the land taxes for 1938 and 1939 as a preferred claim, I am of opinion that the trustee is entitled to be subrogated to the rights of the town as against the lands and probably as against the actual owner: See *Riddell v. McRae*, [1917] 2 W.W.R. 546, 11 Alta. L.R. 414, 34 D.L.R. 102, 17 Can. Abr. 810.

60 He is also entitled to the same right of subrogation in respect of any dividend paid to the town on 1940 land taxes.

61 It may be, having in mind the words of Riddell J.A. in the above mentioned case, *City of North Bay v. Gordon*, [1934] O.R. 376, at p. 379, above set forth, that the town could have no personal claim against the wife of the debtor, who is the actual owner.

62 Before it receives payment of the taxes which I am ordering, the town must assign to the trustee first any personal claim which it may have against Mrs. Weatherwax in respect of 1938 and 1939 taxes, and similarly its lien for same upon the lands, in each case to the extent that the claim for taxes exceeds the sum of $309.97, which I find is the amount due for the proportion of the premises occupied by the debtor in respect of 1938 and 1939 land taxes. There may be no machinery for the collection of the lien such as the town has in the form of tax sale, but the trustee must have his rights against Mrs. Weatherwax and the lands.

63 Also, the town, if and before it receives a dividend in respect of the 1940 taxes, will assign a similar claim and lien to the trustee against Mrs. Weatherwax personally and against the lands to the extent of the dividend received less such proportion of the dividend as the taxes for 1940 on the property occupied by the debtor bear to the whole 1940 land taxes. The assignment of lien in each instance shall be in such form as will be capable of registration.

64 Mulligan is not before the Court, but as the lands are subject to a lien for taxes anyway in priority to his claim, he would not be hurt by the assignment of the liens, particularly as he is getting the benefit of any payment by the trustee in respect of

the premises actually occupied by the debtor. If however, he pays off the liens, he would be entitled to add the taxes paid to the amount due under his agreement with Mrs. Weatherwax.

65 As the trustee will under this judgment still have a claim upon the lands, he will be unable to give the quit-claim deed arranged with Mrs. Weatherwax. So in that respect her release is abortive. She will therefore be permitted to file or refile and to prosecute her claim (if any) as a creditor of the estate. The trustee should as against any dividend due to her be entitled to set off any sums for land taxes paid by him as above which the land ought to have borne according to the above judgment.

66 In regard to the other three creditors who have released their claims, these releases will be cancelled and they should also have the right to file and prefer their claims (if any) against the estate. The trustee will have to deal with all claims of the above creditors on the basis of these being claims which had not been withdrawn or released.

67 If there is any dispute as to my calculations as above set forth, or as to the amount of dividends payable, or the amount of any set-off, or the amount of any lien, or any other amounts which are the subject of calculation herein, it may be referred to the Registrar if the parties cannot agree on the figures necessary for the working out of this judgment, and if there is such a reference the Registrar shall decide as to the costs thereof.

68 The costs of this motion give me some difficulty. The town, having succeeded, is entitled to its costs out of the estate, as is Shields, who was a necessary party. As Mrs. Weatherwax has by her affidavit made statements which were untrue, and has thus caused a great deal of difficulty in regard to the motion, she will have no costs of the motion.

69 As to the trustee, the motion was made upon a difficult point and has resulted in some saving to the estate and therefore he should have his costs as between solicitor and client out of the estate.

70 Judgment accordingly.

End of Document

TAB 4

Court of King's Bench of Alberta

Citation: Orphan Well Association v Trident Exploration Corp, 2022 ABKB 839

Date: 20221213
Docket: 1901 06244
Registry: Calgary

Between:

Orphan Well Association

Applicant

- and -

Trident Exploration Corp., Trident Exploration (WX) Corp., Trident Exploration (Alberta) Corp., Trident Limited Partnership, Trident Exploration (Aurora) Limited Partnership I, Trident Exploration (2006) Limited Partnership I, and Fenergy Corp.

Respondents

Reasons for Decision
of the
Honourable Justice R.A. Neufeld

I. The Trident Insolvency

[1] Trident is a group of privately-owned oil and gas exploration and production companies and partnerships. As of May 2019, it held interests in approximately 4500 petroleum and natural gas wells across Alberta, of which 3700 were licenced to Trident as operator.

[2] On April 30, 2019, Trident issued a press release which advised that:

1) It had been engaged in discussions with the Alberta Energy Regulator (AER) and its lenders regarding restructuring, but without success;

A. Insolvency Process

[19] Under the *BIA*, the monetization of assets and distribution of funds to creditors is done in a common proceeding. Existing actions against the debtor are stayed. Creditors are given the opportunity to submit claims for amounts owed at the time of bankruptcy or receivership. The trustee or receiver, whichever it may be, is tasked with monetizing the assets of the estate and considering the validity of the claims. That is, whether the debts alleged are owed and in what amount. The trustee or receiver may seek advice and directions on these issues, and to facilitate the monetization of assets, may obtain orders approving a sales process and individual sales so as to vest the assets in the purchaser free and clear of claims.

[20] Throughout the process, interested stakeholders are given notice of applications within the insolvency proceeding and an opportunity to participate.

[21] From time to time, the trustee or receiver may also seek approval to make interim distributions to creditors having provable claims and advice and direction regarding matters such as the validity of securities, the priorities among creditors and the interim or final distribution of estate proceeds.

[22] Not all obligations owed by a debtor will give rise to a claim provable in bankruptcy. Provable claims are defined at *BIA* s. 121(1) to be:

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[23] Non-provable claims will continue after the insolvency proceeding has been completed. With the lifting of the stay of proceedings, they may continue to be pursued in the normal course. They cannot, however, be resolved within the insolvency process itself.

B. Abandonment and Reclamation Obligations

[24] The appropriate treatment of environmental obligations of an estate in bankruptcy or receivership within the common proceeding rubric has been the subject of considerable debate and jurisprudence in recent years.

[25] A series of cases decided by the Supreme Court of Canada and the Alberta Court of Appeal have provided direction.

1. *Northern Badger*

[26] The first was ***Pan Americana de Bienes y Servicio v Northern Badger Oil & Gas Limited***, 1991 ABCA 181 [***Northern Badger***]. In that case, a creditor of Northern Badger obtained a receivership order and subsequently a bankruptcy order.

[27] Northern Badger was the licenced operator of 33 wells. Northern Badger's receiver agreed to sell 21 wells and advised the Energy Resources Conservation Board (ERCB) shortly after the sales agreement that the remaining 12 wells had not been sold. In result, 7 wells were passed back to the receiver. When the receiver sought a discharge and proposed to distribute remaining cash on hand ($226,000) to Pan Americana, the ERCB responded by obtaining an order in council requiring the receiver to abandon the 7 wells at an estimated cost of $220,000.

TAB 5

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Kakavelakis v. Boutsakis,*
2017 BCCA 396

Date: 20171115
Dockets: CA42000, CA42001, CA42006, CA42007

Docket: CA42000

Between:

John Kakavelakis

Respondent
(Plaintiff)

And

George Boutsakis

Appellant
(Defendant)

- and -

Docket: CA42001

Between:

John Kakavelakis

Respondent
(Plaintiff)

And

Diane Boutsakis d.b.a. Crown Travel and the said Crown Travel and George Boutsakis

Appellants
(Defendants)

- and -

Docket: CA42006

Between:

John Kakavelakis

Appellant
(Plaintiff)

And

George Boutsakis

Respondent
(Defendant)

- and -

Docket: CA42007

Between:

John Kakavelakis

Appellant
(Plaintiff)

And

Diane Boutsakis d.b.a. Crown Travel and the said Crown Travel and George Boutsakis

Respondents
(Defendants)

Before: The Honourable Madam Justice D. Smith
The Honourable Madam Justice Fenlon
The Honourable Madam Justice Dickson

On appeal from: An order of the Supreme Court of British Columbia, dated June 24, 2014 (*Kakavelakis v. Boutsakis*, 2014 BCSC 1145, Vancouver Docket Nos. F892474, S64190).

Counsel for Appellants/Respondents George Boutsakis, Diane Boutsakis and Crown Travel	G.S. McAlister
Counsel for Appellant/Respondent John Kakavelakis:	D.C. Creighton
Place and Date of Hearing:	Vancouver, British Columbia February 15, 2017
Place and Date of Judgment:	Vancouver, British Columbia November 15, 2017

Written Reasons by:
The Honourable Madam Justice Dickson

Concurred in by:
The Honourable Madam Justice D. Smith
The Honourable Madam Justice Fenlon

the LP Licence nor the LRS Licence Application, and his April 19, 2007 order, which referred to the LP Licence alone. Despite the differing language in these orders, he argues, the partnership position remained identical: the LP Licence and the LRS Licence Application went together. In his submission, this was important contextual evidence because it showed that the parties did not consider reference to the LRS Licence Application necessary for its inclusion in the proposed transfer. Accordingly, he says, the judge should have considered the letters when interpreting the Order and deciding whether the LRS Licence Application was included in the sale.

[64] Moreover, Mr. Boutsakis contends, the judge failed to consider Justice Wilson's statement that the property would be sold subject to all rights enjoyed under a liquor licence. Further, while he accepted Mr. Bastin's testimony on the close connection between the LP Licence and the LRS Licence Application, Mr. Boutsakis argues, he did not give that testimony any effect. In sum, in Mr. Boutsakis' submission, its language and the contextual evidence established that, properly interpreted, the Order included both the LP Licence and the LRS Licence Application.

[65] I do not agree. In my view, the judge followed the *Sutherland* approach in interpreting the Order and found, correctly, that it included the LP Licence but did not include the LRS Licence Application.

[66] In *Sutherland*, the Court analysed the scope of a stay of proceedings clause in a receivership order. In rejecting the appellant's characterization of its task as interpretation of a provision in the Model Receivership Order, Chief Justice Bauman stated:

> [31] First, court orders are not interpreted in a vacuum. This Court has recently described the correct approach to the interpretation of court orders (*Yu v. Jordan*, 2012 BCCA 367 at para. 53, Smith J.A.):
>
> > [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is

> made, the language of the order itself, and the circumstances in which the order was granted.
>
> As a result, in addition to examining the language of the Order, it is necessary to review the pleadings and surrounding circumstances. It would be an error to have regard to those factors but to then interpret a generic Model Order instead of the specific order Mr. Justice Willcock made in response to the pleadings and the surrounding circumstances before him.
>
> [Emphasis added in *Sutherland*.]

[67] As *Sutherland* directs, the judge examined the language of the Order and the context within which it was granted. Contrary to Mr. Boutsakis' submission, he did not ignore the words "including all the rights of the Petitioner and the Respondents under liquor primary licence No. 024681". Rather, he expressly considered them, together with the Order's contrasting lack of reference to the LRS Licence Application and its other words (paras. 20, 28, 33, 49). He also considered Mr. Bastin's evidence on the nature of and relationship between the LP Licence and the LRS Licence Application as part of the relevant context (paras. 39-44, 49, 51). In my view, his conclusion that the Order included the LP Licence and excluded the LRS Licence Application was consistent with its language and the circumstances in which it was granted.

[68] It is true that the judge quoted from the courtroom exchange between Justice Pitfield, counsel and Mr. Boutsakis, including Justice Pitfield's misstatement that he was "getting rid of this building only". However, he did so for purposes of assessing the parties' expectations, which were significant for the juristic reason aspect of his analysis (paras. 32, 49). It is also true that the judge did not refer to the July 2006 partnership letter to the LCLB and referred only generally to the May 2007 letter in his reasons (para. 34). In my view, this was not an error. The letters were extrinsic evidence of the parties' subjective expectations as to future events, expressed in a different context. Although they formed part of the general background, they were not relevant to the proper interpretation of the Order, which was, as Mr. Boutsakis concedes, unambiguous.

[69] I would reject this ground of appeal.

TAB 6

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Sutherland v. Reeves,*
2014 BCCA 222

Date: 20140613
Docket: CA041190

Between:

William Grant Sutherland and
Beau-J Holdings Ltd.

Appellants
(Plaintiffs)

And

Melvin Roy Reeves

Respondent
(Defendant)

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Smith
The Honourable Madam Justice Stromberg-Stein

On appeal from: An order of the Supreme Court of British Columbia dated September 12, 2013, Vancouver Docket No. S131401

Counsel for the Appellants:	J.R. Shewfelt
Counsel for the Respondent:	J.J.L. Hunter, Q.C. C.E. Hunter
Place and Date of Hearing:	Vancouver, British Columbia March 18, 2014
Place and Date of Judgment:	Vancouver, British Columbia June 13, 2014

Written Reasons by:
The Honourable Chief Justice Bauman

Concurred in by:
The Honourable Madam Justice Smith
The Honourable Madam Justice Stromberg-Stein

[28] Mr. Sutherland appeals the decision of Mr. Justice Wong to this Court. There are two issues before us:

a) Was the Action commenced in violation of the Order?

b) If it was, is leave *nunc pro tunc* available, and if so, should it be granted?

III. Interpretation and Scope of the Order

[29] As noted, Mr. Sutherland has attempted to cast this appeal as one requiring an interpretation of the Model Order. Perhaps as a result, his submissions on this issue are brief and straightforward. He argues that because the Action is targeted against Mr. Reeves personally, it is therefore not "in respect of Tangerine or the Property", as per the Order of Mr. Justice Willcock. He further argues that the chambers judge effectively applied a subject-matter connection test when interpreting the phrase "in respect of" and that such a test is overbroad because it provides a defence to third-party claims that do not impact the receivership process. Instead, Mr. Sutherland suggests that this Court should consider whether the relief sought in the Claim is "in respect of the Debtor or the Property".

[30] But I do not accept Mr. Sutherland's underlying premise. This appeal does not turn on an interpretation of the Model Order. It turns on the interpretation of the specific Order made by Mr. Justice Willcock. This is so for two reasons.

[31] First, court orders are not interpreted in a vacuum. This Court has recently described the correct approach to the interpretation of court orders (*Yu v. Jordan*, 2012 BCCA 367 at para. 53, Smith J.A.):

> [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.
>
> [Emphasis added.]

As a result, in addition to examining the language of the Order, it is necessary to review the pleadings and surrounding circumstances. It would be an error to have regard to those factors but to then interpret a generic Model Order instead of the specific order Mr. Justice Willcock made in response to the pleadings and the surrounding circumstances before him.

[32] Second, and critically, the Order in this case is not identical to the Model Order. This is most apparent in their divergent definitions of "Property", which was not discussed in Mr. Sutherland's factum. As noted, the Model Order defines "Property" as including all the "assets, undertakings and properties of the Debtor, including all proceeds thereof". In contrast, the Order defines "Property" as "the affairs, business, undertaking and assets" of Tangerine. This is a significantly broader definition than that found in the Model Order.

[33] When the word "Property" is replaced with its definition in the first portion of clause 10 of the Order, that portion provides:

> 10. No Proceeding against or in respect of Tangerine or the [affairs, business, undertaking and assets of Tangerine] shall be commenced or continued except with the written consent of the Receiver or with leave of this Court…

[34] Thus, the actual issue in this case is whether the Action is in respect of Tangerine or its affairs, business, undertaking and assets. I have concluded that it is. The pleadings in the Action, the language of the Order itself, and the surrounding circumstances all support this conclusion.

[35] First, the language of the Order is undeniably broad. Indeed, it is difficult to imagine a broader prohibition than one on proceedings in respect of Tangerine (or its affairs, business, undertakings and assets). Mr. Sutherland refers to *Sarvanis v. Canada*, 2002 SCC 28 for the proposition that the phrase "in respect of" is not of infinite reach. However, the Court there held that the scope of the phrase must be informed by looking to the context in which the words are found (at paras. 22-24). Based on the circumstances surrounding the Order that I will turn to shortly, this argument does not assist Mr. Sutherland.

TAB 7

Court of Queen's Bench of Alberta

Citation: Manseau & Perron Inc v ThyssenKrupp Industrial Solutions (Canada) Inc, 2018 ABQB 949

Date: 20181121
Docket: 1501 02878
Registry: Calgary

Between:

Manseau & Perron Inc.

Appellant/Respondent

- and -

**ThyssenKrupp Industrial Solutions (Canada) Inc.,
formerly known as Krupp Canada Inc.**

Respondent/Applicant

- and -

**FTI Consulting Canada Inc.,
In Its Capacity As Court-Appointed Receiver of Pacer Promec Energy Corporation and Pacer Promec Energy Construction Corporation**

Appellant/Respondent

**Reasons for Judgment
of the
Honourable Mr. Justice C. Scott Brooker**

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[30] In summary "...it is the Receiver's position that the issue before the Court in the September 3 Application, and this Appeal, is narrow and concerns only whether M&P's builder's lien expired. Any issues relating to M&P's other claims against PPEC are irrelevant."

Analysis

[31] I agree that the correct approach in interpreting the provisions of a court order are as set out in the ***Sutherland*** case which in turn quoted and relied upon that court's decision in ***Yu v Jordan***, 2012 BCCA 367 where Smith J.A. said:

> [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.

[32] However, the facts and circumstances in ***Sutherland*** are quite different than those here. In ***Sutherland*** the court was interpreting the meaning of a phrase in the court order to determine if an action brought personally against a partner in a limited partnership was one "in respect of" the limited partnership and thus subject to the stay provision which had been granted in a receivership order.

[33] The Hanebury Order is not one which has a phrase or word that requires interpretation. On the contrary, it is quite clear. Paragraph 11 of it is clear and unambiguous. In essence, what the Appellant is saying is that it should not have been made --- that the Master had no jurisdiction to make it in face of the Hawco Order.

[34] Of course, as noted previously, the Appellant did not object at the time the Hanebury Order was made even though it was aware of the Hawco Order. And, as noted earlier, not only did M&P not appeal the Hanebury Order or its paragraph 11, it actually filed a statement of claim against PPEC in relation to its lien in the CNRL project, despite the Hawco Order stay provision.

[35] The Hanebury Order was made in an application arising out of the *BLA*. That application was brought by TKIS, the contractor, under the provisions of the *BLA*, to permit it to put up security in the form of a bond, to replace the security represented by the property against which the liens had been filed. Under the *BLA*, a lienholder is obliged to perfect its lien by filing a statement of claim within 180 days of registering its lien. That is what para 11 of the Hanebury Order requires.

[36] The Appellant contends that the requirement for it to file a statement of claim was vitiated by the claims procedure established by the Nixon Order and refers to s.22 and s.49 (3) of the *BLA* to support its position. As well, it argues that the stay put into place by the Hawco Order in relation to proceedings involving PPEC's receivership, prevented it from filing a statement of claim as required by para 11 of the Hanebury Order.

[37] There are a number of problems with the Appellant's position.

TAB 8

Court of Queen's Bench of Alberta

Citation: McCarty v McCarty, 2016 ABQB 91

Date: 20160212
Docket: 4803 142575
Registry: Edmonton

Between:

Patricia Jane McCarty

Plaintiff

- and -

Richard Henry McCarty

Defendant

Reasons for Judgment
of the
Honourable Mr. Justice W.N. Renke

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[1] Patricia Jane McCarty and Richard Henry McCarty were married in 1992. They have two children, C (age 21) and D (age 17). Mr. and Ms. McCarty separated in 2007 and entered into Minutes of Settlement. They were divorced on July 29, 2008, pursuant to the Divorce Judgment and Corollary Relief Order of Justice Greckol (the Divorce Judgment). In 2009, the parties agreed that C would live with Mr. McCarty and D would live with Ms. McCarty. A Consent Order was granted by Justice Greckol on August 21, 2009 respecting custody and access and child support (the Consent Order).

[2] Ms. McCarty sought three orders in a Special Chambers application. She applied for an order directing Mr. McCarty to reimburse her for orthodontic expenses incurred for D, as required by the Consent Order. She also applied for orders varying child support under the Consent Order retroactively to January 1, 2010 and prospectively. The variation applications relied on the argument that the amount of child support for D paid by Mr. McCarty has not fairly reflected all the money available to him for the payment of child support and that all or part of the pre-tax income of corporations controlled by Mr. McCarty should be included in his income.

(c) negation of obligation through paragraph 8?

[20] What stands in the way of this straightforward approach to Mr. McCarty's responsibilities under paragraph 6 is paragraph 8 of the Consent Order. Under paragraph 8, Mr. McCarty shall be responsible for all of the s. 7 expenses relating to C and Ms. McCarty shall be responsible for all of the s. 7 expenses relating to D. But orthodontic services expenses are s. 7 expenses. Paragraph 7(1)(c) of the *Federal Child Support Guidelines* (the *Guidelines*) includes as expenses "health-related expenses that exceed insurance reimbursement by at least $100 annually, including orthodontic treatment ...."

[21] Mr. McCarty made the following argument: D's orthodontic expenses were not covered by insurance under paragraph 6. The expenses then were s. 7 expenses. Under paragraph 8, Ms. McCarty was responsible for these expenses because the expenses were for D.

[22] Although court orders are often interpreted in litigation, there is little authority respecting the principles of interpretation for court orders: see John Tarrant, "Construing undertakings and court orders" (2008), 82 *Australian Law Journal* 82. In the absence of special rules, general rules for interpreting texts should apply. Three are important. First, the order should be read as a whole; clauses which might in isolation appear to contradict one another should be reconciled, so long as that is a reasonable reading of the order. Second, the general yields to the specific. Justices La Forest and McLachlin, as she then was, provided useful guidance in ***BG Checo International Ltd. v. British Columbia Hydro and Power Authority***, [1993] 1 S.C.R. 12 at 23 – 24:

> It is a cardinal rule of the construction of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the parties as evident from the contract as a whole .... Where there are apparent inconsistencies between different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question. Only if an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective .... In this process, the terms will, if reasonably possible, be reconciled by construing one term as a qualification of the other term .... A frequent result of this kind of analysis will be that general terms of a contract will be seen to be qualified by specific terms - or, to put it another way, where there is apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the subject-matter of the specific term.

Third, resort should be had to extrinsic evidence only if an order is ambiguous, meaning that the language supports at least two reasonable interpretations and without the evidence the interpretation cannot be decided one way or the other: ***Ziegler v Green Acres (Pine Lake) Ltd***, 2013 ABQB 349, Yamauchi J at paras12 and 36.

[23] In my opinion, the Consent Order is not ambiguous. Paragraphs 6 and 8 deal with different matters or at least different aspects of similar matters. Paragraph 6 was an order under s. 6 of the *Guidelines*:

> 6 In making a child support order, where medical or dental insurance coverage for the child is available to either spouse through his or her employer or otherwise at a reasonable rate, the court may order that coverage be acquired or continued.

TAB 9

Court of Queen's Bench of Alberta

Citation: Alberta Health Services v Alberta (Information and Privacy Commissioner), 2020 ABQB 263

Date: 20200415
Docket: 1401 13337
Registry: Calgary

Between:

Alberta Health Services

Respondent/Cross-Applicant

- and -

Information and Privacy Commissioner of Alberta and B.G.

Applicant/Respondents

Restriction on Publication

Identification Ban
By Court Order, there is a ban on publishing information that may identify the Applicant.
NOTE: This judgment is intended to comply with the ban so that it may be published.

Memorandum of Decision
of the
Honourable Madam Justice J.C. Price

III. Issues

[28] The primary issues before me are:

i. How should the RCA Order be interpreted?

a. What records are included in "Confidential Information"?

b. Is legal counsel required to destroy the "Confidential Information" in its possession?

ii. Should the RCA Order be varied?

IV. Law and Analysis

i. How should the RCA Order be interpreted?

[29] In ***McCarty v McCarty***, 2016, ABQB 91 at para 22 [***McCarty***], Justice Renke stated the following that provides some assistance on how to interpret court orders:

> Although court orders are often interpreted in litigation, there is little authority respecting the principles of interpretation for court orders: see John Tarrant, "Construing undertakings and court orders" (2008), *82 Australian Law Journal 82*. In the absence of special rules, general rules for interpreting texts should apply. Three are important. First, the order should be read as a whole; clauses which might in isolation appear to contradict one another should be reconciled, so long as that is a reasonable reading of the order. Second, the general yields to the specific. Justices La Forest and McLachlin, as she then was, provided useful guidance in *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12 (S.C.C.), at 23 - 24:
>
> > It is a cardinal rule of the construction of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the parties as evident from the contract as a whole .... Where there are apparent inconsistencies between different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question. Only if an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective .... In this process, the terms will, if reasonably possible, be reconciled by construing one term as a qualification of the other term .... A frequent result of this kind of analysis will be that general terms of a contract will be seen to be qualified by specific terms - or, to put it another way, where there is apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the subject-matter of the specific term.
>
> Third, resort should be had to extrinsic evidence only if an order is ambiguous, meaning that the language supports at least two reasonable interpretations and without the evidence the interpretation cannot be decided one way or the other: *Ziegler Estate v. Green Acres (Pine Lake) Ltd.*, 2013 ABQB 349 (Alta. Q.B.), Yamauchi J at paras12 and 36.

TAB 10

Court of King's Bench of Alberta

Citation: Delta 9 Cannabis Inc (Re), 2024 ABKB 657

Date: 20241108
Docket: 2401 09668
Registry: Calgary

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

In the Matter of the Compromise or Arrangement of Delta 9 Cannabis Inc., Delta 9 Logistics Inc., Delta 9 Bio-Tech Inc., Delta 9 Lifestyle Cannabis Clinic Inc., and Delta 9 Cannabis Store Inc.

Reasons for Decision
of the
Honourable Justice M.A. Marion

I. Introduction and Background

[1] On July 15, 2024, the Court granted an initial order (**Initial Order**) under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (*CCAA*) with respect to the "**Delta 9 Group**", namely Delta 9 Cannabis Inc (**Delta 9 Parent**), Delta 9 Logistics Inc (**Logistics**), Delta 9 Lifestyle Cannabis Clinic Inc (**Lifestyle**), Delta 9 Cannabis Store Inc (**Store**) and Delta 9 Bio-Tech Inc (**Bio-Tech**).

[2] On July 24, 2024, on the "comeback" application with respect to the Initial Order, the Court granted an Amended and Restated Initial Order (**ARIO**), a Claims Procedure Order and an order approving a sale and investment solicitation process (**SISP**) with respect to Bio-Tech (**Bio-Tech SISP Order**). The ARIO approved, among other things, the appointment of a Chief Restructuring Officer (**CRO**), Delta 9 Group borrowing from 2759054 Ontario Inc operating as Fika Herbal Goods (**Fika** or **Plan Sponsor**) subject to an approved an interim financing term sheet (**Interim Financing Term Sheet**), and a $1,500,000 break-fee in favour of Fika (**Break-Fee**).

[3] On September 11, 2024, the Court granted an order (**Extension Order**), among other things, extending the stay period under the ARIO to November 1, 2024 and approving an amendment to the Interim Financing Term Sheet between the Delta 9 Group and Fika.

[4] On October 22, 2024, Fika filed this application (**Application**). It seeks a creditors' meeting order:

Sheet's provision that the "Plan Sponsor shall pay out the outstanding balance of the SNDL Debt on Plan implementation".

[53] SNDL also argues that the Plan is not consistent with the Court's approval of the Restructuring Term Sheet in the ARIO. In reply oral argument, Fika's counsel suggested that the Court did not "approve" the Restructuring Term Sheet. That is a troubling argument for Fika to now make given that, in paragraph 10 of its of its Brief filed October 24, 2024, Fika stated: "This Court **approved** [the Restructuring Term Sheet] pursuant to the ARIO" (emphasis added).

[54] In any event, whether the Court formally or expressly used the words that the Restructuring Term Sheet was "approved" is not determinative. It is the substance of the Court order that prevails. Like other orders, *CCAA* orders should be interpreted by reading them as a whole, in the context of the pleadings, the arguments made by the parties, the factual and legal context in which the order was made, and the intention of the court that granted the order: ***Weinrich Contracting Ltd v Wiebe***, 2022 ABCA 176 at para 25 citing ***Alberta Health Services v Alberta (Information and Privacy Commissioner)***, 2020 ABQB 263 at paras 29-31; ***Campbell v Campbell***, 2016 SKCA 39 at paras 14-17. Even template orders must be interpreted in the context of the particular litigation in which they are granted: ***Weinrich Contracting*** at para 25.

[55] In the ARIO, the Court approved the appointment of the CRO, including on these terms (emphasis added):

> Subject to the terms of this Order and authorization from the Applicants, the CRO is hereby authorized to assist the Applicants and to do all things, **carry out all actions and perform all duties described in the CRO Agreement**, and without limiting the generality of the foregoing, **the CRO is hereby empowered to do the following**:
>
> (a) assist the Applicants with the Restructuring (as defined in the CRO Agreement);
>
> [...]
>
> (d) **assist the Applicants in preparing and evaluating their projected cash flow statements** and approving the same, **in accordance with the terms** of the Interim Financing Term Sheet and the **Restructuring Term Sheet** (collectively, the "Term Sheets");
>
> (e) **assist with the proposed plan of arrangement in accordance with the terms of the Term Sheets** and the applicable orders of this Court, and any potential sale and investment solicitation process in connection with these proceedings;
>
> (f) assist the Applicants with any deliverables owed to the Plan Sponsor **pursuant to the Term Sheets**; [...]

[56] Further, the ARIO approved the Interim Financing Term Sheet, which appears to have also referenced the binding Restructuring Term Sheet. The ARIO also approved Fika's $1,500,000

TAB 11

CITATION: HOJ National Leasing Corp. (Re) , 2008 ONCA 390
DATE: 20080516
DOCKET: C46762

COURT OF APPEAL FOR ONTARIO

BORINS, FELDMAN and ARMSTRONG JJ.A.

IN THE MATTER OF THE BANKRUPTCY OF HOJ NATIONAL LEASING CORP. OF THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO

AND IN THE MATTER OF THE BANKRUPTCY OF HOJ NATIONAL LEASING CORP. OF THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO

BETWEEN:

THE REGISTRAR, ONTARIO MOTOR VEHICLE DEALERS ACT AND MOTOR VEHICLE DEALERS COMPENSATION FUND AND JOHN DOE AND ALL OTHER CONSUMERS OF THE BANKRUPTS

Appellants

and

A. FARBER & PARTNERS INC., TRUSTEE IN BANKRUPTCY, LEASE-WIN LIMITED, LANDMARK VEHICLE LEASING CORPORATION, NORTH YORK CHEVROLET OLDSMOBILE LIMITED, AND CFI TRUST, CORPFINANCE INTERNATIONAL LIMITED AND CFI LEASING LIMITED

Respondents

Frank Bennett for the appellants

Stuart Brotman and R. Graham Phoenix for the respondents A. Farber & Partners Inc., Trustee in Bankruptcy

jurisprudence, quite different from, and, in my view, more restrictive than the jurisprudence of rule 37.14(1)(a).

[27] It has been said that s. 187(5) is unique to insolvency in that it allows the court to review and rescind or vary an order made by a court of co-ordinate jurisdiction, and applies to any order made in the exercise of bankruptcy jurisdiction: *Fitch v. Official Receiver*, [1996] 1 W.L.R. 242 (C.A.), discussing s. 375(1) of the English *Insolvency Act 1986*, which is virtually identical to s. 187(5) of the *BIA*. However, unlike rule 37.14(1), no conditions apply before resort can be had to s. 187(5). As I will explain, a motion under s. 187(5) cannot be brought as a substitute for an appeal, such as when the time to appeal has expired. An appeal is brought when it is believed that there is reversible error in the court below. A motion under s. 187(5) is essentially different. As the English Court of Appeal states in *Fitch* at p. 246, for the provision to apply, there must be a fundamental change in circumstances, between the original hearing and the time of the motion to vary, or evidence must have been discovered that was not known at the time of the original hearing and which could have led to a different result. Or, as the leading Canadian case has put it, the court should not hear a motion under s. 187(5) if its only purpose it to obtain an opportunity to appeal where the time to appeal has elapsed: *Re Catalina Exploration and Development Ltd.* (1981), 121 D.L.R. (3d) 95 (Alta. C.A.), rev'g (1980), 35 C.B.R. (N.S.) 30 (Alta. Q.B.). By this motion and the appeal, the Registrar asks that the court rehear the trustee's motion for directions and make another order in the place of the one already made, drawn up, entered and acted upon. This, of course, the court cannot do.

[28] A thorough and instructive review of the jurisprudence of s. 187(5) is to be found in L.W. Houlden, G.B. Morawetz & J. Sarra, *Bankruptcy and Insolvency Law of Canada*, 3rd ed., looseleaf, (Scarborough, Ont.: Carswell, 1993) pp. 7-20.2 to 7-24.1; 7-31 to 7-32. Among the principles governing the court's application of s. 187(5), is that the jurisdiction given by s. 187(5) should be sparingly exercised. Although s. 187(5) contains no time limit, because bankruptcy proceedings often take place in real time, a motion to vary should be made promptly: *1064521 Ontario Ltd.* (1998), 38 O.R. (3d) 407 (Gen. Div.). Moreover, as the court should not consider a motion to vary an earlier order on the record, the moving party should bring forward new evidence of a substantial nature that was not available at the original hearing: *Re Strachan* (1980), 34 C.B.R. (N.S.) 136 (Ont. S.C.). See, also, Frank Bennett, *Bennett on Bankruptcy*, 10th ed. (Toronto CCH Canadian, 2008) pp. 461-62. As McGillivray C.J.A. stated at p. 102 of *Re Catalina* in reference to the former s. 157(5) of the *BIA*, which is identical in wording to the existing s. 187(5):

> While the language of this section is broad, it seems to me that it is designed to permit of a Judge to deal with continuing matters in the bankruptcy so as not to be bound by an earlier decision if faced by changing circumstances. Thus, while a

> Judge might approve the appointment of a trustee, he at a future date might alter that order by appointing more than one trustee or removing a trustee. He might refuse a discharge to a bankrupt but later, having regard to circumstances then existing, vary that order so as to permit of a discharge on terms and he might again at a future date vary that order. Similarly, the manner of remuneration might from time to time be subject to variation and review. Against this, however, there is that type of case where a final adjudication has to be made. The claim of one class of creditors over another has to have priority. The question whether a particular piece of property forms part of the bankrupt's estate, the validity of the claim or the amount of the claim, are all matters which should be the subject of a final adjudication in respect of which an appeal with leave would lie, but surely, adjudication of claims of that sort cannot be the subject of repeated applications. There have been cases where an order disallowing a creditor's claim has been reviewed, but new evidence was available and it was apparently very cogent evidence, but I am of the view that by and large claims capable of final determination should not be the subject of repeated applications.

[29] Even though the motion was dealt with pursuant to rule 37.14(1)(a) rather than under s. 187(5) of the *BIA*, in my view, had it been resolved pursuant to s. 187(5) applying the principles discussed above, the result would have been the same. The same analysis that the motion judge applied in determining that neither the Registrar nor HOJ's customers were affected by Justice Campbell's vesting order would apply. Applying s. 187(5) jurisprudence, the motion to vary was not made expeditiously. It was made long after the ten days in which to appeal had elapsed, giving rise to the inference that it was made because it was too late to bring an appeal. Moreover, it was not supported by new evidence of a substantial nature that was unavailable at the original hearing. Counsel for the appellants wanted the motion judge to rehear the motion heard by Campbell J.

[30] Notwithstanding liberal opportunities to appeal, our judicial system operates on the principle that final judgments are intended to be just that – final. If judgments did not, in general, have finality, the consequences would be at least as serious as the fact that an injustice may have been done. These consequences include the disturbance of the parties' reliance on judgments and the erosion of the moral authority of the judicial system as final arbiter of legal disputes. Related to this is how promptly the objection is raised, for the parties' reliance on a judgment and the strength of the judgment's moral authority are to an important degree a function of the length of time during which a judgment's finality remains in limbo. In this case, it was on September 27, 2004 that

TAB 12

In the Court of Appeal of Alberta

Citation: Elias v. Hutchinson, 1981 ABCA 31

Date: 19810219
Docket: 12856
Registry: Calgary

Between:

William H. Elias on his own behalf, and as representative of all the unsecured creditors of Catalina Exploration & Development Ltd. (in bankruptcy) and Catalina Exploration & Development Ltd.

Appellant
(Respondent)

- and -

J. Gordon Hutchinson

Respondent
(Applicant)

The Court:

The Honourable Chief Justice McGillivray
The Honourable Mr. Justice Moir
The Honourable Mr. Justice Laycraft

Reasons for Judgment of The Honourable Chief Justice McGillivray
Concurred in by The Honourable Mr. Justice Moir
And Concurred in by The Honourable Mr. Justice Laycraft

IN THE MATTER OF: THE BANKRUPTCY OF CATALINA EXPLORATION & DEVELOPMENT LTD.

COUNSEL:

William H. Elias, Esq., Appeared in person.

C. D. O'Brien, Esq., for J. Gordon Hutchison.

[30] The appellant, in renewing his application to sue the trustee, relied on Section 157 (5) of the Bankruptcy Act which I have quoted earlier and which I repeat for convenience:

> "157. …
>
> (5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction…"

[31] While the language of this section is broad, it seems to me that it is designed to permit of a judge to deal with continuing matters in the bankruptcy so as not to be found by an earlier decision if faced by changing circumstances. Thus, while a judge might approve the appointment of a trustee, he at a future date might alter that order by appointing more than one trustee or removing a trustee. He might refuse a discharge to a bankrupt but later, having regard to then circumstances, vary that order so as to permit of a discharge on terms and he might again at a future date vary that order. Similarly, the manner of remuneration might from time to time be subject to variation and review. Against this, however, there is that type of case where a final adjudication has to be made. The claim of one class of creditors over another has to have priority. The question whether a particular piece of property forms part of the bankrupt's estate; the validity of the claim or the amount of the claim, are all matters which should be the subject of a final adjudication in respect of which an appeal with leave would lie, but surely, adjudication of claims of that sort cannot be the subject of repeated applications. There have been cases where an order disallowing a creditor's claim has been reviewed, but new evidence was available and it was apparently very cogent evidence, but I am of the view that by and large claims capable of final determination should not be the subject of repeated applications. The learned authors of Houlden and Morawetz Bankruptcy Law of Canada in thier 1980 revision of an earlier text, in dealing with this subject say this:

> "The power given by Sec. 157 (5) can only be applied in respect of judgments on interlocutory matters and not where a final judgment dealing with the rights of the parties has been given; in the latter type of situation an appeal under Sec. 163 is the proper remedy. A judgment dismissing a petition for a receiving order is a final judgment and an appeal under Sec. 157 (5) is the appropriate recourse: Traders Finance Corpn. Ltd. v. Garage Morrissett et Fils Ltee, (1960) Que. S.C. 712, 1 C.B.R. (N.S.) 267."

[32] In the circumstances as found by the learned Trial Judge, I am of the view that no right to review, rescind, or vary the earlier order refusing leave lies. In the result I am of the opinion that the appeal must be quashed for lack of jurisdiction. As the meaning to be

TAB 13

Court of King's Bench of Alberta

Citation: AlphaBow Energy Ltd (Re), 2025 ABKB 550

Date: 20250923
Docket: 2401 05179
Registry: Calgary

In the Matter of the Companies' Creditors Arrangement Act, RSC 1985, c C-36, as amended
And in the Matter of the Compromise or Arrangement of AlphaBow Energy Ltd.

Decision
of the
Honourable Justice B.B. Johnston

---

[1] The Applicant AlphaBow, seeks a declaration that the CO2 Stream Purchase and Sale Agreement with ME Global Canada ULC as the seller and AlphaBow as the buyer, dated December 1, 2004 ("CO2 Agreement") be retained as part of the previously approved subscription agreement, free and clear of any liabilities, claims or encumbrances other than retained liabilities as defined in the subscription agreement.

[2] The Applicant further requests amendments to the Amended and Restated Subscription Agreement dated December 16, 2024 between AlphaBow and 2628071Alberta Ltd. ("2628071") (the "Subscription Agreement").

[3] The Applicant disputes any Cure Costs are owing to ME Global but proposes that recourse for amounts claimed by ME Global would be against the Creditor Trust as is the case for other creditors whose claims are not being retained.

[4] ME Global opposes the application.

[5] The Resurgent Group, which is collectively 2628069 Alberta Ltd. ("2628069"), its nominee Cascade Capture Ltd ("Cascade") and 2628071 support the relief sought by the Applicant.

[6] The monitor takes no position on the application.

Background

[7] AlphaBow is a privately-owned company in the business of acquisition, development, and production of oil and natural gas in Alberta. At the time of commencing these proceedings, it held licenses issued by the AER to operate 3,785 wells, 4,038 pipelines and 321 facilities across Alberta.

[8] The CO2 Agreement was executed on December 1, 2004 with amendments on January 1, 2019, December 1, 2019, and January 1, 2020 pursuant to which ME Global agreed to sell and deliver CO2 gas to AlphaBow.

[9] The CO2 Agreement expires on December 31, 2028 and ME Global can opt out of any extensions by providing two years notice.

[10] On March 28, 2024, AlphaBow filed a notice of intention ("NOI") to make a proposal under the *Bankruptcy and Insolvency Act*, RSC 1985 c B-3 ("BIA").

[11] On April 26, 2024, AlphaBow sought and obtained an initial order continuing the NOI proceedings under the *Companies' Creditors Arrangement Act* RSC 1985, c C-36, as amended ("CCAA"). A number of stay extensions were granted.

[12] On September 20, 2024, Justice Neilson issued a Claims Process Order. Cure Costs were defined in the Claims Process Order.

[13] On October 23, 2024, ME Global submitted a proof of claim in the amount of $10,293,055.20 in accordance with the Claims Process Order. This includes $6,700,734.11 in pre filing amounts and $3,592,321.09 in post filing amounts. The proof of claim was filed prior to the Claims Bar Date.

[14] AlphaBow conducted a court approved sales and investment solicitation process (SISP) which resulted in a number of asset transactions and a corporate transaction involving the sale of all of AlphaBow's shares by way of the Subscription Agreement.

[15] One of the transactions involved an asset purchase and sales agreement between AlphaBow and 2628069 ("2628069 APA"). In the application materials filed with the court seeking approval of the 262809 APA, the CO2 Agreement was initially listed as an asset to be included in the 2628069 APA.

[16] On December 18, 2024, counsel for ME Global sent an email to counsel for 2628069 stating "I note that your client as purchaser of certain assets has listed contracts with my client that it wishes to acquire. (I have excerpted and attached the corresponding schedule from the APA). Please find attached my client's Proof of Claim."

[17] Counsel for 2628069 responded on December 18, 2024 and noted "Please be advised that your client's contract will be disclaimed and it, and its related claims, will be included in the Transferred Assets. Accordingly, the following contracts have been removed from Schedule "A" to the 2628069 Alberta Ltd. Asset Purchase Agreement (under "Contracts: 1 CO2 Facilities Agreements")". The email then listed the CO2 Agreement and all three of the amending agreements.

[18] Given the representations of counsel, counsel for ME Global did not appear before Justice Jeffery on December 19, 2024.

[19] On December 19, 2024, Justice Jeffrey granted amongst other things, the Transaction Approval and Reverse Vesting Order ("RVO") approving the transfer of all the common shares of AlphaBow to 2628071 pursuant to the Subscription Agreement and approving the asset sale to 2628069 contemplated in the 2628069 APA. 2628069 is an affiliate of 2628071. The CO2 Agreement was not included as a retained contract in any of the transactions approved in the Jeffrey Order.

[20] The Jeffrey order was not appealed.

[21] The Subscription Agreement approved by the Court required that any contracts to be retained were to have been identified two business days prior to the application for the approval.

[22] On December 23, 2024, counsel for ME Global again wrote to counsel for 2628069 and indicated "as you can see from the below correspondence, Cascade seems to be under the mistaken understanding that the ME Global contracts were assigned pursuant to the SAVO. I attach your correspondence confirming the opposite. The redline SAVO that I reviewed confirmed this as well. Can you please clarify with your client that the Prentiss CO2 agreements were not transferred."

[23] On December 24, 2024, counsel for 2628069 again responded and stated "To answer your question, the current state of the contract is that it has been disclaimed. That said our client is very much interested in continuing in discussions with ME Global to carry on business together..." .

[24] On April 8, 2025, counsel for ME Global wrote to counsel for AlphaBow stating "On December 18, 2024, Mr. David Mann of Blue Rock Law LLP confirmed to me that the CO2 Agreement and Lease were to be disclaimed. Additionally, Mr. Mann confirmed that they were disclaimed to me via email on December 24, 2024. Although the CO2 Agreement and Lease have been disclaimed, AlphaBow has Buyer Responsible Equipment on my clients' site and therefore, AlphaBow is herby notified that it must remove all Buyer Responsible Equipment at its sole cost, risk, and expense. Additionally, AlphaBow must restore the land."

[25] The Applicant filed an application on June 17, 2025 seeking various relief. As part of the application, ME Global learned for the first time that the Applicant now intended to retain the disclaimed CO2 Agreement as part of the RVO Transaction by amending the Subscription Agreement to make the CO2 Agreement a retained contract.

[26] Justice Armstrong issued an Amending Order on June 17, 2025 granting some of the relief sought in the Application. The issues of the further "amendments to the definition of Cure Costs set out in section 1.1(ee)" of the Subscription Agreement and "the retention of the" CO2 Agreement were adjourned. This part of the application is now before me.

Analysis

Authority to Amend

[27] The Applicant seeks to amend the definition of Cure Costs in section 1.1(ee) of the Subscription Agreement by amongst other things adding the following to the definition:

> provided, however, that "Cure Costs" shall not include any amounts claimed by ME Global under the Claims Process or in connection with the ME Global Contract.

[28] They further seek to have the CO2 Agreement retained under the Subscription Agreement free and clear of any claims.

[29] The Applicant argues that the Court has authority to make the amendments sought as there is no actual amendment to the RVO. Rather, they assert that the authority to amend comes from the Subscription Agreement itself and the RVO. In any event, they submit that rule 9.15 of the Alberta rules of court allows an applicant to vary an order where information arose or was discovered after the order was made. Further, section 11 of the CCAA provides the court with broad remedial discretion which includes the ability to amend any order granted as part of the CCAA proceedings. They contend that the amendments sought do not change the fundamental terms of the corporate transaction but rather clarify when Cure Costs will and will not be paid in the case of a retained contract.

[30] The Respondent disagrees. They note in their brief that “Alpha Bow seeks the Court’s assistance, in essence, to secure a more favourable transaction for the purchaser than what was approved by Justice Jeffrey at the sale approval application by disguising the proposed amendments as a mere clarification of the Subscription Agreement”. They assert that the amendments sought are material and not of the sort contemplated by the Subscription Agreement or RVO. The amendments, they argue, substantially narrow the circumstances under which the purchaser would be required to pay Cure Costs in respect of a retained contract and specifically, they create a carve out for any amounts claimed by ME Global. Significantly, the liability extinguishing relief materially alters how the ME Global claim is treated compared to how it would be treated under the RVO.

[31] I disagree with the Applicant that they are not seeking to amend the RVO. I agree that the RVO approved December 19, 2024 at paragraph 30, permits AlphaBow and 2628071 to amend the Subscription Agreement. Indeed, Justice Armstrong made amendments to the Subscription Agreement in his June 26, 2025 order. However, section 30 of the RVO contemplates “incremental changes”. I do not agree that the changes contemplated by the Applicant are incremental and therefore find this section inapplicable.

[32] Further, I agree with the Respondent that rule 9.15 only applies to interim orders. An RVO is not an interim order, but rather a final order which makes rule 9.15(4) inapplicable.

[33] Finally, the Respondent argues that section 11 of the CCAA does not provide the court broad authority to amend court orders once the court is *functus*. I disagree. Section 11 of the CCAA provides as follows:

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

[34] Subject to some exceptions, section 11 of the CCAA gives this court broad remedial power which I find includes the authority to amend orders as part of the CCAA process. A

CCAA process must be fluid. Indeed, this is why the court is granted such broad remedial powers. If the courts powers were circumscribed as the Respondent suggests, this would be anathema to the entire purpose of the legislation.

[35] I also note that the Subscription Agreement itself contemplates amendments.

[36] I therefore conclude this Court has the jurisdiction to make the amendments to the Subscription Agreement.

[37] I will therefore turn my analysis to consider whether this court should exercise its broad remedial authority under section 11 of the CCAA.

Should the Court Exercise its Broad Remedial Powers under the CCAA?

[38] There is no doubt that a court has broad discretion to craft any orders that are appropriate in the specific circumstances of any given CCAA. These powers however are not unlimited.

[39] In ***Canada v Canada North Group***, 2021 SCC 30 at para 21, the Supreme Court of Canada confirmed that although a court's discretion under section 11 of the CCAA is broad, there are limits on this discretion. First, section 11 is constrained by any restrictions in the CCAA. Second, the discretion must be appropriate in the circumstances. As the Supreme Court noted in Canada North, jurisprudence has developed "baseline requirements of appropriateness, good faith and due diligence in order to exercise this power." In other words, a justice must be satisfied that the order is appropriate, and the Applicant has acted in good faith and with due diligence. A justice must further be satisfied that the order will advance the policy and remedial objectives of the CCAA.

[40] The Applicant argues the CO2 Agreement was previously excluded under the Subscription Agreement because 2628071 was in discussions with ME Global regarding entering a new agreement which never materialized. They assert that the amendment to the Subscription Agreement is "a key agreement for the purchaser and their business model which has enabled them to seek to assume significant amounts of environmental liability from AlphaBow." Further they assert that the amendments would not change the fundamental terms of the Corporate Transaction but "rather clarify the circumstances in which Cure Costs will and will not be paid in the case of a Retained Contract". They further submit that the claim for Cure Costs is not required to be paid by the purchaser in the circumstances as this is a share deal. In any event, they dispute that any Cure Costs are owing as alleged. Finally, even if the transaction had required the CO2 Agreement be assigned, the terms of the CO2 Agreement allow for the assignment. There is no requirement under section 11.3(1) and 11.3(4) of the CCAA for a debtor to pay Cure Costs prior to assigning an agreement that does not require consent.

[41] The Resurgent group argues in support of the Application that there is no evidence of bad faith, and the relief sought will enhance the proceedings to the benefit of all stakeholders and assist the Resurgent Group with the assumption of AlphaBow's environmental liability. They also assert that since the CO2 Agreement is assignable under section 13.12(a) and (d) on its express terms, there is minimal downside to the Court granting the relief sought.

[42] In considering whether I should exercise my remedial authority under the CCAA, I must decide whether the order is appropriate in the circumstances. In this case, if find it is not.

[43] The monitor plays an important role in CCAA proceedings. They are officers of the Court, and the Court relies on their insight and good judgment. They are obligated to act independently and objectively considering the interests of all stakeholders. Although not determinative, I note the monitor has taken no position on the amendments before this Court.

[44] I have also considered the manner in which the Applicant and the Resurgent group have acted. I find they have not acted with due diligence, and I am not satisfied that they have acted in good faith.

[45] Section 11.3(4) of the CCAA provides that a Court may not approve the assignment of an agreement unless it is satisfied that all monetary defaults, with enumerated exceptions, in relation to the agreement will be remedied before the day fixed by the Court. The Claims Order set out the process to deal with the amounts that may be owing under section 11.3(4). The Respondent filed their claims in accordance with the claims process eleven months ago.

[46] In materials provided to ME Global before the Jeffrey appearance, the CO2 Agreement was included. The affidavits before this Court show that the purchaser initially sought to retain the CO2 agreement through its affiliate 2628069 pursuant to the 2628069 APA. Counsel for ME Global wrote to counsel for 2628069 on December 16, 2024 stating “I note that your client as purchaser of certain assets has listed contracts with my client that it wishes to acquire”.

[47] The proof of claim from ME Global was attached to the email.

[48] On December 18, 2024 counsel for the purchaser wrote back and advised as follows:

> Please be advised that your client’s contract will be disclaimed, and it and its related claims will be included in the Transferred Assets.

[49] Counsel again confirmed in writing that the CO2 contract was being disclaimed on December 24, 2024.

[50] The Applicant represented to the Court in both oral submissions and through sworn evidence that Cure Costs would be payable. Notwithstanding they expressly advised ME Global that the CO2 Agreement was being disclaimed, they now, over nine months later, seek to include the contract as a retained contract and ask that ME Global be expressly carved out of the definition of the Cure Costs.

[51] They also seek to include the CO2 Agreement in the Subscription Agreement rather than the 2628069 APA and argue since it is now a share deal, section 11.3(4) of the CCAA has no application.

[52] In this case, there was an express intention to exclude the CO2 Agreement when the matter came before the Court for approval of the transactions. I accept that the purchaser may well have hoped to negotiate a new agreement with ME Global and avoid paying Cure Costs. That clearly failed. When the purchaser was unable to negotiate a new agreement, and only after ME Global asked that equipment be removed from their land, the Applicant then filed the within application seeking to now include the CO2 Agreement as an included agreement in the Subscription Agreement.

[53] Further, notwithstanding the definition of Cure Costs in the Claims Order and the asset purchase agreements that were before the Court, the Applicant then sought to expressly amend the definition of Cure Costs to exclude ME Global. They then argued in their brief that in any event, the Cure Costs claimed by ME Global were improper and not owing. However, in oral

argument they acknowledged if Cure Costs were payable, there would be some that would be properly owing.

[54] This Court is further concerned that in the appearance before Justice Jeffrey on December 19, 2024, counsel made oral representations to the Court that Cure Costs would be paid for retained contracts. Further, in the affidavit sworn by Ben Li on December 9, 2024 that was before Justice Jeffrey, Mr. Li swore that all Cure Costs for retained contracts would be paid in accordance with the Claims Process.

[55] I also note that the preamble to the Jeffrey order states "and upon the Court being satisfied based on the written submissions that the factors in ***Heart Gold Corp (Re)***, 2022 ONSC 653 ("***Heart Gold***") have been met and the transaction has not been structured to override voting on a plan".

[56] The factors in ***Heart Gold*** are in part premised on the non exhaustive factors in section 36(3) of the CCAA. Part of the analysis includes a consideration of whether the process leading to the proposed sale or disposition was reasonable in the circumstances. The fairness and equitable treatment of the claims against the company and the protection of the public interest are considerations: ***Heart Gold*** at para 77.

[57] It is unclear whether Justice Jeffrey would have approved the RVO with the proposed changes that are before this Court. That is not for me to decide.

[58] In this case I do not find that it is appropriate for the Court to exercise its broad discretion under section 11 of the CCAA. Ultimately, the Applicant and the Resurgent group made their decision to exclude the CO2 Agreements when they presented the transactions before the Court for approval. Having received the precise approval they were after; they now want to change the approved transaction in a way that would have a material adverse impact on one of the stakeholders. The Applicant not only wants the Court to sanction this major alteration to the transaction but also make a pre-determination of the value of the affected creditor's Cure Costs. I see no reasonable basis to do either and I decline to do so.

[59] I therefore need to consider whether the Cure Costs are payable under the circumstances.

Conclusion

[60] I dismiss the application.

Heard on the 10th day of September, 2025.
Dated at the City of Calgary, Alberta this 23rd day of September, 2025.

B.B. Johnston
J.C.K.B.A.

Appearances:

Michael Selnes
for AlphaBow Energy Ltd.

Jeffrey Oliver
for the Monitor KSV Restructuring Inc.

Jerritt Pawlyk and Anthony Mersich
for ME Global Canada ULC

Taylor Henschel
for 2628069 Alberta Ltd., 2628071 Alberta Ltd., and Cascade Capture Ltd.

Tristen Cones
for the Department of Justice Canada, Minister of National Revenue

Maria Lavelle
for the Alberta Energy Regulator

Nathan Stewart
for Strathcona Resources Ltd.

Dylan Sigurdson
for County, Lamont County, Starland County, County of Stettler No. 6, County of Warner No. 5, MD of Provost, Ponoka County, and County of Paintearth No. 18

TAB 14

CANADA

CONSOLIDATION

CODIFICATION

Income Tax Act

Loi de l'impôt sur le revenu

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

S.R.C. 1985, ch. 1 (5e suppl.)

NOTE

Application provisions are not included in the consolidated text; see relevant amending Acts.

NOTE

Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois modificatives appropriées.

Current to October 14, 2025

Last amended on June 27, 2025

À jour au 14 octobre 2025

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immediately after that time is of the number of the issued shares of that class outstanding immediately after that time.

Distribution on winding-up, etc.

(2) Where funds or property of a corporation resident in Canada have at any time after March 31, 1977 been distributed or otherwise appropriated in any manner whatever to or for the benefit of the shareholders of any class of shares in its capital stock, on the winding-up, discontinuance or reorganization of its business, the corporation shall be deemed to have paid at that time a dividend on the shares of that class equal to the amount, if any, by which

(a) the amount or value of the funds or property distributed or appropriated, as the case may be,

exceeds

(b) the amount, if any, by which the paid-up capital in respect of the shares of that class is reduced on the distribution or appropriation, as the case may be,

and a dividend shall be deemed to have been received at that time by each person who held any of the issued shares at that time equal to that proportion of the amount of the excess that the number of the shares of that class held by the person immediately before that time is of the number of the issued shares of that class outstanding immediately before that time.

Redemption, etc.

(3) Where at any time after December 31, 1977 a corporation resident in Canada has redeemed, acquired or cancelled in any manner whatever (otherwise than by way of a transaction described in subsection 84(2)) any of the shares of any class of its capital stock,

(a) the corporation shall be deemed to have paid at that time a dividend on a separate class of shares comprising the shares so redeemed, acquired or cancelled equal to the amount, if any, by which the amount paid by the corporation on the redemption, acquisition or cancellation, as the case may be, of those shares exceeds the paid-up capital in respect of those shares immediately before that time; and

(b) a dividend shall be deemed to have been received at that time by each person who held any of the shares of that separate class at that time equal to that portion

de cette catégorie particulière est réputée avoir à ce moment touché un dividende égal à la fraction du dividende ainsi réputé avoir été payé par la société représentée par le rapport entre le nombre d'actions de cette catégorie particulière qu'elle détenait immédiatement après ce moment et le nombre d'actions émises de cette catégorie qui étaient en circulation immédiatement après ce moment.

Distribution lors de liquidation, etc.

(2) Lorsque des fonds ou des biens d'une société résidant au Canada ont, à un moment donné après le 31 mars 1977, été distribués ou autrement attribués, de quelque façon que ce soit, aux actionnaires ou au profit des actionnaires de tout catégorie d'actions de son capital-actions, lors de la liquidation, de la cessation de l'exploitation ou de la réorganisation de son entreprise, la société est réputée avoir versé au moment donné un dividende sur les actions de cette catégorie, égal à l'excédent éventuel du montant ou de la valeur visés à l'alinéa a) sur le montant visé à l'alinéa b):

a) le montant ou la valeur des fonds ou des biens distribués ou attribués, selon le cas;

b) le montant éventuel de la réduction, lors de la distribution ou de l'attribution, selon le cas, du capital versé relatif aux actions de cette catégorie;

chacune des personnes qui détenaient au moment donné une ou plusieurs des actions émises est réputée avoir reçu à ce moment un dividende égal à la fraction de l'excédent représentée par le rapport existant entre le nombre d'actions de cette catégorie qu'elle détenait immédiatement avant ce moment et le nombre d'actions émises de cette catégorie qui étaient en circulation immédiatement avant ce moment.

Rachat, etc.

(3) Lorsque, à un moment donné après le 31 décembre 1977, une société résidant au Canada a racheté acquis ou annulé de quelque façon que ce soit (autrement que par une opération visée au paragraphe (2)) toute action d'une catégorie quelconque de son capital-actions :

a) la société est réputée avoir versé au moment donné un dividende sur une catégorie distincte d'actions constituée des actions ainsi rachetées, acquises ou annulées, égal à l'excédent éventuel de la somme payée par la société lors du rachat, de l'acquisition ou de l'annulation, selon le cas, de ces actions sur le capital versé relatif à ces actions, existant immédiatement avant ce moment;

b) chacune des personnes qui détenaient au moment donné une ou plusieurs actions de cette catégorie distincte est réputée avoir reçu à ce moment un

of the amount of the excess determined under paragraph 84(3)(a) that the number of those shares held by the person immediately before that time is of the total number of shares of that separate class that the corporation has redeemed, acquired or cancelled, at that time.

dividende égal à la fraction de l'excédent déterminé en vertu de l'alinéa a) représentée par le rapport existant entre le nombre de ces actions que détenait cette personne immédiatement avant ce moment et le nombre total des actions de cette catégorie distincte que la société a rachetées, acquises ou annulées, à ce moment.

Reduction of paid-up capital

(4) Where at any time after March 31, 1977 a corporation resident in Canada has reduced the paid-up capital in respect of any class of shares of its capital stock otherwise than by way of a redemption, acquisition or cancellation of any shares of that class or a transaction described in subsection 84(2) or (4.1),

(a) the corporation shall be deemed to have paid at that time a dividend on shares of that class equal to the amount, if any, by which the amount paid by it on the reduction of the paid-up capital, exceeds the amount by which the paid-up capital in respect of that class of shares of the corporation has been so reduced; and

(b) a dividend shall be deemed to have been received at that time by each person who held any of the issued shares at that time equal to that proportion of the amount of the excess referred to in paragraph 84(4)(a) that the number of the shares of that class held by the person immediately before that time is of the number of the issued shares of that class outstanding immediately before that time.

Réduction du capital versé

(4) Lorsqu'une société résidant au Canada a réduit, à un moment donné après 31 mars 1977, le capital versé à l'égard de toute catégorie d'actions de son capital-actions autrement que par le rachat, l'acquisition ou l'annulation de toute action de cette catégorie ou par une opération visée au paragraphe (2) ou (4.1):

a) la société est réputée avoir payé au moment donné sur les actions de cette catégorie un dividende égal à l'excédent éventuel de la somme qu'elle a payée pour la réduction du capital versé sur le montant qui a été soustrait du capital versé à l'égard de cette catégorie d'actions de la société;

b) chacune des personnes qui détenaient au moment donné une ou plusieurs des actions émises est réputée avoir à ce moment reçu un dividende égal à la fraction de l'excédent visé à l'alinéa a) représentée par le rapport existant entre le nombre des actions de cette catégorie que détenait cette personne immédiatement avant ce moment et le nombre des actions émises de cette catégorie en circulation immédiatement avant ce moment.

Deemed dividend on reduction of paid-up capital

(4.1) Any amount paid by a public corporation on the reduction of the paid-up capital in respect of any class of shares of its capital stock, otherwise than by way of a redemption, acquisition or cancellation of any shares of that class or by way of a transaction described in subsection (2) or section 86, is deemed to have been paid by the corporation and received by the person to whom it was paid, as a dividend, unless

(a) the amount may reasonably be considered to be derived from proceeds of disposition realized by the public corporation, or by a person or partnership in which the public corporation had a direct or indirect interest at the time that the proceeds were realized, from a transaction that occurred

(i) outside the ordinary course of the business of the corporation, or of the person or partnership that realized the proceeds, and

(ii) within the period that commenced 24 months before the payment; and

Dividende réputé lors de la réduction du capital versé

(4.1) Toute somme payée par une société publique à l'occasion de la réduction du capital versé au titre d'une catégorie d'actions de son capital-actions, autrement que par le rachat, l'acquisition ou l'annulation d'une action de cette catégorie ou que par une opération visée au paragraphe (2) ou à l'article 86, est réputée avoir été payée par la société et reçue à titre de dividende par la personne à qui elle a été payée, sauf si les faits ci-après se vérifient :

a) il est raisonnable de considérer que la somme provient du produit de disposition réalisé par la société, ou par une personne ou une société de personnes dans laquelle elle avait une participation directe ou indirecte au moment de la réalisation du produit, à l'occasion d'une opération conclue, à la fois :

(i) en dehors du cours normal des activités de l'entreprise de la société, ou de la personne ou société de personnes ayant réalisé le produit,

(ii) au cours de la période ayant commencé 24 mois avant le paiement;

paid-up capital at any particular time means,

(a) in respect of a share of any class of the capital stock of a corporation, an amount equal to the paid-up capital at that time, in respect of the class of shares of the capital stock of the corporation to which that share belongs, divided by the number of issued shares of that class outstanding at that time,

(b) in respect of a class of shares of the capital stock of a corporation,

(i) where the particular time is before May 7, 1974, an amount equal to the paid-up capital in respect of that class of shares at the particular time, computed without reference to the provisions of this Act,

(ii) where the particular time is after May 6, 1974, and before April 1, 1977, an amount equal to the paid-up capital in respect of that class of shares at the particular time, computed in accordance with the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, as it read on March 31, 1977, and

(iii) if the particular time is after March 31, 1977, an amount equal to the paid-up capital in respect of that class of shares at the particular time, computed without reference to the provisions of this Act except subsections 51(3) and 66.3(2) and (4), sections 84.1 and 84.2, subsections 85(2.1), 85.1(2.1) and (8), 86(2.1), 87(3) and (9), paragraph 128.1(1)(c.3), subsections 128.1(2) and (3), section 135.2, subsections 138(11.7), 139.1(6) and (7), 148(7), 192(4.1) and 194(4.1) and sections 212.1 and 212.3,

except that, where the corporation is a cooperative corporation (within the meaning assigned by subsection 136(2)) or a credit union and the statute by or under which it was incorporated does not provide for paid-up capital in respect of a class of shares, the paid-up capital in respect of that class of shares at the particular time, computed without reference to the provisions of this Act, shall be deemed to be the amount, if any, by which

(iv) the total of the amounts received by the corporation in respect of shares of that class issued and outstanding at that time

exceeds

(v) the total of all amounts each of which is an amount or part thereof described in subparagraph (iv) repaid by the corporation to persons who held any of the issued shares of that class before that time, and

a) La somme qui correspond à la partie d'un dividende imposable qui est, à la fois, reçue par une personne résidant au Canada, versée par une société résidant au Canada et désignée à titre de dividende déterminé conformément au paragraphe (14);

b) en ce qui concerne une personne résidant au Canada, toute somme qui est réputée, en vertu des paragraphes 96(1.11) ou 104(16), être un dividende imposable reçu par la personne. (*eligible dividend*)

dividende imposable Dividende autre :

a) qu'un dividende relativement auquel la société qui le verse a fait soit le choix prévu au paragraphe 83(1) dans sa version antérieure à 1979, soit le choix prévu au paragraphe 83(2);

b) qu'un dividende admissible versé par une société publique aux actionnaires d'une catégorie prescrite d'actions privilégiées à impôt différé de la société, au sens du paragraphe 83(1). (*taxable dividend*)

facteur du taux général Le facteur du taux général applicable à une société pour une année d'imposition correspond au total des sommes suivantes :

a) la proportion de 0,68 que représente le nombre de jours de l'année d'imposition qui sont antérieurs à 2010 par rapport au nombre total de jours de l'année d'imposition;

b) la proportion de 0,69 que représente le nombre de jours de l'année d'imposition qui sont en 2010 par rapport au nombre total de jours de l'année d'imposition;

c) la proportion de 0,70 que représente le nombre de jours de l'année d'imposition qui sont en 2011 par rapport au nombre total de jours de l'année d'imposition;

d) la proportion de 0,72 que représente le nombre de jours de l'année d'imposition qui sont postérieurs à 2011 par rapport au nombre total de jours de l'année d'imposition. (*general rate factor*)

revenu imposable rajusté Le revenu imposable rajusté d'une société pour une année d'imposition correspond à la somme obtenue par la formule suivante :

A – B – C

où :

A représente :

a) sauf en cas d'application de l'alinéa b), le revenu imposable de la société pour l'année;

(c) in respect of all the shares of the capital stock of a corporation, an amount equal to the total of all amounts each of which is an amount equal to the paid-up capital in respect of any class of shares of the capital stock of the corporation at the particular time; (*capital versé*)

private corporation at any particular time means a corporation that, at the particular time, is resident in Canada, is not a public corporation and is not controlled by one or more public corporations (other than prescribed venture capital corporations) or prescribed federal Crown corporations or by any combination thereof and, for greater certainty, for the purposes of determining at any particular time when a corporation last became a private corporation,

(a) a corporation that was a private corporation at the commencement of its 1972 taxation year and thereafter without interruption until the particular time shall be deemed to have last become a private corporation at the end of its 1971 taxation year, and

(b) a corporation incorporated after 1971 that was a private corporation at the time of its incorporation and thereafter without interruption until the particular time shall be deemed to have last become a private corporation immediately before the time of its incorporation; (*société privée*)

public corporation at any particular time means

(a) a corporation that is resident in Canada at the particular time if at that time a class of shares of the capital stock of the corporation is listed on a designated stock exchange in Canada,

(b) a corporation (other than a prescribed labour-sponsored venture capital corporation) that is resident in Canada at the particular time if at any time after June 18, 1971 and

(i) before the particular time, it elected in prescribed manner to be a public corporation, and at the time of the election it complied with prescribed conditions relating to the number of its shareholders, the dispersal of ownership of its shares and the public trading of its shares, or

(ii) before the day that is 30 days before the day that includes the particular time it was, by notice in writing to the corporation, designated by the Minister to be a public corporation and at the time it was so designated it complied with the conditions referred to in subparagraph (i),

b) si la société est une compagnie d'assurance-dépôts au cours de l'année, zéro;

B le produit de la multiplication de la somme déduite par la société pour l'année en application du paragraphe 125(1) par le quotient de 100 par le taux de la déduction prévue par ce paragraphe pour l'année;

C :

a) si la société est une société privée sous contrôle canadien au cours de l'année, son revenu de placement total pour l'année ou, s'il est moins élevé, son revenu imposable pour l'année;

b) sinon, zéro. (*adjusted taxable income*)

société canadienne À un moment donné, société qui réside au Canada et qui :

a) soit a été constituée au Canada;

b) soit a résidé au Canada tout au long de la période qui a commencé le 18 juin 1971 et se termine à ce moment.

Il est entendu que la société issue, à un moment quelconque, de la fusion ou de l'unification de plusieurs sociétés, ou de la mise sur pied d'un arrangement ou autre réorganisation les concernant (autrement que par suite de l'acquisition des biens d'une société par une autre soit par achat, soit par la distribution de biens à l'occasion d'une liquidation), n'est une société canadienne par l'effet de l'alinéa a) que si :

c) d'une part, la réorganisation a été effectuée en conformité avec les lois fédérales ou celles d'une province;

d) d'autre part, chacune des sociétés était une société canadienne immédiatement avant le moment quelconque. (*Canadian corporation*)

société canadienne imposable Société qui, au moment où l'expression est pertinente :

a) d'une part, était une société canadienne;

b) d'autre part, n'était pas, en vertu d'une disposition législative, exonérée de l'impôt prévu à la présente partie. (*taxable Canadian corporation*)

société privée À un moment donné, société qui, à ce moment, réside au Canada, n'est pas une société publique et n'est pas contrôlée par une ou plusieurs sociétés publiques (sauf des sociétés à capital de risque visées par règlement) ou sociétés d'État prévues par règlement, ou par l'une et l'autre de celles-ci; il est entendu que, pour ce qui est de déterminer, à un moment donné, le moment

another designated entity in respect of the Canadian service provider) that are affiliated with the Canadian service provider does not exceed 25% of the fair market value, at the particular time, of all investments in the entity.

sociétés de personnes (sauf une autre entité désignée à l'égard du fournisseur de services canadien) qui sont affiliées au fournisseur de services canadien n'excède pas 25 % de la juste valeur marchande, à ce moment, de l'ensemble des placements dans l'entité.

Transfer pricing

(4) For the purpose of section 247, where subsection (2) applies in respect of services provided to a person that is a corporation or trust or to a partnership, if the Canadian service provider referred to in that subsection does not deal at arm's length with the promoter of the person or of the partnership, the service provider is deemed not to deal at arm's length with the person or partnership.

Prix de transfert

(4) Pour l'application de l'article 247, lorsque le paragraphe (2) s'applique relativement à des services fournis à une personne qui est une société ou une fiducie ou à une société de personnes, le fournisseur de services canadien visé à ce paragraphe qui a un lien de dépendance avec le promoteur de la personne ou de la société de personnes est réputé avoir un tel lien avec la personne ou la société de personnes.

(5) [Repealed, 2013, c. 34, s. 244]

[NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts and regulations.] ; 2000, c. 19, s. 21; 2002, c. 9, s. 35; 2007, c. 35, s. 68; 2013, c. 34, ss. 124, 244; 2023, c. 26, s. 25.

(5) [Abrogé, 2013, ch. 34, art. 244]

[NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois et règlements modificatifs appropriés.] ; 2000, ch. 19, art. 21; 2002, ch. 9, art. 35; 2007, ch. 35, art. 68; 2013, ch. 34, art. 124 et 244; 2023, ch. 26, art. 25.

Disposition by non-resident person of certain property

116 (1) If a non-resident person proposes to dispose of any taxable Canadian property (other than property described in subsection (5.2) and excluded property) the non-resident person may, at any time before the disposition, send to the Minister a notice setting out

(a) the name and address of the person to whom he proposes to dispose of the property (in this section referred to as the "proposed purchaser");

(b) a description of the property sufficient to identify it;

(c) the estimated amount of the proceeds of disposition to be received by the non-resident person for the property; and

(d) the amount of the adjusted cost base to the non-resident person of the property at the time of the sending of the notice.

Disposition par une personne non-résidente

116 (1) La personne non-résidente qui se propose de disposer d'un bien canadien imposable, sauf un bien visé au paragraphe (5.2) et un bien exclu, peut envoyer au ministre au préalable un avis contenant les renseignements suivants :

a) les nom et adresse de la personne en faveur de laquelle elle se propose de disposer de ce bien (appelée l'« acheteur éventuel » au présent article);

b) une description du bien permettant de le reconnaître;

c) le montant estimatif du produit de disposition qu'elle recevra pour ce bien;

d) le montant du prix de base rajusté du bien, pour elle, au moment de l'envoi de l'avis au ministre.

Certificate in respect of proposed disposition

(2) Where a non-resident person who has sent to the Minister a notice under subsection 116(1) in respect of a proposed disposition of any property has

(a) paid to the Receiver General, as or on account of tax under this Part payable by the non-resident person for the year, 25% of the amount, if any, by which the estimated amount set out in the notice in accordance with paragraph 116(1)(c) exceeds the amount set out in the notice in accordance with paragraph 116(1)(d), or

Certificat relatif à une disposition éventuelle

(2) Lorsqu'une personne non-résidente qui, en vertu du paragraphe (1), a envoyé un avis au ministre concernant la disposition éventuelle d'un bien quelconque, a :

a) soit payé au receveur général, au titre de l'impôt payable par cette personne pour l'année en vertu de la présente partie, 25 % de l'excédent éventuel du montant estimatif mentionné dans l'avis conformément à l'alinéa (1)c) sur le montant mentionné dans l'avis conformément à l'alinéa (1)d);

proceeds of disposition of the property exceed the adjusted cost base to the non-resident person of the property immediately before the disposition, or

(b) furnished the Minister with security acceptable to the Minister in respect of the disposition of the property,

the Minister shall forthwith issue to the non-resident person and the purchaser a certificate in prescribed form in respect of the disposition.

Liability of purchaser

(5) Where in a taxation year a purchaser has acquired from a non-resident person any taxable Canadian property (other than depreciable property or excluded property) of the non-resident person, the purchaser, unless

(a) after reasonable inquiry the purchaser had no reason to believe that the non-resident person was not resident in Canada,

(a.1) subsection (5.01) applies to the acquisition, or

(b) a certificate under subsection 116(4) has been issued to the purchaser by the Minister in respect of the property,

is liable to pay, and shall remit to the Receiver General within 30 days after the end of the month in which the purchaser acquired the property, as tax under this Part for the year on behalf of the non-resident person, 25% of the amount, if any, by which

(c) the cost to the purchaser of the property so acquired

exceeds

(d) the certificate limit fixed by the certificate, if any, issued under subsection 116(2) in respect of the disposition of the property by the non-resident person to the purchaser,

and is entitled to deduct or withhold from any amount paid or credited by the purchaser to the non-resident person or otherwise recover from the non-resident person any amount paid by the purchaser as such a tax.

Treaty-protected property

(5.01) This subsection applies to the acquisition of a property by a person (referred to in this subsection as the "purchaser") from a non-resident person if

(a) the purchaser concludes after reasonable inquiry that the non-resident person is, under a tax treaty that Canada has with a particular country, resident in the particular country;

de disposition du bien sur le prix de base rajusté du bien pour la personne immédiatement avant la disposition;

b) soit fourni au ministre une garantie acceptable par ce dernier concernant la disposition du bien,

le ministre délivre sans délai à la personne non-résidente ainsi qu'à l'acheteur un certificat selon le formulaire prescrit concernant la disposition.

Assujettissement de l'acheteur

(5) L'acheteur qui, au cours d'une année d'imposition, acquiert auprès d'une personne non-résidente un bien canadien imposable (sauf un bien amortissable ou un bien exclu) d'une telle personne est redevable, pour le compte de cette personne, d'un impôt en vertu de la présente partie pour l'année, sauf si, selon le cas :

a) après enquête raisonnable, l'acheteur n'avait aucune raison de croire que la personne ne résidait pas au Canada;

a.1) le paragraphe (5.01) s'applique à l'acquisition;

b) le ministre a délivré à l'acheteur, en application du paragraphe (4), un certificat concernant le bien.

Cet impôt — à remettre au receveur général dans les 30 jours suivant la fin du mois au cours duquel l'acheteur a acquis le bien — est égal à 25 % de l'excédent éventuel du coût visé à l'alinéa c) sur la limite visée à l'alinéa d):

c) le coût pour l'acheteur du bien ainsi acquis;

d) la limite prévue par le certificat délivré en application du paragraphe (2) concernant la disposition du bien par la personne non-résidente en faveur de l'acheteur.

L'acheteur a le droit de déduire d'un montant qu'il a versé à la personne non-résidente, ou porté à son crédit, ou de retenir sur un tel montant, ou de recouvrer autrement d'une telle personne, tout montant qu'il a payé au titre de cet impôt.

Biens protégés par traité

(5.01) Le présent paragraphe s'applique à l'acquisition d'un bien effectuée par une personne (appelée « acheteur » au présent paragraphe) auprès d'une personne non-résidente si les conditions suivantes sont réunies :

a) après enquête raisonnable, l'acheteur en vient à la conclusion que la personne non-résidente est, aux

non-resident person was not resident in Canada, is liable to pay, as tax under this Part for the year on behalf of the non-resident person, 50% of the amount, if any, by which

(i) the amount payable by the taxpayer for the property so acquired

exceeds

(ii) the amount fixed in the certificate, if any, issued under subsection 116(5.2) in respect of the disposition of the property by the non-resident person to the taxpayer

and is entitled to deduct or withhold from any amount paid or credited by the taxpayer to the non-resident person or to otherwise recover from the non-resident person any amount paid by the taxpayer as such a tax; and

(b) the taxpayer shall, within 30 days after the end of the month in which the taxpayer acquired the property, remit to the Receiver General the tax for which the taxpayer is liable under paragraph 116(5.3)(a).

Presumption

(5.4) Where there has been a disposition by a non-resident of a life insurance policy in Canada by virtue of subsection 148(2) or any of paragraphs (a) to (c) and (e) of the definition ***disposition*** in subsection 148(9), the insurer under the policy shall, for the purposes of subsections 116(5.2) and (5.3) be deemed to be the taxpayer who acquired the property for an amount equal to the proceeds of disposition as determined under section 148.

Definition of *excluded property*

(6) For the purposes of this section, ***excluded property*** of a non-resident person means

(a) a property that is a taxable Canadian property solely because a provision of this Act deems it to be a taxable Canadian property;

(a.1) a property (other than real or immovable property situated in Canada, a Canadian resource property or a timber resource property) that is described in an inventory of a business carried on in Canada by the person;

(b) a security that is

(i) listed on a recognized stock exchange, and

(ii) either

personne non-résidente n'était pas un résident du Canada, est tenu de payer, au titre de l'impôt prévu par la présente partie pour l'année pour le compte de la personne non-résidente, 50 % de l'excédent du montant visé au sous-alinéa (i) sur le montant visé au sous-alinéa (ii) :

(i) le montant payable par le contribuable pour le bien ainsi acquis,

(ii) le montant indiqué dans le certificat émis en vertu du paragraphe (5.2) relativement à la disposition du bien par la personne non-résidente en faveur du contribuable,

et a droit de déduire ou de retenir sur tout montant qu'il paie ou qu'il porte au crédit de la personne non-résidente ou de recouvrer d'une autre manière auprès de la personne non-résidente tout montant qu'il a payé au titre de ce impôt;

b) le contribuable doit, dans les 30 jours suivant la fin du mois au cours duquel il a acquis le bien, remettre au receveur général l'impôt qu'il est tenu de payer en vertu de l'alinéa a).

Présomption

(5.4) Lorsqu'une personne non-résidente a disposé d'une police d'assurance-vie au Canada en vertu du paragraphe 148(2) ou de l'un des alinéas a) à c) et e) de la définition de ***disposition*** au paragraphe 148(9), l'assureur en vertu de la police est, pour l'application des paragraphes (5.2) et (5.3), réputé être le contribuable qui a acquis le bien pour un montant égal au produit de disposition, déterminé en vertu de l'article 148.

Définition de *bien exclu*

(6) Pour l'application du présent article, ***bien exclu***, relativement à une personne non-résidente, s'entend :

a) d'un bien qui est un bien canadien imposable du seul fait qu'il est réputé être un tel bien par une disposition de la présente loi;

a.1) d'un bien (sauf un bien immeuble ou réel situé au Canada, un avoir minier canadien et un avoir forestier) qui figure à l'inventaire d'une entreprise exploitée au Canada par la personne;

b) d'un titre qui est, à la fois :

(i) inscrit à la cote d'une bourse de valeurs reconnue,

(ii) selon le cas :

amount would, if the non-resident person were resident in Canada, be included because of subsection 148.1(3) in computing the person's income;

(w) a payment out of a trust that is, or was, at any time, an employee life and health trust, except to the extent that it is a payment of a designated employee benefit (as defined by subsection 144.1(1));

Tax informant program

(x) a payment of an amount described in paragraph 56(1)(z.4); or

First home savings account

(y) a payment out of a FHSA, other than any portion of the payment that is transferred in accordance with subsection 146.6(7).

Tax on dividends

(2) Every non-resident person shall pay an income tax of 25% on every amount that a corporation resident in Canada pays or credits, or is deemed by Part I or Part XIV to pay or credit, to the non-resident person as, on account or in lieu of payment of, or in satisfaction of,

Subventions à l'isolation thermique des maisons ou à la conversion énergétique

s) d'une subvention dans le cadre d'un programme visé par règlement du gouvernement du Canada et relatif à l'isolation thermique des maisons ou à la conversion énergétique;

Paiement sur un second fonds du compte de stabilisation du revenu net

t) d'un paiement sur un second fonds du compte de stabilisation du revenu net, dans la mesure où ce montant serait à inclure, en application du paragraphe 12(10.2), dans le calcul du revenu de la personne pour une année d'imposition si la partie I s'appliquait;

Paiements d'une fiducie au profit d'un athlète amateur

u) d'un paiement relatif à une fiducie au profit d'un athlète amateur qui serait à inclure, en vertu de l'article 143.1, dans le calcul du revenu de la personne pour une année d'imposition si la partie I s'appliquait;

Paiements dans le cadre d'un arrangement de services funéraires

v) d'un paiement effectué par le dépositaire, au sens du paragraphe 148.1(1), d'un arrangement qui, au moment de son établissement, était un arrangement de services funéraires, dans la mesure où le paiement serait inclus, par l'effet du paragraphe 148.1(3), dans le calcul du revenu de la personne non-résidente si elle résidait au Canada;

w) d'un paiement provenant d'une fiducie qui est ou était, à un moment donné, une fiducie de soins de santé au bénéfice d'employés, sauf dans la mesure où il s'agit d'une prestation désignée au sens du paragraphe 144.1(1);

Programme de dénonciateurs de l'inobservation fiscale

x) du paiement d'une somme visée à l'alinéa 56(1)z.4);

CELIAPP

y) d'un paiement provenant d'un CELIAPP, sauf dans la mesure où il s'agit d'une portion de ce dernier qui est transférée conformément au paragraphe 146.6(7).

Impôt sur dividendes

(2) Toute personne non-résidente paie un impôt sur le revenu de 25 % sur toute somme qu'une société résidant au Canada lui paie ou porte à son crédit ou est réputée, selon les parties I ou XIV, lui payer ou porter à son crédit, au titre ou en paiement intégral ou partiel :

(a) a taxable dividend (other than a capital gains dividend within the meaning assigned by subsection 130.1(4), 131(1) or 133(7.1)); or

(b) a capital dividend.

a) d'un dividende imposable (autre qu'un dividende sur les gains en capital, au sens que donne à cette expression le paragraphe 130.1(4), 131(1) ou 133(7.1));

b) d'un dividende en capital.

Exempt dividends

(2.1) Subsection (2) does not apply to an amount paid or credited, by a borrower, under a securities lending arrangement or a specified securities lending arrangement if

(a) the amount is deemed by subparagraph 260(8)(a)(ii) to be a dividend;

(b) either

(i) the arrangement is a fully collateralized arrangement, or

(ii) the borrower and the lender are dealing at arm's length; and

(c) the security that is transferred or lent to the borrower under the securities lending arrangement is a share of a class of the capital stock of a non-resident corporation.

Dividendes exonérés

(2.1) Le paragraphe (2) ne s'applique pas au montant qu'un emprunteur verse ou crédite dans le cadre d'un mécanisme de prêt de valeurs mobilières ou d'un mécanisme de prêt de valeurs mobilières déterminé si, à la fois :

a) le montant est réputé être un dividende en vertu du sous-alinéa 260(8)a)(ii);

b) selon le cas :

(i) le mécanisme est un mécanisme entièrement garanti,

(ii) l'emprunteur et le prêteur n'ont pas de lien de dépendance;

c) le titre qui est transféré ou prêté à l'emprunteur dans le cadre du mécanisme est une action d'une catégorie du capital-actions d'une société non-résidente.

Interest — definitions

(3) The following definitions apply for the purpose of paragraph (1)(b).

fully exempt interest means

(a) interest that is paid or payable on a bond, debenture, note, mortgage, hypothecary claim or similar debt obligation

(i) of, or guaranteed (otherwise than by being insured by the Canada Deposit Insurance Corporation) by, the Government of Canada,

(ii) of the government of a province,

(iii) of an agent of a province,

(iv) of a municipality in Canada or a municipal or public body performing a function of government in Canada,

(v) of a corporation, commission or association to which any of paragraphs 149(1)(d) to (d.6) applies, or

(vi) of an educational institution or a hospital if repayment of the principal amount of the obligation and payment of the interest is to be made, or is

Définitions

(3) Les définitions qui suivent s'appliquent à l'alinéa (1)b).

intérêts entièrement exonérés

a) Intérêts payés ou payables sur des obligations, débentures, billets, créances hypothécaires ou titres de créance semblables :

(i) du gouvernement du Canada ou garantis par lui (autrement que parce qu'ils sont assurés par la Société d'assurance-dépôts du Canada),

(ii) du gouvernement d'une province,

(iii) d'un mandataire d'une province,

(iv) d'une municipalité du Canada ou d'un organisme municipal ou public exerçant une fonction gouvernementale au Canada,

(v) d'une société, commission ou association à laquelle s'applique l'un des alinéas 149(1)d) à d.6),

(vi) d'un établissement d'enseignement ou d'un hôpital, si le remboursement du principal du titre et le paiement des intérêts doivent être effectués, ou sont garantis, assurés ou par ailleurs expressément

(b) each other party to these agreements or arrangements is affiliated with the person or partnership; (*chaîne d'arrangements de capitaux propres synthétiques*)

tar sands means bituminous sands or oil shales extracted, otherwise than by a well, from a mineral resource, but, for the purpose of applying sections 13 and 20 and any regulations made for the purpose of paragraph 20(1)(a) in respect of property acquired after March 6, 1996, includes material extracted by a well from a deposit of bituminous sands or oil shales; (*sables asphaltiques*)

taxable Canadian corporation has the meaning assigned by subsection 89(1); (*société canadienne imposable*)

taxable Canadian property of a taxpayer at any time in a taxation year means a property of the taxpayer that is

(a) real or immovable property situated in Canada,

(b) property used or held by the taxpayer in, property included in Class 14.1 of Schedule II to the *Income Tax Regulations* in respect of, or property described in an inventory of, a business carried on in Canada, other than

(i) property used in carrying on an insurance business, and

(ii) where the taxpayer is non-resident, ships and aircraft used principally in international traffic and personal or movable property pertaining to their operation if the country in which the taxpayer is resident does not impose tax on gains of persons resident in Canada from dispositions of such property,

(c) if the taxpayer is an insurer, its designated insurance property for the year,

(d) a share of the capital stock of a corporation (other than a mutual fund corporation) that is not listed on a designated stock exchange, an interest in a partnership or an interest in a trust (other than a unit of a mutual fund trust or an income interest in a trust resident in Canada), if, at any particular time during the 60-month period that ends at that time, more than 50% of the fair market value of the share or interest, as the case may be, was derived directly or indirectly (otherwise than through a corporation, partnership or trust the shares or interests in which were not themselves taxable Canadian property at the particular time) from one or any combination of

(i) real or immovable property situated in Canada,

(A) elle est établie sous le régime des lois d'une province,

(B) elle réside au Canada,

(C) si une ou plusieurs personnes ou sociétés de personnes détiennent des participations à titre de bénéficiaire, au moins 75 % de la juste valeur marchande de l'ensemble de ces participations sont détenues par l'une des personnes suivantes :

(I) des particuliers qui sont citoyens canadiens,

(II) des personnes ou sociétés de personnes visées à l'un des sous-alinéas (i) à (iii),

(iv) elle exerce ses activités au Canada, le contenu qu'elle produit devant notamment être révisé, conçu et, sauf dans le cas de contenu numérique, publié au Canada,

(v) elle produit du contenu de nouvelles originales qui, à la fois :

(A) doit être axé principalement sur des questions d'intérêt général et rendre compte de l'actualité, y compris la couverture des institutions et processus démocratiques,

(B) ne doit pas être axé principalement sur un sujet donné, comme des nouvelles propres à un secteur particulier, les sports, les loisirs, les arts, les modes de vie ou le divertissement,

(vi) elle emploie régulièrement au moins deux journalistes qui n'ont aucun lien de dépendance avec l'organisation pour la production de son contenu,

(vii) elle ne se consacre pas de façon importante à la production de contenu :

(A) ayant pour but de promouvoir les intérêts d'une organisation, d'une association ou de ses membres, ou de rendre compte de leurs activités,

(B) pour le compte d'un gouvernement, d'une société d'État ou d'un organisme gouvernemental,

(C) [Abrogé, 2021, ch. 23, art. 61]

(viii) elle n'est ni une société d'État, ni une société municipale, ni un organisme gouvernemental;

(ii) Canadian resource properties,

(iii) timber resource properties, and

(iv) options in respect of, or interests in, or for civil law rights in, property described in any of subparagraphs (i) to (iii), whether or not the property exists,

(e) a share of the capital stock of a corporation that is listed on a designated stock exchange, a share of the capital stock of a mutual fund corporation or a unit of a mutual fund trust, if, at any particular time during the 60-month period that ends at that time,

(i) 25% or more of the issued shares of any class of the capital stock of the corporation, or 25% or more of the issued units of the trust, as the case may be, were owned by or belonged to one or any combination of

(A) the taxpayer,

(B) persons with whom the taxpayer did not deal at arm's length, and

(C) partnerships in which the taxpayer or a person referred to in clause (B) holds a membership interest directly or indirectly through one or more partnerships, and

(ii) more than 50% of the fair market value of the share or unit, as the case may be, was derived directly or indirectly from one or any combination of properties described under subparagraphs (d)(i) to (iv), or

(f) an option in respect of, or an interest in, or for civil law a right in, a property described in any of paragraphs (a) to (e), whether or not the property exists,

and, for the purposes of section 2, subsection 107(2.001) and sections 128.1 and 150, and for the purpose of applying paragraphs 85(1)(i) and 97(2)(c) to a disposition by a non-resident person, includes

(g) a Canadian resource property,

(h) a timber resource property,

(i) an income interest in a trust resident in Canada,

(j) a right to a share of the income or loss under an agreement referred to in paragraph 96(1.1)(a), and

(k) a life insurance policy in Canada; (*bien canadien imposable*)

b) est désignée, au moment considéré, par le ministre, celui-ci tenant compte aux fins de la désignation des recommandations, le cas échéant, d'une entité établie pour l'application de la présente définition. (*qualified Canadian journalism organization*)

organisation journalistique enregistrée *Organisation journalistique admissible* (au sens du paragraphe 149.1(1)) qui a présenté au ministre une demande d'enregistrement sur le formulaire prescrit, qui a été enregistrée et dont l'enregistrement n'a pas été révoqué. (*registered journalism organization*)

organisme de bienfaisance enregistré L'organisme suivant, qui a présenté au ministre une demande d'enregistrement sur formulaire prescrit et qui est enregistré, au moment considéré, comme œuvre de bienfaisance, comme fondation privée ou comme fondation publique :

a) œuvre de bienfaisance, fondation privée ou fondation publique, au sens du paragraphe 149.1(1), qui réside au Canada et qui y a été constituée ou y est établie;

b) division — annexe, section, paroisse, congrégation ou autre — d'une œuvre de bienfaisance, fondation privée ou fondation publique, au sens du paragraphe 149.1(1), qui réside au Canada, qui y a été constituée ou y est établie et qui reçoit des dons en son nom propre. (*registered charity*)

organisme enregistré de services nationaux dans le domaine des arts Organisme de services nationaux dans le domaine des arts que le ministre a enregistré en application du paragraphe 149.1(6.4) et dont l'enregistrement n'a pas été annulé. (*registered national arts service organization*)

participation au capital S'agissant de la participation au capital d'une fiducie, détenue par un contribuable, s'entend au sens du paragraphe 108(1). (*capital interest*)

participation au revenu S'agissant de la participation au revenu d'une fiducie, détenue par un contribuable, s'entend au sens du paragraphe 108(1). (*income interest*)

particulier Personne autre qu'une société. (*individual*)

particulier déterminé S'entend au sens du paragraphe 120.4(1). (*specified individual*)

TAB 15

CITATION: *Nuance Pharma Ltd. v. Antibe Therapetics Inc.*, 2025 ONSC 706
COURT FILE NO.: CV-24-00719237-00CL
DATE: 20250129

ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

IN THE MATTER OF AN APPLICATION UNDER SECTION 101 OF THE COURTS OF JUSTICE ACT

RE: Nuance Pharma Ltd., Applicant

AND:

Antibe Therapeutics Inc., Respondent

BEFORE: Osborne J.

COUNSEL: *Rebecca Kennedy and Ines Ferreira*, for the Receiver, FTI Consulting Canada Inc.
Alex Payne, Sidney Brejak and Aiden Nelms, for Nuance Pharma Ltd.
Sidney Brejak, for the Purchaser, Taro
Aiden Nelms, for Nuance Pharma Ltd.
Andrew Winton, for the Former Directors
Roger Jaipargas, for the Purchaser, Taro
Jim Robinson, Receiver, FTI Consulting Canada Inc.

HEARD: January 29, 2025

ENDORSEMENT

[1] The Receiver moves for various relief:

a. an approval and reverse vesting order:

i. approving the sale transaction between the Receiver as vendor and Taro Pharmaceuticals Inc. as Purchaser dated January 15, 2025;

ii. vesting all right, title and interest in the Purchased Shares to be issued to the Purchaser, free and clear of encumbrances;

iii. cancelling and terminating without consideration all equity interests of Antibe except for the Purchased Shares;

iv. granting releases in favour of the Receiver and other parties;

v. deeming Antibe to cease being a Respondent in these proceedings, upon delivery by the Receiver of its certificate; and

vi. sealing the unredacted Transaction Agreement until the Transaction is closed or further order of the Court; and

b. an Ancillary Order:

i. approving the Second Report of the Receiver dated January 15, 2025 and the activities of the Receiver and its counsel as described therein;

ii. approving the fees of the Receiver and its counsel;

iii. approving an interim distribution of funds to proven unsecured creditors on a *pro rata* basis, subject to certain sufficient holdbacks for costs to complete the administration of the Receivership and claims that have not yet been proven; and

iv. a distribution of funds in Canadian dollars equivalent to USD $519,000 of Traceable Funds, plus accrued interest, converted at the prevailing foreign exchange rate on the date of transfer, to Nuance as a permanent and indefeasible repayment of the indebtedness and obligations secured by the Nuance Constructive Trust.

[2] The Receiver relies on the Second Report. Defined terms in this Endorsement have the meaning given to them in the motion materials unless otherwise stated.

[3] The Service List has been served. I note in particular, given the nature and scope of the relief sought (and in particular, the proposed reverse vesting structure intended in part to preserve the value of tax loss carry forwards, certain scientific and research tax credits, and the transfer of certain patents and intellectual property), that the Service List includes the Department of Justice, the Canada Revenue Agency, the Ontario Securities Commission and the Ministry of Finance.

[4] The relief sought today is unopposed, including by the Former Directors, given the agreement reached with respect to the scope and terms of the order sought.

[5] For the reasons set out below, the relief sought is granted, with the exception of the proposed interim distribution of funds to proven unsecured creditors.

[6] With respect to the Transaction with Taro, the Sale Process was conducted in accordance with the Sale Process Approval Order I granted earlier in this proceeding. It consisted of two phases. Following receipt of the Phase 2 Bids and further negotiations, the Receiver declared the Purchaser as the Successful Party and proceeded to negotiate the Transaction Agreement which was executed on January 15, 2025.

[7] The terms of the Transaction Agreement are set out in the materials. The Purchaser will own 100% of the issued and outstanding shares of Antibe free and clear of encumbrances. The Purchase Price is set out in the materials proposed to be the subject of a sealing order, and is to be satisfied in part by a deposit equal to 10%. That has already been paid. The Transaction is on an "as is, where is" basis, scheduled to close no later than March 7, 2025.

[8] The Receiver is of the view that the Transaction provides the best possible outcome for the stakeholders in the circumstances given that it represents the highest and best offer received in the Sale Process. It is supported by the Financial Advisor.

[9] The Transaction contemplates a reverse vesting structure because the Purchaser requires certain intellectual property that is registered globally in approximately 41 jurisdictions around the world. In addition, the reverse vesting structure will preserve certain tax attributes including tax loss carry forwards and Scientific, Research and Experimental Development (SRED) credits, the value of which are an integral component of the consideration for the Purchaser.

[10] This Court and other courts have granted reverse vesting orders in receiverships brought pursuant to section 101 of the *Courts of Justice Act* and section 243 of the *Bankruptcy and Insolvency Act*, as well as in CCAA proceedings. While they remain the exception and not the rule, in certain circumstances such as I am satisfied are present in this case, these structures are appropriate, and are consistent with the well-established purposes of a receivership to enhance and facilitate the preservation and realization of the assets of the debtor for the benefit of creditors.

[11] I am satisfied that the Taro Transaction meets the *Soundair Principles*. Sufficient effort was made to obtain the best price. The Receiver did not act improvidently, and it considered the interests of all parties, and those are best served by the Transaction Agreement. The Sale Process was run efficaciously and with integrity and there was no resulting unfairness.

[12] The *Harte Gold* factors applicable to a consideration of whether a reverse vesting order should be granted have also been satisfied here. Such a structure is necessary in this case as the debtor operates in a highly regulated environment in which its existing permits, licences and other rights are difficult or impossible to assign to a purchaser.

[13] Moreover, and as set out above, maintaining the existing legal entities will preserve tax attributes and SRED credits, and avoid the very material cost, delay and risk relating to what would otherwise be necessary requests for approval of patent transfers which are registered in 41 separate international jurisdictions, but which also represent the core assets of Antibe and as such, are integral to the Transaction.

[14] The Transaction yielded the highest value from all competitive bids submitted in the Sale Process. The Receiver is strongly of the view that the Transaction Agreement with Taro could not have proceeded except by way of a reverse vesting structure. I am satisfied that the proposed reverse vesting order produces the best economic outcome. I am also satisfied that stakeholders are not worse off under such a structure, and that major creditors are not prejudiced. The Receiver submits that no creditor will be prejudiced by transferring the Excluded Assets, the Excluded Contracts, and the Excluded Liabilities to ResidualCo, which will stand in the place of Antibe for the purposes of distributions to stakeholders.

[15] Moreover, the purchase price proceeds attributable to the Property of Antibe will vest in ResidualCo and any creditor claims shall attach to those proceeds.

[16] I am also satisfied that the proposed limited release in favour of the Receiver Released Parties is appropriate here. Each was critical to the identification, execution and completion of the Transaction.

[17] I am further satisfied that Confidential Appendices "A" and "B" to the Second Report should be sealed as requested on the limited basis, pending closing of the Transaction, or until further order of the court. These materials include information on the Phase 1 and 2 bids received and the unredacted Transaction Agreement. If the Transaction does not close and the property that is the subject of the Transaction is required to be remarketed and sold, the disclosure of this information would materially impair both the integrity of the subsequent sales process and the likely recoveries for stakeholders.

[18] For all of these reasons, the sealing order is granted pursuant to section 137(2) of the *Courts of Justice Act* as it meets the factors articulated by the Supreme Court of Canada in *Sierra Club* and refined in *Sherman Estate*.

[19] The Second Report and the activities set out therein are also approved, as is appropriate from time to time: see *Target Canada Co., Re*. The activities of the Receiver as set out in the Second Report are consistent with the mandate given to the Receiver in the original appointment order and are accretive to the progress of this proceeding and the steps necessary to be taken to maximize recovery for stakeholders.

[20] The fees and disbursements of the Receiver and its counsel are fully set out in the Fee Affidavits. I am satisfied that they are reasonable, consistent with the activities described above, and are appropriate. They meet the overriding principle of reasonableness reflecting the knowledge, experience and skill of the Receiver and its counsel, the diligence displayed, responsibilities assumed, results of the efforts and cost of comparable services. See *Laurentian University of Sudbury, Re* and *Bank of Nova Scotia v. Diemer*.

[21] Finally, and with respect to the proposed distributions, I am satisfied that the distribution of the Traceable Funds should be approved. As noted, it is not opposed. More substantively, the Receiver has conducted an extensive analysis and determined that the Traceable Funds constitute property that is subject to a constructive trust in favour of Nuance. It follows that those funds are beneficially owned by that party and should be paid out for its benefit.

[22] However, I am not prepared today to approve the proposed interim distribution to unsecured creditors with Proven Claims. While this relief was initially opposed by the Former Directors, those parties reached an agreement with the Receiver that would essentially provide that the Receiver would serve and file a Supplementary Report setting out a summary of the proposed distributions prior to proceeding with any interim distributions, and the parties on the Service List would be provided with a notice period of seven days within which they could file any notices of dispute. Absent such a notice, the Receiver would be authorized to proceed with an interim distribution, and if disputes remained, the Receiver would seek directions from the Court.

[23] The challenge for me is that an interim distribution is appropriate where the court is satisfied that no creditors will be prejudiced and that sufficient holdbacks or reserves are made for unproven claims. See: *Maple Bank GmbH (Re),* 2017 ONSC 2536 at para. 34. The evidence in the record today is such that I cannot be so satisfied.

[24] The problem is that, through no fault of its own, the Receiver is not yet able to quantify the value of all unresolved claims (such as outstanding claims against the Former Directors advanced

under the claims process or corresponding indemnity claims of those Former Directors against Antibe), and there is no evidence as to the exact quantum of the proposed holdbacks or reserves relative to the estimated value of, or maximum exposure in respect of, unresolved claims.

[25] The proposed accommodation is essentially an agreement to make the necessary calculations later, give affected parties seven days to decide whether to object, and then if none does, make the distribution. While I acknowledge the practical approach this represents (something encouraged by the Commercial List), I am not comfortable that it is sufficient in the circumstances to meet the test set out in *Maple Bank* today.

[26] I have advised the Receiver and the other parties that I will make myself available to hear a distribution approval motion on an expedited basis once these issues are resolved.

[27] For all of these reasons, the requested relief (with the exception of the proposed interim distribution to unsecured creditors with proven claims) is granted.

[28] Orders to go in the form I have signed today which are effective immediately and without the necessity of issuing and entering.

Osborne J.

TAB 16

CITATION: Maple Bank GmbH (Re), 2017 ONSC 2536
COURT FILE NO.: CV-16-11290-00CL
DATE: 2017-04-27

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF MAPLE BANK GmbH

AND IN THE MATTER OF THE *WINDING-UP AND RESTRUCTURING ACT*, R.S.C. 1985, C.W-11, AS AMENDED

AND IN THE MATTER OF THE *BANK ACT*, S.C. 1991, C.46, AS AMENDED

BEFORE: Regional Senior Justice Geoffrey B. Morawetz

COUNSEL: *Alex MacFarlane, Robert Weir, Rachel Belanger*, for KPMG Inc., in its capacity as the Liquidator of the Business in Canada of Maple Bank GmbH and its Assets as defined under s. 618 of the *Bank Act*

David Byers, for the German Insolvency Administrator

Jonathan Wigley, Court Appointed Costs Counsel

Jane Milburn, Executive Employee Counsel for Paul Lishman, Jeff Campbell and Cyrus Sekhia

Kimberley Boara Alexander, Executive Employee Counsel for Don Scott

Maurice Fleming, for Radius Financial

Kyla Maher and *Erin Pleet*, Counsel for Paul Lishman

Massimo Starnino and *Megan Shortreed*, for Employees' Representative Counsel

HEARD: March 10, 2017

RELEASED: April 27. 2017

ENDORSEMENT

[1] On March 10, 2017, this motion was granted with reasons to follow.

[2] These are the reasons.

[3] On March 16, 2016 (the "Winding-Up Date") upon the application of the Attorney General of Canada, the court granted an order (the "Winding-Up Order") pursuant to s. 10.1 of the *Winding-Up and Restructuring Act*, R.S.C. ("WURA"):

(i) winding-up the business (the "Business") in Canada of Maple Bank GmbH ("Maple Bank"); and

(ii) appointing KPMG Inc. (the "Liquidator") as the Liquidator of the Business and the assets (as defined in section 618 of the *Bank Act*) of Maple Bank (the "Toronto Branch Assets").

[4] The Liquidator brought this motion for an order (the "Interim Distribution Order") authorizing and directing the Liquidator to make a partial distribution to the German Insolvency Administration (the "GIA") of a portion of the estimated surplus of funds, which have been realized by the Liquidator from the liquidation and/or sale of the Toronto Branch Assets and the Business (the "Interim Distribution") on, or after March 10, 2017 (the "Interim Distribution Date").

[5] Maple Bank is a Canadian owned German Bank, and an authorized foreign bank in Canada under s. 2 and Part XII.I of the *Bank Act* (an "Authorized Foreign Bank"). In Germany, Maple Bank is subject to regulation by the Federal Financial Supervisory Authority Service. As an Authorized Foreign Bank, Maple Bank was regulated with respect to its Business in Canada (the "Toronto Branch") by the Office of the Superintendent of Financial Institutions ("OSFI").

[6] In February 2016, the emergence of significant German tax claims led to the appointment of the GIA over Maple Bank, which appointment led OSFI to request that the Attorney General of Canada obtain the Winding-Up Order in respect of the Business of the Toronto Branch Assets (the "Winding-Up Proceedings").

[7] Since the Winding-Up Date, the Liquidator has worked to liquidate the Toronto Branch Assets and wind-up the Toronto Branch.

[8] The realization process for all of the Toronto Branch assets is essentially complete and the Liquidator has approximately $820.1 million available to satisfy outstanding claims.

[9] On June 8, 2016, the court issued a claims procedure order (the "Claims Procedure Order"), in order to facilitate a determination of the existence and amount of any claims against the Toronto Branch. Creditors were requested to file their claims by September 19, 2016 (the "Claims Submission Date")

[10] The Claims Procedure Order resulted in Liquidator receiving 56 proofs of claim totaling $1.57 billion, including a proof of claim submitted by the GIA on behalf of Maple Bank totalling $791.33 million (the "GIA Claim") in respect of certain term loans, as well as other operational funding that was provided to the Toronto Branch by Maple Bank from Germany.

[11] On November 25, 2016, the court issued a distribution order (the "Distribution Order"), authorizing the Liquidator to make a distribution to creditors of the Toronto Branch with proven claims. In accordance with the Distribution Order, on December 9, 2016, the Liquidator paid proven claims in the total value on account of principal and statutory interest under WURA of approximately $686.8 million.

[12] The Liquidator has reached an agreement with respect to the GIA Claim, whereby the GIA Claim, to the extent that it is valid, will be reduced to the extent of any distributions made to the GIA. The GIA has further agreed that such corresponding portion of the GIA Claim shall be extinguished and released by such distribution. In addition, the remaining portion of the GIA Claim, to the extent that it is valid, after taking into account any interim distribution, shall be capped at an amount (which amount may, from time to time, increase or decrease) that results in the Toronto Branch having assets in excess of its liabilities, so that creditors with proven claims will receive 100% of their claim plus interest in accordance with the WURA.

[13] There remain 24 unproven claims with an aggregate value of $82.4 million.

[14] On January 27, 2014, the court issued a principal officers additional claims order (the "Principal Officers Additional Claims Order"), with the aim of facilitating the determination of the existence and amount of any claims that may exist against certain Principal Officers of the Toronto Branch and in order to determine the corresponding quantum of any potential indemnity claims by such Principal Officer against the Toronto Branch. Pursuant to the Principal Officer's Additional Claims Order, creditors were required to file their claims with the Liquidator prior to February 28, 2017 (the "Principal Officers Claims Bar Date"). The Liquidator is not aware of any valid claims against Principal Officers having been filed.

[15] The Claims Procedure Order has been implemented in excess of 150 days and the Principal Officers Claim Bar Date has passed.

[16] In its Eleventh Report, the Liquidator advises that it can now predict, with a high degree of certainty, both:

(i) the universe of Claims that will be proven under the Winding-Up Proceedings; and

(ii) that the Toronto Branch will have an estimated surplus of at least $660.6 million.

[17] The Liquidator has worked with the GIA in order to implement a distribution process in Canada that will ensure that appropriate reserves will be maintained in order to pay, in full, proven claims of creditors of the Toronto Branch, while effecting a prompt distribution to the GIA, after the establishment of the estimated reserve. The Liquidator has, in consultation with the GIA, developed a proposed Interim Distribution.

[18] The Liquidator reports that, in order to facilitate the Interim Distribution, the Liquidator has established a reserve (the "Estimated Reserve") to provide for:

(i) the Unproven Claims;

(ii) the Future Potential Claims;

(iii) interest on Unproven Claims and Future Potential Claims at 5% per annum up to and including March 31, 2018; and

(iv) estimated costs to administer the Toronto Branch Liquidation through March 31, 2018.

[19] The Estimated Reserve is in the approximate amount of $157.1 million.

[20] The GIA supports the establishment of the Estimated Reserve.

[21] The Liquidator is of the view that the Interim Distribution is appropriate in the context of the Winding-Up Proceedings.

[22] The motion was not opposed.

[23] The sole issue to be determined is whether it is appropriate for the court to approve the Interim Distribution.

[24] In general terms, the underlying purpose of the WURA is to provide a mechanism for the orderly gathering of and realization on the assets of a debtor (including, an Authorized Foreign Bank) as inexpensively and expeditiously as possible and the corresponding distribution of the proceeds by the Liquidator under the supervision of the court to the creditors and, where applicable, the equity holders of a debtor (see: *Coopérants, Mutual Life Insurance Society (Liquidator of)* v. *Dubois*, [1996] 1 S.C.R. 900 at paras. 36-37 and *Canada (Attorney General)* v. *Reliance Insurance Co.*, 2015 ONSC 7489 (Ont. S.C.J. [Commercial List]), at para. 10).

[25] Sections 75 and 77 of the WURA provide a skeletal framework for the distribution of the assets of the debtor by the Liquidator.

[26] Counsel to the Liquidator submits that the case law has developed which confirms that it is not a precondition to a distribution to creditors of a debtor under the WURA that:

(i) all claims filed in the WURA proceeding at the date of the intended distribution be allowed or disallowed by the Liquidator; nor

(ii) that there be complete certainty that all potential creditors have submitted proofs of claim at the date of the intended distribution.

[27] Counsel further submits that orders granting interim distribution in the context of a WURA proceeding are neither unusual nor unheard of (see: *Canada Deposit Insurance Corp.* v. *Columbia Trust Co.* 1987 CarswellBC 11; *Reliance, supra*; *Canada (Attorney General)* v. *Reliance Insurance Co.* 2009 CarswellOnt 4250 (Ont. S.C.J. [Commercial List]); and *Canada*

(Attorney General) v. *Confederation Life Insurance Co.* [2002] O.J. No. 4360 (Ont. S.C.J. [Commercial List]). It is noted, however, that in all of these proceedings, the proposed interim distributions were not opposed and the issue before me was not the subject of comment.

[28] Section 158.1(2) of the WURA provides for a distribution scheme pursuant to which an Authorized Foreign Bank, in liquidation in Canada may, with the approval of the court, receive the surplus from the Winding-Up after all creditors with proven claim have receive payment of the full value of their proven claim and statutory interest (the "Priority Amount"):

> **Distribution of Property**
>
> 158.1 (1) Where a winding-up order is made in respect of an authorized foreign bank, claims shall be paid in the following order of priority:
>
> (a) charges, costs and expenses, including the remuneration of the liquidator, incurred in the winding-up of the business in Canada of the authorized foreign bank and of the liquidation of its assets;
>
> (b) claims of preferred creditors, specified in section 72; and
>
> (c) debts and liabilities of the authorized foreign bank in respect of its business in Canada in order of priority as set out in sections 625 and 627 of the *Bank Act*.
>
> **Distribution and Release of Surplus Assets**
>
> (2) Any assets that remain after payment of the claims referred to in paragraphs (1)(a) to (c) are to be applied firstly in payment of interest from the commencement of the winding-up at the rate of five per cent per annum on all claims proved in the winding-up and according to their priority. The liquidator may, with the approval of the court, release to the authorized foreign bank any assets remaining after payment of the interest.

[29] The Liquidator submits that section 158.1 is not a bar to an interim distribution of surplus to an Authorized Foreign Bank where sufficient reserves are established to ensure that all priority amounts will be paid in due course.

[30] Counsel to the Liquidator submits that federal insolvency law statutes are complementary and operate in tandem and further, that the court has long recognized that in dealing with insolvency legislation, a technical interpretation should not be applied. Rather, insolvency legislation needs to be given a broad, flexible and purposive interpretation. In support of these propositions, counsel cites: *Century Services Inc.* v. *Canada (Attorney General)* 2010 SCC 60; *Union of Canada Life Insurance (Re)*, 2012 ONSC 957 (S.C.J. [Commercial List]); *Kansa General International Insurance Co. (liquidator of)* v. *Maska U.S. Inc.* [2002] Q.J. No. 1732 (S.C.); and *Kitchener Frame Ltd.,* Re 2012 ONSC 234 (S.C.J. [Commercial List]).

[31] Counsel then submitted that an interpretation of section 158.1(2) that would serve as a temporal bar to an interim distribution of surplus to an Authorized Foreign Bank where sufficient reserves have been established to satisfy the Priority Amounts, solely on the basis that the Priority Amounts have not yet been paid out, would be: (i) overly technical and strict; and (ii) where an Authorized Foreign Bank is in liquidation in the jurisdiction of its head office, contrary to the recognized policy of this court to, where possible, assist with and accommodate insolvency proceedings in a foreign jurisdiction, in order to maximize value for the benefit of all creditors.

[32] Counsel to the Liquidator further submits that in determining whether or not to approve the Interim Distribution, the Court should focus on whether or not the creditors of the Toronto Branch would be prejudiced by the Interim Distribution. The Liquidator proposes to maintain the Estimated Reserve to cover Unproven Claims, Future Potential Claims, interest on Unproven Claims and Future Claims at five percent per annum, as well as costs to administer the Toronto Branch Liquidation.

[33] The Liquidator is of the view that the Interim Distribution will not prejudice the Toronto Branch's creditors, but the failure to approve the Interim Distribution would expose creditors in Germany to delay and to considerable foreign exchange risks on the amounts that would eventually be distributed to them.

[34] I am satisfied that the Interim Distribution is appropriate in the context of these proceedings. I am satisfied that no creditors of the Toronto Branch will suffer prejudice as a result of the Interim Distribution, as the Toronto Branch has a significant surplus and the Liquidator has calculated that it will be able to maintain adequate reserves which will ultimately pay all Proven Claims and Future Potential Claims.

[35] In these circumstances, there is no principled basis on which to delay the distribution of the surplus to the GIA, until such time as the Liquidator resolves all outstanding claims against the Toronto Branch. Indeed, it would be inequitable to the GIA to delay the distribution.

[36] As a Superior Court of general jurisdiction, the Superior Court of Justice has all the powers that are necessary to do justice between the parties. Except where provided specifically to the contrary, the court's jurisdiction is unlimited and unrestricted in substantive law and civil matters (see: *80 Wellesley St. East Ltd.* v. *Fundy Bay Builders Ltd.*, (1972), [1972] O.J. No. 1713 (Ont. C.A.) and *Re Intertan Canada Ltd.* (2009), [2009] O.J. No. 293, 174 A.C.W.S. (3d) 617 (Ont. S.C.J.)).

[37] In this case, the Estimated Reserve being maintained by the Liquidator provides adequate security to ensure that all claims proved in the Winding-Up can be paid. The Liquidator has established the reserve for the benefit of those who have Unproven Claims and Future Potential Claims. In this respect, it is reasonable in the circumstances to deem that these claims have been paid for the purposes of section 158.1(2), which thus enables the Liquidator to make the Interim Distribution.

[38] I do not read section 158.1 as prohibiting a distribution in these circumstances.

Regional Senior Justice G.B. Morawetz

Date: April 27, 2017

TAB 17

CITATION: Maple Bank GmbH (Re), 2017 ONSC 2536
COURT FILE NO.: CV-16-11290-00CL
DATE: 2017-04-27

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF MAPLE BANK GmbH

AND IN THE MATTER OF THE *WINDING-UP AND RESTRUCTURING ACT*, R.S.C. 1985, C.W-11, AS AMENDED

AND IN THE MATTER OF THE *BANK ACT*, S.C. 1991, C.46, AS AMENDED

BEFORE: Regional Senior Justice Geoffrey B. Morawetz

COUNSEL: *Alex MacFarlane, Robert Weir, Rachel Belanger*, for KPMG Inc., in its capacity as the Liquidator of the Business in Canada of Maple Bank GmbH and its Assets as defined under s. 618 of the *Bank Act*

David Byers, for the German Insolvency Administrator

Jonathan Wigley, Court Appointed Costs Counsel

Jane Milburn, Executive Employee Counsel for Paul Lishman, Jeff Campbell and Cyrus Sekhia

Kimberley Boara Alexander, Executive Employee Counsel for Don Scott

Maurice Fleming, for Radius Financial

Kyla Maher and *Erin Pleet*, Counsel for Paul Lishman

Massimo Starnino and *Megan Shortreed*, for Employees' Representative Counsel

HEARD: March 10, 2017

RELEASED: April 27. 2017

ENDORSEMENT

[1] On March 10, 2017, this motion was granted with reasons to follow.

[2] These are the reasons.

[3] On March 16, 2016 (the "Winding-Up Date") upon the application of the Attorney General of Canada, the court granted an order (the "Winding-Up Order") pursuant to s. 10.1 of the *Winding-Up and Restructuring Act*, R.S.C. ("WURA"):

(i) winding-up the business (the "Business") in Canada of Maple Bank GmbH ("Maple Bank"); and

(ii) appointing KPMG Inc. (the "Liquidator") as the Liquidator of the Business and the assets (as defined in section 618 of the *Bank Act*) of Maple Bank (the "Toronto Branch Assets").

[4] The Liquidator brought this motion for an order (the "Interim Distribution Order") authorizing and directing the Liquidator to make a partial distribution to the German Insolvency Administration (the "GIA") of a portion of the estimated surplus of funds, which have been realized by the Liquidator from the liquidation and/or sale of the Toronto Branch Assets and the Business (the "Interim Distribution") on, or after March 10, 2017 (the "Interim Distribution Date").

[5] Maple Bank is a Canadian owned German Bank, and an authorized foreign bank in Canada under s. 2 and Part XII.I of the *Bank Act* (an "Authorized Foreign Bank"). In Germany, Maple Bank is subject to regulation by the Federal Financial Supervisory Authority Service. As an Authorized Foreign Bank, Maple Bank was regulated with respect to its Business in Canada (the "Toronto Branch") by the Office of the Superintendent of Financial Institutions ("OSFI").

[6] In February 2016, the emergence of significant German tax claims led to the appointment of the GIA over Maple Bank, which appointment led OSFI to request that the Attorney General of Canada obtain the Winding-Up Order in respect of the Business of the Toronto Branch Assets (the "Winding-Up Proceedings").

[7] Since the Winding-Up Date, the Liquidator has worked to liquidate the Toronto Branch Assets and wind-up the Toronto Branch.

[8] The realization process for all of the Toronto Branch assets is essentially complete and the Liquidator has approximately $820.1 million available to satisfy outstanding claims.

[9] On June 8, 2016, the court issued a claims procedure order (the "Claims Procedure Order"), in order to facilitate a determination of the existence and amount of any claims against the Toronto Branch. Creditors were requested to file their claims by September 19, 2016 (the "Claims Submission Date")

[10] The Claims Procedure Order resulted in Liquidator receiving 56 proofs of claim totaling $1.57 billion, including a proof of claim submitted by the GIA on behalf of Maple Bank totalling $791.33 million (the "GIA Claim") in respect of certain term loans, as well as other operational funding that was provided to the Toronto Branch by Maple Bank from Germany.

[11] On November 25, 2016, the court issued a distribution order (the "Distribution Order"), authorizing the Liquidator to make a distribution to creditors of the Toronto Branch with proven claims. In accordance with the Distribution Order, on December 9, 2016, the Liquidator paid proven claims in the total value on account of principal and statutory interest under WURA of approximately $686.8 million.

[12] The Liquidator has reached an agreement with respect to the GIA Claim, whereby the GIA Claim, to the extent that it is valid, will be reduced to the extent of any distributions made to the GIA. The GIA has further agreed that such corresponding portion of the GIA Claim shall be extinguished and released by such distribution. In addition, the remaining portion of the GIA Claim, to the extent that it is valid, after taking into account any interim distribution, shall be capped at an amount (which amount may, from time to time, increase or decrease) that results in the Toronto Branch having assets in excess of its liabilities, so that creditors with proven claims will receive 100% of their claim plus interest in accordance with the WURA.

[13] There remain 24 unproven claims with an aggregate value of $82.4 million.

[14] On January 27, 2014, the court issued a principal officers additional claims order (the "Principal Officers Additional Claims Order"), with the aim of facilitating the determination of the existence and amount of any claims that may exist against certain Principal Officers of the Toronto Branch and in order to determine the corresponding quantum of any potential indemnity claims by such Principal Officer against the Toronto Branch. Pursuant to the Principal Officer's Additional Claims Order, creditors were required to file their claims with the Liquidator prior to February 28, 2017 (the "Principal Officers Claims Bar Date"). The Liquidator is not aware of any valid claims against Principal Officers having been filed.

[15] The Claims Procedure Order has been implemented in excess of 150 days and the Principal Officers Claim Bar Date has passed.

[16] In its Eleventh Report, the Liquidator advises that it can now predict, with a high degree of certainty, both:

(i) the universe of Claims that will be proven under the Winding-Up Proceedings; and

(ii) that the Toronto Branch will have an estimated surplus of at least $660.6 million.

[17] The Liquidator has worked with the GIA in order to implement a distribution process in Canada that will ensure that appropriate reserves will be maintained in order to pay, in full, proven claims of creditors of the Toronto Branch, while effecting a prompt distribution to the GIA, after the establishment of the estimated reserve. The Liquidator has, in consultation with the GIA, developed a proposed Interim Distribution.

[18] The Liquidator reports that, in order to facilitate the Interim Distribution, the Liquidator has established a reserve (the "Estimated Reserve") to provide for:

(i) the Unproven Claims;

(ii) the Future Potential Claims;

(iii) interest on Unproven Claims and Future Potential Claims at 5% per annum up to and including March 31, 2018; and

(iv) estimated costs to administer the Toronto Branch Liquidation through March 31, 2018.

[19] The Estimated Reserve is in the approximate amount of $157.1 million.

[20] The GIA supports the establishment of the Estimated Reserve.

[21] The Liquidator is of the view that the Interim Distribution is appropriate in the context of the Winding-Up Proceedings.

[22] The motion was not opposed.

[23] The sole issue to be determined is whether it is appropriate for the court to approve the Interim Distribution.

[24] In general terms, the underlying purpose of the WURA is to provide a mechanism for the orderly gathering of and realization on the assets of a debtor (including, an Authorized Foreign Bank) as inexpensively and expeditiously as possible and the corresponding distribution of the proceeds by the Liquidator under the supervision of the court to the creditors and, where applicable, the equity holders of a debtor (see: *Coopérants, Mutual Life Insurance Society (Liquidator of)* v. *Dubois*, [1996] 1 S.C.R. 900 at paras. 36-37 and *Canada (Attorney General)* v. *Reliance Insurance Co.*, 2015 ONSC 7489 (Ont. S.C.J. [Commercial List]), at para. 10).

[25] Sections 75 and 77 of the WURA provide a skeletal framework for the distribution of the assets of the debtor by the Liquidator.

[26] Counsel to the Liquidator submits that the case law has developed which confirms that it is not a precondition to a distribution to creditors of a debtor under the WURA that:

(i) all claims filed in the WURA proceeding at the date of the intended distribution be allowed or disallowed by the Liquidator; nor

(ii) that there be complete certainty that all potential creditors have submitted proofs of claim at the date of the intended distribution.

[27] Counsel further submits that orders granting interim distribution in the context of a WURA proceeding are neither unusual nor unheard of (see: *Canada Deposit Insurance Corp.* v. *Columbia Trust Co.* 1987 CarswellBC 11; *Reliance, supra*; *Canada (Attorney General)* v. *Reliance Insurance Co.* 2009 CarswellOnt 4250 (Ont. S.C.J. [Commercial List]); and *Canada*

(Attorney General) v. *Confederation Life Insurance Co.* [2002] O.J. No. 4360 (Ont. S.C.J. [Commercial List]). It is noted, however, that in all of these proceedings, the proposed interim distributions were not opposed and the issue before me was not the subject of comment.

[28] Section 158.1(2) of the WURA provides for a distribution scheme pursuant to which an Authorized Foreign Bank, in liquidation in Canada may, with the approval of the court, receive the surplus from the Winding-Up after all creditors with proven claim have receive payment of the full value of their proven claim and statutory interest (the "Priority Amount"):

> **Distribution of Property**
>
> 158.1 (1) Where a winding-up order is made in respect of an authorized foreign bank, claims shall be paid in the following order of priority:
>
> (a) charges, costs and expenses, including the remuneration of the liquidator, incurred in the winding-up of the business in Canada of the authorized foreign bank and of the liquidation of its assets;
>
> (b) claims of preferred creditors, specified in section 72; and
>
> (c) debts and liabilities of the authorized foreign bank in respect of its business in Canada in order of priority as set out in sections 625 and 627 of the *Bank Act*.
>
> **Distribution and Release of Surplus Assets**
>
> (2) Any assets that remain after payment of the claims referred to in paragraphs (1)(a) to (c) are to be applied firstly in payment of interest from the commencement of the winding-up at the rate of five per cent per annum on all claims proved in the winding-up and according to their priority. The liquidator may, with the approval of the court, release to the authorized foreign bank any assets remaining after payment of the interest.

[29] The Liquidator submits that section 158.1 is not a bar to an interim distribution of surplus to an Authorized Foreign Bank where sufficient reserves are established to ensure that all priority amounts will be paid in due course.

[30] Counsel to the Liquidator submits that federal insolvency law statutes are complementary and operate in tandem and further, that the court has long recognized that in dealing with insolvency legislation, a technical interpretation should not be applied. Rather, insolvency legislation needs to be given a broad, flexible and purposive interpretation. In support of these propositions, counsel cites: *Century Services Inc.* v. *Canada (Attorney General)* 2010 SCC 60; *Union of Canada Life Insurance (Re)*, 2012 ONSC 957 (S.C.J. [Commercial List]); *Kansa General International Insurance Co. (liquidator of)* v. *Maska U.S. Inc.* [2002] Q.J. No. 1732 (S.C.); and *Kitchener Frame Ltd.,* Re 2012 ONSC 234 (S.C.J. [Commercial List]).

[31] Counsel then submitted that an interpretation of section 158.1(2) that would serve as a temporal bar to an interim distribution of surplus to an Authorized Foreign Bank where sufficient reserves have been established to satisfy the Priority Amounts, solely on the basis that the Priority Amounts have not yet been paid out, would be: (i) overly technical and strict; and (ii) where an Authorized Foreign Bank is in liquidation in the jurisdiction of its head office, contrary to the recognized policy of this court to, where possible, assist with and accommodate insolvency proceedings in a foreign jurisdiction, in order to maximize value for the benefit of all creditors.

[32] Counsel to the Liquidator further submits that in determining whether or not to approve the Interim Distribution, the Court should focus on whether or not the creditors of the Toronto Branch would be prejudiced by the Interim Distribution. The Liquidator proposes to maintain the Estimated Reserve to cover Unproven Claims, Future Potential Claims, interest on Unproven Claims and Future Claims at five percent per annum, as well as costs to administer the Toronto Branch Liquidation.

[33] The Liquidator is of the view that the Interim Distribution will not prejudice the Toronto Branch's creditors, but the failure to approve the Interim Distribution would expose creditors in Germany to delay and to considerable foreign exchange risks on the amounts that would eventually be distributed to them.

[34] I am satisfied that the Interim Distribution is appropriate in the context of these proceedings. I am satisfied that no creditors of the Toronto Branch will suffer prejudice as a result of the Interim Distribution, as the Toronto Branch has a significant surplus and the Liquidator has calculated that it will be able to maintain adequate reserves which will ultimately pay all Proven Claims and Future Potential Claims.

[35] In these circumstances, there is no principled basis on which to delay the distribution of the surplus to the GIA, until such time as the Liquidator resolves all outstanding claims against the Toronto Branch. Indeed, it would be inequitable to the GIA to delay the distribution.

[36] As a Superior Court of general jurisdiction, the Superior Court of Justice has all the powers that are necessary to do justice between the parties. Except where provided specifically to the contrary, the court's jurisdiction is unlimited and unrestricted in substantive law and civil matters (see: *80 Wellesley St. East Ltd.* v. *Fundy Bay Builders Ltd.*, (1972), [1972] O.J. No. 1713 (Ont. C.A.) and *Re Intertan Canada Ltd.* (2009), [2009] O.J. No. 293, 174 A.C.W.S. (3d) 617 (Ont. S.C.J.)).

[37] In this case, the Estimated Reserve being maintained by the Liquidator provides adequate security to ensure that all claims proved in the Winding-Up can be paid. The Liquidator has established the reserve for the benefit of those who have Unproven Claims and Future Potential Claims. In this respect, it is reasonable in the circumstances to deem that these claims have been paid for the purposes of section 158.1(2), which thus enables the Liquidator to make the Interim Distribution.

[38] I do not read section 158.1 as prohibiting a distribution in these circumstances.

Regional Senior Justice G.B. Morawetz

Date: April 27, 2017

TAB 18

Blue Mountain Resorts Limited v. Den Bok et al.
[Indexed as: Blue Mountain Resorts Ltd. v. Ontario (Ministry of Labour)]

Ontario Reports

Court of Appeal for Ontario,

MacPherson, R.P. Armstrong and Blair JJ.A.

February 7, 2013

114 O.R. (3d) 321 | 2013 ONCA 75

Case Summary

Employment — Occupational health and safety — "Workplace" — Resort guest dying while swimming in unattended indoor pool — Resort not required to report death to Ministry of Labour on basis that it was death or critical injury incurred by person at workplace as contemplated by s. 51(1) of Occupational Health and Safety Act — Labour Relations Board's finding that swimming pool was "workplace" as resort employees must have been present at other times being unreasonable — Reasonable nexus required between hazard giving rise to death or critical injury and realistic risk to worker safety at that site — No such nexus existing in this case — Occupational Health and Safety Act, R.S.O. 1990, c. O.1, s. 51(1).

A guest at the applicant's resort died while swimming in an unattended pool. An inspector under the Occupational Health and Safety Act found that the applicant was required to report the death to the Ministry of Labour because it was a death or critical injury incurred by a person at a workplace as contemplated by s. 51(1) of the Act. The inspector issued an order to that effect. The Ontario Labour Relations Board upheld the order on the basis that resort employees must have been present at other times in the pool area to check and maintain it. The Divisional Court dismissed the applicant's application for judicial review, holding that the board's determination that the swimming pool was a "workplace" was reasonable. The applicant appealed.

Held, the appeal should be allowed.

While the Act, as public welfare legislation, must be given a very broad and generous interpretation, the principle of statutory interpretation affirming that broad language may be given a restrictive interpretation to avoid absurdity came into play in this case. The interpretation given to s. 51(1) of the Act by the board and the Divisional Court would make virtually every place in Ontario a "workplace" because a worker may, at some time, be at that place. This would lead to the absurd conclusion that every death or critical injury to anyone, anywhere, whatever the cause, must be reported. This interpretation goes well beyond the proper reach of the Act and the reviewing role of the ministry reasonably necessary to advance the objective of protecting the health and safety of workers in the workplace and, therefore, is unreasonable. A proper interpretation of the Act requires that there be some reasonable nexus between the hazard giving rise to the death or critical injury and a realistic risk to worker safety at the site. There was

[39] Counsel for the ministry conceded before the board that on the ministry's interpretation of the reporting section he could not think of any location in the province of Ontario, except perhaps an abandoned woodlot, that would not be classified as a workplace. In this court, counsel and his client could not think of any examples. That is not a defensible outcome.

[40] Consider the following, as well.

[41] Mr. Den Bok acknowledged that if there were a critical injury to a hockey player or a spectator during a Toronto Maple Leaf hockey game at the Air Canada Centre, it would have to be reported to the ministry. If the injury occurred on the ice, the hockey game would have to be shut down -- televised or not -- until the premises were released by a ministry inspector. He took the same position with respect to a wide variety of other circumstances. For instance, he took the view that reporting to [page331] the ministry would be mandatory in the case of customer injuries at a Canadian Tire store or other retail outlet; in the case of injuries sustained by the public on highways patrolled by police (because the police or other workers may arrive after the accident, or may have passed by on a prior occasion); and in the case of worshippers who may suffer a heart attack or other critical injury at a religious institution (whether the services would have to be halted pending ministry release of the place of worship, was left unsaid).

[42] One can envision endless examples that would be caught by the board's interpretation, all without any causal relationship with a workplace safety issue. Would parents have to report to the ministry if their child were injured at home because they had hired a nanny? Does a roller coaster become a "workplace" when a guest is injured while riding on it? Because hotel employees enter guest rooms, does a hotel room become a "workplace" when a guest dies of a heart attack or a drug overdose, or is murdered?

[43] As noted above, where there are competing plausible constructions, a statute should be interpreted in a way that avoids absurd results: Rizzo & Rizzo Shoes Ltd. (Re) (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 27; Boma Manufacturing, at para. 109; and Canadian Pacific, at pp. 1081-1082 S.C.R. In Rizzo, at para. 27, Iacobucci J. states that "[i]t is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences".

[44] The consequences or results of the Divisional Court's and the board's decision are incompatible with the objects of the Act and the enforcement provisions of s. 51(1), in my opinion. Their interpretation extends the scope of the Act and has the potential to give the ministry and its inspectors significantly intrusive powers far beyond what is reasonably required to accomplish its purpose of preserving and promoting worker safety in the workplace. The interpretation is therefore unreasonable.

The proper interpretation of s. 51(1)

[45] That being the case, it falls to this court to determine the proper interpretation of s. 51(1). In doing so, we must have regard to the words of that provision in their grammatical and ordinary sense and in their context, read harmoniously with the scheme of the statute as a whole, the purpose of the statute and the intention of the legislature: Rizzo, at para. 21; R. v. Gladue, [1999] 1 S.C.R. 688, [1999] S.C.J. No. 19, at para. 25; and Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 26. [page332]

TAB 19

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *All Canadian Investment Corporation (Re),* 2020 BCSC 1683

Date: 20201103
Docket: S1710393
Registry: Vancouver

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

And

In the Matter of the *Business Corporations Act*, S.B.C., c. 57, as amended

And

In the Matter of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended

And

In the Matter of a Plan of Compromise and Arrangement of All Canadian Investment Corporation

Before: The Honourable Mr. Justice Walker

Oral Reasons for Judgment

Counsel for the Petitioner:	J.D. West
Counsel for the Preferred Shareholders:	J. Whyte
Counsel for the creditors, James Hancock and 1083163 Alberta Ltd.	P.J. Reardon
Counsel for the Monitor:	D.B. Hyndman
Place and Dates of Hearing:	Vancouver, B.C. October 30,2020 November 3, 2020
Place and Date of Judgment:	Vancouver, B.C. November 3, 2020

Introduction

[1] In this proceeding brought under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*], the debtor company, All Canadian Investment Corporation ("ACIC"), and the Monitor ask whether the current plan of arrangement to be put to a vote by ACIC's creditors should be amended to include a provision that the creditors shall be paid, *pari passu*, post-filing interest at the 5% interest rate provided for in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*].

[2] The normal rule in insolvency proceedings is that creditors are not entitled to be paid interest, contractual or otherwise, accruing after filing. The rule is referred to in the common law as the "interest stops" rule. In *Nortel Networks Corp. (Re)*, 2015 ONCA 681, the Ontario Court of Appeal confirmed this rule applies in *CCAA* proceedings.

[3] I am told there is no reported case where post-filing interest has been approved in the *CCAA* context. Counsel took me to the reported cases closest on point they said they could find: *Nortel*; *Canada (Attorney General) v. Confederation Life Insurance Co.,* [2001] O.T.C. 486, [2001] O.J. No. 2610 (S.C.J.) [cited in these reasons to O.J.].

[4] In *Nortel*, Mr. Justice Rouleau determined that the interest stops rule (which applies in *BIA* proceedings) should also apply as a presumptive general rule in the *CCAA* context. Rouleau J.A. pointed to prior decisions where the interest stops rule was described as a necessary corollary of the *pari passu* rule (where the assets of a debtor are to be distributed amongst classes of creditors rateably and equally, as those assets are found at the date of insolvency): *Confederation Life* at paras. 20-21, citing *In re Savin* (1872), L.R. 7 Ch. App. 760 at 764 (Eng. Ch. Div.) and *In re Humber Ironworks and Shipbuilding Co.*, (1869), 38 L.J. Ch. 712 at 713-714, L.R. 4 Ch. App. 643 (Eng. Ch. Div). The primary purposes behind the common law rule, as Rouleau J.A. pointed out at para. 27 of *Nortel*, are to achieve fairness to creditors and allow the orderly administration of an insolvency debtor's estate.

[5] The interest stops rule has been applied consistently in bankruptcy and winding-up proceedings: *Confederation Life* at paras. 22-23.

[6] There is no specific provision in the *CCAA* dealing with post-filing interest. However, as Rouleau J.A. explained, in *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60, the Supreme Court of Canada described the *BIA* and the *CCAA* as part of a harmonized integrated insolvency regime where the fair treatment of creditors and the orderly administration of an insolvent debtor's estate apply with equal force. If the interest stops rule is not presumptive in the *CCAA* context, creditors entitled to post-filing interest may be less motivated to compromise than those creditors without it; the *CCAA*'s remedial objectives could be frustrated. Rouleau J.A. disagreed with the submission that the interest stops rule is contrary to established *CCAA* practice and also rejected the submission that the interest stops rule provides an incentive for debtors to unfairly use the *CCAA* to obtain a permanent interest holiday from its creditors: *Nortel* at paras. 34, 41, 45-47.

[7] However, Rouleau J.A. recognized that there may be exceptional circumstances where the interest stops rule works an unfairness and said that plans of arrangement may be negotiated which allow for payment of post-filing interest:

> [45] As to past practice and the reasonable expectations of the parties, I do not view the existence of an interest stops rule as being contrary to established *CCAA* practice or as preventing a *CCAA* plan from providing for post-filing interest. Parties may negotiate for a plan that provides for payments of more or less than a creditor's legal entitlement in lieu of the foregone interest. Thus, I do not accept the appellant's submission that there would be a disincentive to participate in *CCAA* proceedings, which is based on the premise that post-filing interest may not be recovered under a *CCAA* plan.
>
> [46] The appellant also raised the concern that a debtor company could obtain a permanent interest holiday, resulting in unfairness. The appellant says that if there are proceeds over and above the amounts needed to satisfy the pre-filing claims of creditors, those proceeds would be for the benefit of the shareholders of the debtor. This follows from the fact that the *CCAA* contains no provision for the payment of a "surplus" to creditors and the interest stops rule would prevent the unsecured creditors from recovering any post-filing interest. The debtor could therefore resort to the *CCAA* to stop interest from accruing and operate his business interest free.

> [47] This hypothetical raises the same concern about the loss of post-filing interest but in a somewhat different way. The concern is that a debtor may seek *CCAA* protection to avoid the obligation to pay interest.
>
> [48] There may well be exceptional situations where, at some point in a *CCAA* proceeding, the common law interest stops rule risks working an unfairness of some sort. I leave for another day what orders, if any, might be made by a *CCAA* judge in cases such as the hypothetical presented by the appellant where a debtor might be considered to benefit unfairly as a result of the common law interest stops rule. I note, however, that in order to achieve the remedial purpose of the *CCAA*, *CCAA* courts have been innovative in their interpretation of their stay power and in the exercise of their authority in the administration of *CCAA* proceedings. This approach has been specifically endorsed by the Supreme Court of Canada in *Century Services* and would no doubt guide the court should the need arise: see, for example, paras. 61 and 70.
>
> [Emphasis added]

Background Facts

[8] The history of the instant *CCAA* proceeding is set out in considerable detail in prior reasons for judgment I issued on September 4, 2019 (indexed at 2019 BCSC 1488).

[9] A brief summary will suffice at this juncture. This is a liquidating *CCAA*. ACIC is a mortgage investment company that no longer carries on active business. It loaned money it obtained from investors who subscribed for its preferred shares to various business enterprises. The loans were meant to be secured against real property. Unfortunately, in many instances, that did not occur. ACIC's filing under the *CCAA* was consequent on its inability to pay its creditors and satisfy redemption requests from some of its preferred shareholders. The preferred shareholders are equity claimants and rank lower in priority to ACIC's creditors. They will not be paid until the creditors' claims, including those who have a contractual entitlement to pre-filing interest, are paid. The Monitor has reviewed all of the claims and has determined which of those have been proven.

[10] I previously gave preliminary approval to a plan that did not call for payment of post-filing interest to be put to a vote by the creditors. The Monitor now advises that if that plan is put to a vote, it will fail because the two largest creditors, Mr.

James Hancock and 1083163 Alberta Ltd. ("Alberta Ltd."), will not approve the plan unless it is amended to provide for post-filing interest to be paid to all creditors.

[11] The Monitor informs me that Mr. Hancock and Alberta Ltd. have agreed to approve an amended plan that provides for all creditors to be paid, *pari passu*, post-filing interest at 5%, which is the interest rate provided for in s. 143 of the *BIA*. The Monitor advises me that with those two creditors in agreement, an amended plan with that provision will pass when put to a vote of all creditors. Without that provision, ACIC's bankruptcy will ensue.

[12] Under the *BIA*, the creditors are entitled to be paid post-filing interest at 5% before any distribution to ACIC's preferred shareholders is made.

[13] In that respect, s.143 of the *BIA* provides:

> **Interest from date of bankruptcy**
>
> 143 Where there is a surplus after payment of the claims as provided in sections 136 to 142, it shall be applied in payment of interest from the date of the bankruptcy at the rate of five per cent per annum on all claims proved in the bankruptcy and according to their priority.

[14] This is an atypical *CCAA* proceeding because there will ultimately be sufficient funds recovered by the Monitor to pay creditors in full and to make a distribution to preferred shareholders (albeit less than the value of their claims). Thus far, the Monitor has recovered enough funds (approximately $2.2 million) to be in a position to make a significant payment to the creditors (the total amount of their claims accepted by the Monitor is slightly over $3.796 million).

[15] The Monitor's advice (also in evidence), which I accept, is that it will make further recovery from the sale of real estate in Burnaby, B.C. sufficient to pay the creditors in full, including post-filing interest at 5%, and to make a distribution to the ACIC's preferred shareholders. The Monitor also anticipates further recoveries, and if it is successful, it will be to the benefit of the preferred shareholders as the creditors' claims will have been satisfied.

[16] The rationale underlying the position taken by Mr. Hancock and Alberta Ltd. is that since there will be funds to distribute to the preferred shareholders, the creditors should be paid post-filing interest (depending on when it is paid, the total amount of post-filing interest will range between $500,000 and $600,000).

[17] The Monitor recommends that the plan be amended to include payment to the creditors of post-filing interest at 5%.

Determination

[18] I am persuaded by the Monitor that if the proposed amended plan is not approved by the creditors, bankruptcy will follow, resulting in an insolvency falling under the *BIA*. In that event, the creditors will not only be paid their proven claims (as mentioned, some have contractual entitlements to pre-filing interest), they will achieve the result Mr. Hancock and Alberta Ltd. seek in the proposed amended plan due to the application of s. 143 of the *BIA*.

[19] Since the only alternative is bankruptcy, application of the interest stops rule in this case will result in unfairness to ACIC's preferred shareholders if the plan is not amended. Bankruptcy is likely to result in increased costs and in any event, it will certainly delay distributions to ACIC's creditors and preferred shareholders. Post-filing interest at 5% will continue to accrue on the creditors' proven claims until they are paid, eroding the surplus available for distribution to the preferred shareholders.

[20] In my opinion, the facts of this case fall within the ambit of exceptional circumstances raised in *Nortel*. I am bolstered in this conclusion by the wide discretion provided to courts in *CCAA* proceedings to make orders that advance the purposes of the statute, which will be the case if the amended plan is approved: *Century Services* at paras. 66-71.

[21] Accordingly, the plan shall be amended in the form recommended by the Monitor to allow for post-filing interest of 5%, and presented to the creditors for their vote.

"Walker J."

TAB 20

CITATION: Re Proex Logistics, 2025 ONSC 51
COURT FILE NO.: BK-24-03014694-0031; BK-24-03014698-0031; BK-24-03014700-0031; BK-24-03014702-0031
DATE: 20250103

ONTARIO

SUPERIOR COURT OF JUSTICE [Commercial List]

IN THE MATTER OF THE BANKRUPTCY OF PROEX LOGISTICS INC.;
IN THE MATTER OF THE BANKRUPTCY OF GURU LOGISTICS INC.;
IN THE MATTER OF THE BANKRUPTCY OF 1542300 ONTARIO INC.;
IN THE MATTER OF THE BANKRUPTCY OF 2221589 ONTARIO INC.

BEFORE: Justice Jana Steele

COUNSEL: *Natalie Levine, John Picone, I. Jamie Arabi* for KSV Restructuring Inc, Trustee

Aaron Kreaden, Lee Nicholson, Sam Dukesz, *Brittney Ketwaroo* for Paul Randhawa

Max Starnino, Ryan Shah for Rana Randhawa

Brian Kolenda, Jennah Khaled, for Lenczner Slaght LLP

HEARD: November 27, 2024, and December 13, 2024

ENDORSEMENT

[1] The Trustee, KSV Restructuring Inc., brings a motion seeking:

a. Substantive consolidation of the estates of the three companies that comprise the "Trucking Business," namely, ProEx Logistics Inc. ("ProEx"), Guru Logistics Inc. ("Guru"), and 1542300 Ontario Inc. (operated as ASR Transportation) ("ASR");

b. Authorization for the Trustee to accept the claims by Paul Randhawa ("Paul") against the Trucking Business as: (i) an unsecured claim of $117,693.40; and (ii) an equity claim in the amount of $2,650,000 (the "Wrongful Conduct Claim") (collectively, "Paul's Claims");

c. Profitability of consolidation at a single location;

d. Commingling of assets and business functions;

e. Unity of ownership interests;

f. Existence of intercorporate loan guarantees;

g. Transfer of assets without the observance of corporate formalities.

[34] For the reasons set out at para. 35 of the Trustee's factum, I am satisfied that the *Northland* factors are largely present in the instant case.

Benefits of consolidation outweigh any potential prejudice to creditors

[35] In the instant case, all creditors will benefit from substantive consolidation. Absent substantive consolidation, some creditors would suffer a shortfall. With substantive consolidation, all of the creditors will receive payment of their claims in full. No third-party creditor would be prejudiced.

Substantive consolidation is fair and reasonable

[36] In this case, I am satisfied that substantive consolidation is fair and reasonable. Most importantly, creditors will benefit because substantive consolidation will permit payment of all their claims in full.

[37] I am satisfied that the order sought by the Trustee for substantive consolidation should be granted.

Approval of the Trustee's Reports

[38] The Trustee seeks court approval of the reports that have been filed in this proceeding: (i) Preliminary Report of the Trustee dated December 18, 2023; (ii) the First Report of the Trustee dated February 7, 2024; and (iii) the Second Report of the Trustee dated October 18, 2024 (and the Supplement to the Second Report).

[39] As noted above, there is no objection to the Trustee's request for the court to approve its reports.

[40] I am satisfied that the activities of the Trustee were necessary for the administration of the estates of the bankrupt entities, and consistent with the Trustee's duties and powers authorized by this court and the *BIA* and should be approved.