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| COURT FILE NUMBER | **25-3009380** |
| COURT | COURT OF KING'S BENCH OF ALBERTA, IN BANKRUPTCY AND INSOLVENCY |
| JUDICIAL CENTRE | CALGARY |
| | IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C B-3 AS AMENDED<br><br>AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF ATHABASCA MINERALS INC., AMI SILICA INC., AMI AGGREGATES INC., AMI ROCKCHAIN INC., TERRASHIFT ENGINEERING LTD., 2132561 ALBERTA LTD., and 2140534 ALBERTA LTD. |
| APPLICANTS | ATHABASCA MINERALS INC., AMI SILICA INC., AMI AGGREGATES INC., AMI ROCKCHAIN INC., TERRASHIFT ENGINEERING LTD., 2132561 ALBERTA LTD., and 2140534 ALBERTA LTD. |
| DOCUMENT | **SUPPLEMENTAL BRIEF OF THE APPLICANTS: DISMISSAL OF STAY and APPROVAL OF REPLACEMENT INTERIM FINANCING** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | **Fasken Martineau DuMoulin LLP**<br>Attn: Robyn Gurofsky / Jessica Cameron<br>3400 First Canadian Centre<br>350-7 Avenue SW<br>Calgary, AB T2P 3N9<br>Telephone: (403) 261-9469/261-9468<br>Facsimile: (403) 261-5351<br>Email: rgurofsky@fasken.com / jcameron@fasken.com<br><br>File No. 318938.00024 |

Clerk's Stamp

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## I. INTRODUCTION:

1. This Supplemental Brief is submitted by Athabasca Minerals Inc. ("**AMI**"), AMI Silica Inc. ("**Silica**"), AMI Aggregates Inc. ("**Aggregates**"), AMI RockChain Inc. ("**RockChain**"), TerraShift Engineering Ltd. ("**TerraShift**"), 2132561 Alberta Ltd. ("**231**"), and 2140534 Alberta Ltd. ("**214**" and collectively with AMI, Silica, Aggregates, RockChain, TerraShift, and 213 the "**Applicants**" or the "**Companies**"), the debtor companies in these proposal proceedings (the "**Proposal Proceedings**") under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "**BIA**")[1], in support of applications returnable March 8, 2024 (the "**Application**"), seeking, among other relief:

   (a) dismissal of JMAC Energy Services LLC's ("**JMAC**") cross-application to, *inter alia*, stay the Companies' primary Application for the approval of, *inter alia*, the transaction for the sale of substantially all of the Companies' Business and Property via a corporate share transaction (the "**Transaction**") to Badger Mining Corporation ("**Badger**");

   (b) dismissal of JMAC's cross-application to lift the statutory stay of proceedings imposed by the BIA (the "**Stay of Proceedings**") and allow JMAC to pursue litigation against AMI in the United States District Court, District of North Dakota, Western Division (the "**US District Court**");

   (c) confirming a litigation plan with respect to the hearing of the Companies' Application for approval of the Badger Transaction and Subscription Agreement, by way of RVO, which hearing shall include a determination of whether the right of first refusal ("**ROFR**") asserted by JMAC is triggered by that Transaction;

   (d) authorizing the Applicants to enter into the Secondary Interim Financing Term Sheet dated March 4, 2024 (the "**Second Interim Financing Term Sheet**"), between the Applicants and Badger (in such capacity, the "**Second Interim Lender**") for committed terms for replacement interim financing, and authorizing

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

borrowings under the Second Interim Financing Facility in the principal amount of up to $5,300,000.00 (the "**Second Interim Financing Facility**");

(e) authorizing repayment of the amounts owing to JMAC under the existing Interim Financing Term Sheet by the Companies; and

(f) amending the Interim Lender's Charge granted in these Proposal Proceedings by the Honourable A.C.J. Nixon on December 12, 2023, by replacing JMAC with Badger as the beneficiary of the Interim Lender's Charge, and increasing the amount of the Interim Lender's Charge to $5,300,000.00.

2. All capitalized terms used, but not otherwise defined herein, shall have the meanings given to them in the Companies' first brief filed on the within applications on February 26, 2024 (the "**First Brief**").

3. In short, the Companies originally set down an application before this Court for approval of a corporate share Transaction with Badger to be implemented by way of a Subscription Agreement and RVO. The proposed purchase price under the Badger Transaction is $29.2 million, which is expected to result in payment in full to all of the Companies' creditors and residual distributions to existing AMI shareholders of approximately $0.15 to $0.19 per common share.

4. That application has been met with strenuous opposition from JMAC, the Companies' present Interim Lender, first secured creditor, 50% interest partner in AMIS LLC, and 20% shareholder of AMI. JMAC's opposition takes two forms. First, the day after the Companies filed their Transaction approval materials with this Court, JMAC commenced a civil complaint against AMI in the US District Court for North Dakota alleging, among other things, breach of contract and seeking injunctive relief. The following day, JMAC filed motion materials with the US District Court for a temporary restraining order ("**TRO**") prohibiting AMI from proceeding with approval of the Transaction here in Canada, as well as requesting a temporary injunction prohibiting same until JMAC's civil

complaint can be heard by way of a jury trial in North Dakota (collectively, the "**US Proceedings**").[2]

5. Second, JMAC has also filed a cross-application with this Court seeking various forms of relief, including: i) ostensibly a stay of proceedings dressed up as an adjournment request of the Companies' Transaction approval motion, and in effect the Transaction itself, and ii) an order lifting the stay of proceedings against AMI so that JMAC may pursue its US litigation.

6. All of this is being done by JMAC in order to assert an alleged ROFR contained in the AMIS LLC Operating Agreement between AMI and JMAC. The Companies submit that not only is JMAC's ROFR inapplicable to the proposed Transaction, JMAC had the ability to exercise same through its participation in the Auction pursuant to the terms of the Court-approved SISP.

7. Further, while the Operating Agreement is governed by the laws of North Dakota, there is no attornment clause, no jurisdiction clause, and no forum selection clause. This issue has arisen in the context of a corporate share transaction of a Canadian public company, who is the subject of Canadian insolvency proceedings, together with its six Canadian subsidiary companies, with an application already pending before this Court, here in Canada, for approval of the Transaction. This Court has ample jurisdiction to hear and determine JMAC's dispute, in the context of the Companies' overall Transaction approval motion.

8. Rather than bring these issues forward in the within Canadian Proposal Proceedings, JMAC's litany of litigation in the US is designed to delay and frustrate the Companies' insolvency proceedings, at great expense to all of the Companies' creditors and other stakeholders, including shareholders. There is nothing that warrants the requested stay of proceedings, nor lifting of the stay, as JMAC has not satisfied the requisite onerous legal tests for either remedy.

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[2] Fourth Churchill Affidavit at para 15, Exhibits "B"-"E".

9. On that basis, and for the additional reasons set forth below, the Companies respectfully request that this Court dismiss JMAC's cross-application for a stay of the Transaction approval motion, and in effect the Transaction itself, and for the lifting of the stay of proceedings. Further, the Companies respectfully request that this Court approve a litigation schedule respecting the real issue in dispute: the Transaction approval motion, including determination of any ROFR of JMAC triggered by that transaction. Lastly, approval of the replacement interim financing is necessary and appropriate in the circumstances, and in order to allow the Companies the opportunity to continue to respond to JMAC's litigation.

10. The Proposal Trustee supports the additional relief sought by the Applicants on this Application.

## II. FACTS:

11. The facts relevant to the various applications before this Court are set out in the Companies' First Brief, which are incorporated herein, and the Affidavit No. 4 of John David Churchill, sworn March 4, 2024 (the "**Fourth Churchill Affidavit**").

## III. ISSUES:

12. The additional issues to be considered by this Court on the various Applications before it, are whether it is appropriate to:

    (a) stay approval of the Companies' Transaction approval motion, and in effect, the Transaction itself (which has yet to be approved by the Court);

    (b) lift the stay of proceedings to allow JMAC to pursue its US litigation;

    (c) approve a litigation schedule for the ultimate hearing of the Companies' Transaction approval motion, including a determination of the ROFR issue; and

    (d) approve the replacement Secondary Interim Financing Facility, and repayment to JMAC of the existing Interim Financing Facility, and amend the Interim Lender's Charge accordingly.

## IV. LAW & ANALYSIS:

### a. Staying the Approval of the Transaction is Not Appropriate

13. The granting of a stay of the Transaction approval motion, or the Transaction itself, would have significant detrimental impacts to the Companies and their stakeholders. The timeline of the US Proceedings is likely to be protracted, and a trial date in that matter is not expected to be set down until late 2025.[3] As a result, a stay pending resolution of those proceedings could effectively thwart the Transaction, resulting in loss of value in excess of $16 million to the Companies' stakeholders.

#### i. The Law

14. JMAC's requested relief includes an order "setting aside or alternatively, staying the sale to Badger". However, despite requesting a stay, JMAC argues that the applicable legal test for such relief is that which applies to requests for adjournments. JMAC is not seeking an adjournment of the Transaction Approval Motion; rather, JMAC is seeking a stay of proceedings until its US Litigation can be determined.

15. The Applicants submit that JMAC's statement of the law in this respect is incorrect. When a stay is sought, the well-established tripartite test as set out by the Supreme Court of Canada in *RJR-MacDonald Inc v Canada (Attorney General)* is applicable.[4] This test has been applied numerous times in a variety of decisions in the context of proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "**CCAA**")[5] and the BIA.[6] This test has also been applied where a stay has been sought under Rule 1.4(2)(h), as is presently being sought by JMAC on its cross-application.[7]

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[3] Fourth Churchill Affidavit at para 22.

[4] *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 1994 CarswellQue 120 [*RJR* cited to CarswellQue] [**TAB 2**].

[5] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended [CCAA] [**TAB 3**].

[6] See *Royal Bank v Cow Harbour Construction Ltd*, 2010 ABQB 637 at para 55 [*Cow Harbour*] [**TAB 4**]; *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, 2021 ABCA 304 at para 16 [*Third Eye*] [**TAB 5**]; *British Columbia v Peakhill Capital Inc*, 2023 BCCA 368 at para 8 [*Peakhill Capital*] [**TAB 6**].

[7] *HML Contracting Ltd v Pinder*, 2022 ABCA 185 at para 18 [**TAB 7**].

16. In order to satisfy the test from *RJR*, the party seeking a stay must demonstrate that:

    (a) there is a serious question to be tried, or an arguable issue which is not frivolous or vexatious;

    (b) there will be irreparable harm if the stay is not granted; and

    (c) the balance of convenience favours granting the stay.[8]

17. All three elements must be satisfied before a stay will be granted. A failure to establish one of the elements will preclude the granting of a stay.[9]

**ii. <u>There is No Serious Question or Arguable Issue to be Tried</u>**

18. The first branch of the *RJR* test is typically whether there is a serious question or arguable issue to be tried. While this first factor imposes a low threshold to be met, the party seeking the stay must still demonstrate that the issues they raise are not frivolous or vexatious, and that they have some merit.[10]

19. However, where a party is seeking relief in the form of a mandatory injunction, the threshold issue of this first branch of the *RJR* test increases to one of a strong *prima facie* case.[11] Furthermore, in certain circumstances a prohibitive injunction can be akin to a mandatory injunction; the Court should examine, in substance, the overall effect of the injunction and whether it would require a party to *do* something, or to *refrain from doing* something.[12]

20. There are various articulations of what constitutes a "strong *prima facie* case", including requiring the applicant (in this case JMAC) to demonstrate: "a strong and clear chance of success", a "strong and clear" or "unusually strong and clear" case, that the applicant is "clearly right" or "clearly in the right", that they enjoy a "high probability" or "great

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[8] *RJR*, *supra* at para 48 [**TAB 2**].
[9] *Cow Harbour*, *supra* at para 56 [**TAB 4**].
[10] *RJR*, *supra* at para 54 [**TAB 2**].
[11] *R v Canadian Broadcasting Corp*, 2018 SCC 5 at paras 15-16 [*CBC*] [**TAB 8**].
[12] *CBC*, *supra* at para 16 [**TAB 8**].

likelihood of success", a "high degree of assurance" of success, a "significant prospect of success", or "almost certain" success.[13] As the Supreme Court of Canada has noted:

> Common to all of these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will ultimately be successful in proving the allegations set out in the originating notice.[14]

21. The relief JMAC is seeking is akin to a prohibitive injunctive: they are requesting this Court to issue an Order prohibiting or preventing the Companies' from proceeding with their Transaction Approval Motion. If they are successful, the Companies will in effect be required to respond and participate in the US Litigation. The Companies' submit that they therefore must demonstrate that there is a strong *prima facie* case to be tried here, which they have failed to do. In the alternative, JMAC has also not demonstrated that there is a serious question or arguable issue to be tried.

22. First, there is no merit to JMAC's arguments that the issues regarding the applicability of the ROFR must be adjudicated in North Dakota. Pursuant to Article 14.03, AMI and JMAC selected the laws of the State of North Dakota to be the governing law in regard to the interpretation and application of the Operating Agreement.[15] The applicable substantive law or the *lex causae* in regard to the dispute over the applicability of the ROFR is then that of the State of North Dakota.

23. The Operating Agreement does not contain an attornment or jurisdiction clause to denote what procedural law or *lex fori* is to apply to disputes arising under the Operating Agreement. As AMI and JMAC did not expressly attorn to a specific jurisdiction in the Operating Agreement, this Court can then assume jurisdiction over this dispute regarding the applicability of the ROFR to the Transaction and apply their own *lex fori* to the matter at hand.

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[13] *CBC*, *supra* at para 17 [**TAB 8**].

[14] *CBC*, *supra* at para 17 [**TAB 8**].

[15] Third Churchill Affidavit at Exhibit "L".

24. The application of foreign law by Canadian courts is commonplace, especially given our close ties to the US.[16] Furthermore, Canadian courts have previously heard disputes regarding foreign law as part of Canadian insolvency proceedings specifically.

25. In the proceedings of international real estate group Homburg Invest Inc. under the CCAA, the Superior Court of Quebec was required to interpret a subordination clause contained in indenture agreements to determine an issue regarding the priority of claims in the Debtors' estate. The indentures contained terms that stated any disputes arising from the same were to be governed by the laws of the State of New York.[17] Justice Schrager held that while the governing law provision in the indentures meant the law of the State of New York applied to the interpretation and determination of the validity of such contracts, the local law applied to the insolvency estate of the Debtors under the CCAA as matters of insolvency law are considered procedural in nature.[18] Conflicts of law rules then required the *lex fori* to apply to determining the priority of the claims in dispute.[19]

26. The Quebec Court of Appeal upheld Schrager J's decision on appeal. The Appellate Court found that Schrager J correctly identified the law of the State of New York as the applicable substantive law to interpret the indentures and appropriately determined the content of the indentures using the expert opinion on the same.[20] The Appellate Court further stated that once the lower court determined the substantive rights of the parties using the law of the State of New York, "the procedural treatment of such rights […] was subject to Canadian insolvency law".[21]

27. Similarly in the CCAA proceedings of Essar Steel Algoma Inc., the Ontario Superior Court of Justice determined they possessed the appropriate jurisdiction to hear a dispute in regard to a supply contract for a mine located in the State of Michigan, despite the supply contract

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[16] *Forbes Energy Group Inc v Parsian Energy Rad Gas*, 2019 ONCA 372 at para 8(iii) [*Forbes*] [**TAB 9**]; *A1 Pressure Sensitive Products Inc v Bostik Inc*, 2009 ONCA 206 at para 4 [*A1 Pressure*] [**TAB 10**].

[17] *Homburg Invest Inc (Arrangement relatif à)*, 2014 QCCS 3135 at para 9 [*Homburg*] [**TAB 11**].

[18] *Homburg*, *supra* at para 31 [**TAB 11**].

[19] *Homburg*, *supra* at para 31 [**TAB 11**].

[20] *Taberna Preferred Funding VI Ltd c Stitching Homburg Bonds*, 2015 QCCA 62 at para 13 [*Homburg II*] [**TAB 12**].

[21] *Homburg II*, *supra* at para 13 [**TAB 12**].

containing a choice of law provision in favour of the State of Ohio.[22] On application of the real and substantial connection test, under which test the party arguing that a court has jurisdiction must meet the burden of identifying a presumptive connecting factor linking the subject matter of the litigation to the forum, as outlined by the Supreme Court of Canada in *Club Resorts Ltd v Van Breda*,[23] Newbould J found the Court to be the appropriate jurisdiction to hear the dispute with the ability to apply the foreign law as required.[24]

28. The application of foreign law by Canadian courts is considered a common occurrence and choice of law clauses are not a determinative factor of jurisdiction, particularly where the concepts of law in dispute are known to the *lex fori*.[25]

29. Further, the single control or proceeding model provides that litigation involving the debtor company in insolvency proceedings should be heard in a single jurisdiction.[26] Canadian courts have commonly applied this approach in proceedings under the BIA and the CCAA in order to have the same forum hear all issues, whether foreign or domestic, that arise out of the same insolvency proceedings to avoid a chaotic or inefficient process and to facilitate negotiations between creditors by allowing all parties to be on equal grounds.[27]

30. Here, there is a real and substantial connection between the current dispute and the forum of the Court of King's Bench of Alberta. This matter involves approval of a share transaction of a publicly traded Canadian company, who, together with its six Canadian subsidiaries, are subject to insolvency proceedings in Canada, including being subject to the benefit of a stay of proceedings. The Proposal Proceedings, SISP, and the Auction have all been overseen or approved by this Court, and there is already a pending application before this Court that can determine these issues. The concept of a ROFR is known to this Court and is not a concept of law that is unique to the State of North Dakota. The

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[22] *Re Essar Steel Algoma Inc et al*, 2016 ONSC 595 at paras 1-3 [*Essar*] [**TAB 13**].

[23] *Van Breda v Village Resorts Ltd,* 2012 SCC 17, at paras 79, 82, 90 [*Van Breda*] [**TAB 14**].

[24] *Essar*, *supra* at paras 34-38, 70-79 [**TAB 13**].

[25] *Essar*, *supra* at paras 76, 80 [**TAB 13**]; *Forbes, supra* at para 8(iii) [**TAB 9**]; *A1 Pressure*, *supra* at para 4 [**TAB 10**].

[26] *Arrangement relative à Bloom Lake*, 2021 QCCS 3402 at para 52 [*Bloom Lake*] [**TAB 15**].

[27] *Bloom Lake*, *supra* at para 52 [**TAB 15**]; *Essar*, *supra* at para 31 [**TAB 13**]; *Sam Lévy & Associés v Azco Mining Inc*, 2001 SCC 92 at para 27 [**TAB 16**]; *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 22 [*Century Services*] [**TAB 17**].

appropriate forum is that where the Proposal Proceedings have been taking place since their inception – this Court.

31. Furthermore, regardless of whether this issue is heard in and adjudicated according to the laws of Alberta or North Dakota, there is no merit to JMAC's argument that the ROFR was triggered when AMI was "willing to accept" an offer from Badger at $13.1 million. This is simply incorrect. AMI was never willing to accept Badger's initial bid in the SISP, which bid was actually made at $13.2 million. Rather, AMI was only willing to accept the Successful Bid after Auction made by Badger of $29.2 million.[28]

32. Moreover, the ROFR simply does not apply in the context of the Transaction. While the ROFR speaks to the sale of any portion of Membership or Economic Interest in AMIS LLC, the Transaction instead contemplates a sale of the shares of AMI itself. The following key factors demonstrate the inapplicability of the ROFR:

(a) Despite the sophisticated nature of the parties to the Operating Agreement, that agreement lacks any express change of control provision which would be relevant to a sale of shares such as that contemplated by the Transaction. If the parties had intended for a provision such as the ROFR to apply in the case of share transactions of either AMI or JMAC, it is reasonable to assume such language would be included within the Operating Agreement. However, instead such language is completely absent.

(b) AMI is a publicly traded company with, prior to its insolvency filing, daily trades of shares on the TSX-V, historically and at the time that JMAC and AMI entered into the LLC Operating Agreement. If JMAC's interpretation of the ROFR were to apply, the ROFR would be, and would have been, triggered multiple times per day, every time a share of AMI was traded. Such an interpretation neither aligns with logical and sound business practices, nor with the past practices of JMAC and AMI.

(c) The underlying purpose of the ROFR remains preserved under the Transaction. The provision was intended to protect a joint owner, such as JMAC, from receiving a

[28] Fourth Churchill Affidavit at para 38(a).

> new partner in AMIS LLC without the opportunity to match the terms of that sale. Here, JMAC will have the same partner following the transaction – it will continue to jointly own AMIS LLC with AMI, notwithstanding any change of ownership of AMI. While the ROFR does apply to AMIS LLC, it does not apply to AMI, and as a result is not triggered by a sale of shares of AMI.

33. In the alternative, it is submitted that even if the ROFR does apply to the Transaction, JMAC was provided with ample opportunity to acquire the Companies and exercise its rights under the LLC Operating Agreement.

34. First, JMAC was initially poised to acquire the Companies through the Arrangement Agreement; however, JMAC terminated that agreement late on a Friday afternoon, ostensibly due to the restatement of the Companies' audited financial statements, which had no material impact on the Companies' financial position. This action ultimately precipitated the Companies' NOI filings and the within Proposal Proceedings.[29]

35. Second, JMAC was the Stalking Horse Bidder under the SISP and consented to the First Order, approving the SISP, which included the following provision:

> The granting of this Order, including the approval of the SISP, shall be without prejudice to any argument of JMAC regarding the extent and application of a right of first refusal granted to it pursuant to the LLC Operating Agreement, and without prejudice to any of JMAC's rights under the LLC Operating Agreement, upon the sale of the Applicants' Property, business, or shares, **and any such rights may be exercised notwithstanding that Closing of any transaction under the SISP has occurred, and as if closing has not occurred**.

36. Clearly, the parties contemplated that a transaction would close without prejudice to JMAC's asserted ROFR claim, to be litigated without the insolvent Companies' involvement. As Stalking Horse Bidder, JMAC was also granted a waiver of strict compliance with the SISP requirements, which allowed it to even participate in the Auction.[30]

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[29] First Churchill Affidavit at paras 36-40.

[30] Third Churchill Affidavit at para 16.

37. Third, JMAC signed and acknowledged the Auction Rules and participated in 161 rounds of bidding at the Auction. Ultimately, in Round 162, JMAC declined to bid, thereby refusing to pay as much as Badger was willing to offer. [31] That is the epitome of a ROFR: are you willing to pay as much as a third party? JMAC was given the opportunity to match Badger's offer through the Auction, and declined to do so.

38. Therefore, JMAC's position regarding the applicability of the ROFR lacks merit, and JMAC has failed to meet the first element of the *RJR* test. The Applicants submit that rather than presenting either a *prima facie* case, or a serious or arguable issue to be tried, the issues raised by JMAC, coupled with JMAC's conduct in initiating the US Proceedings, approach the level of frivolousness and vexatiousness. This is especially so in light of the requirement for parties to conduct themselves in good faith expressly enshrined in section 4.2 of the BIA.[32] Rather than bring this matter forward in the within Canadian insolvency proceedings, JMAC is attempting to circumvent the jurisdiction of this Court and drag an insolvent group of companies into costly US litigation. The Applicants submit that is not acting in good faith.

39. JMAC has been extensively involved throughout the entirety of the Proposal Proceedings, and was well aware of and participated in the Auction conducted pursuant to the SISP.[33] In addition, JMAC has expressly reserved its alleged rights under the ROFR since the outset of the Proposal Proceedings, and restated its position as the Bid Deadline approached.[34] It cannot be said that JMAC was caught unawares of either the Proposal Proceedings or the SISP and associated Auction. Yet, JMAC declined to exercise or seek to enforce its alleged rights until after the Auction had concluded and it was clear that JMAC was not the successful bidder. It is at that point that JMAC initiated the US Proceedings, despite the fact that the issues at hand relate to insolvency proceedings filed in Canada, a Canadian court-approved SISP, and the approval of a transaction emanating from that Canadian process. It is the Companies' view JMAC's conduct is a blatant attempt

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[31] Third Churchill Affidavit at paras 30-31.

[32] BIA, *supra* at s 4.2 **[TAB 1]**

[33] Third Churchill Affidavit at paras 9-10.

[34] Third Churchill Affidavit at para 59.

to gain complete ownership of AMIS LLC via undermining the Companies' restructuring efforts, to the detriment of the Companies' other creditors, shareholders, and employees.

40. Finally, even if this Court concludes that JMAC's position demonstrates a strong *prima facie* case, or at the very least, presents a serious or arguable issue to be tried, JMAC does not satisfy the other two branches of the test for injunctive relief for a stay, in which case such relief must be denied.

### iii. JMAC Will Not Suffer Irreparable Harm if a Stay is Not Granted

41. Turning to the second factor, it is submitted that JMAC will not suffer irreparable harm should the stay not be granted and the Transaction be approved. On the contrary, if a stay were to be granted, it would be the Companies and their stakeholders which would suffer irreparable harm, rather than JMAC.

42. Under the second element of the *RJR* test, the relevant consideration is the nature of the harm, rather than its magnitude.[35] Jurisprudence is clear that the irreparable harm contemplated by the *RJR* test does not encompass harm which may be quantified and be recovered via an award of damages. As the Court of Appeal of Alberta stated in *Third Eye*, "[i]rreparable harm is limited to harm that cannot be compensated by an award of costs or damages or otherwise satisfactorily redressed, rectified, or made right at some later point in time".[36]

43. Firstly, JMAC will not suffer any harm if its stay is not granted – the matter has not even yet been fully argued. The issue of the applicability of the ROFR would be fully argued within the context of the Companies' Transaction Approval Motion.

44. Second, any potential harm which may be suffered by JMAC should the Transaction ultimately be approved and completed may be quantified and recovered as damages in an action for breach of contract subsequently undertaken by JMAC – the type of harm explicitly not encompassed within the meaning of the term 'irreparable'. Furthermore,

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[35] *RJR*, *supra* at para 64 [**TAB 2**].

[36] *Third Eye*, *supra* at para 22 [**TAB 5**].

JMAC will not lose any rights it currently possesses under the ROFR. The Transaction does not alter the terms of the LLC Operating Agreement. If it is found that the ROFR applies as JMAC argues, then a subsequent sale by Badger would trigger JMAC's alleged rights under the Operating Agreement.

45. On the other hand, it is submitted that the granting of a stay would result in irreparable harm to the Companies' and their stakeholders. The circumstances here are analogous to those in *1296371 BC Ltd v Domain Mortgage Corp*, where Justice DeWitt-Van Oosten of the British Columbia Court of Appeal considered a request for a stay of an order approving the sale of assets within the context of CCAA proceedings.[37] There, the Court declined to stay the order, finding that rather than to the applicants, irreparable harm would instead result to the respondent stakeholders due to the loss of significant benefits from the approved sale, which would potentially fall through if a stay was granted.[38] Similarly, in *Peakhill Capital*, Justice Saunders of the British Columbia Court of Appeal found that the prevention of completion of a transaction and the resulting financial losses to the parties constituted irreparable harm under the *RJR* test.[39]

46. Analogous considerations apply here. The granting of a stay of proceedings will likely prevent the completion of the Transaction, the Outside Date of which has been extended to April 30, 2024.[40] The final resolution of this matter in the US Proceedings is not expected to occur for at least one year.[41] As a result, a stay would result in significant and severe detrimental impacts to both AMI and its stakeholders, most notably through the loss of more than $16 million of value which would have resulted from the completion of the Transaction compared at completing a transaction with JMAC.

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[37] *1296371 BC Ltd v Domain Mortgage Corp*, 2022 BCCA 331 [*Domain Mortgage*] [**TAB 18**].
[38] *Domain Mortgage*, *supra* at paras 61-63 [**TAB 18**].
[39] *Peakhill Capital*, *supra* at para 10 [**TAB 6**].
[40] Fourth Churchill Affidavit at para 30.
[41] Fourth Churchill Affidavit at para 22.

### iv. The Balance of Convenience Does Not Favour Granting the Stay

47. Finally, the balance of convenience overwhelmingly points in favour of not granting a stay. The Court of Appeal of Alberta has previously stated in analogous circumstances that the primary consideration under this step of the *RJR* test is whether the interests of the party seeking a stay outweigh the interests of the other stakeholders and the estate as a whole.[42]

48. The decision in *Third Eye* is illustrative. There, Justice Feehan held that the balance of convenience did not favour the granting of a stay of a sale transaction in the context of bankruptcy proceedings under the BIA. Relevant considerations assessed by the Court included the fact that the sale would likely be unfeasible in the future should the stay be granted, and the subsequent potential collapse of the entirety of the receivership proceedings due to the financial difficulties faced by the estate.[43]

49. Similarly, in *Matco Capital Limited v Interex Oilfield Services Ltd*, the Court considered whether to grant a stay of orders approving the sales of assets of various corporations under receivership. In declining to grant the stay, the Court held that the potential harm to the entire estate "far outweighs any benefit" to the applicants seeking the stay. This finding was primarily based upon the potential loss of all sales approved by the court below and the corresponding loss of value to stakeholders should the stay be granted.[44]

50. Any possible benefit which may be received by JMAC from a stay is highly speculative, and contingent upon a favourable decision regarding the applicability of the ROFR. As stated above, it is expected that the completion of the US Proceedings will occur over a year from the present time. Moreover, while JMAC argues that no harm will result to the Companies and their stakeholders should a stay be granted due to the fact that the $13.1 million offer by JMAC will ostensibly fulfill the claims of the Companies' creditors, this fails to consider the increased costs which will be incurred by the Companies as they continue to operate over the next year and continue to participate in both the Canadian and US Proceedings. Canadian courts have previously found that the potential benefits of a

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[42] *Third Eye*, *supra* at para 26 [**TAB 5**].

[43] *Third Eye*, *supra* at paras 26-28 [**TAB 5**].

[44] *Matco Capital Limited v Interex Oilfield Services Ltd*, 2007 ABCA 317 at para 11 [*Matco*] [**TAB 19**].

speculative future offer are outweighed by the costs accrued by a corporation if proceedings are delayed.[45] The same considerations apply here.

51. This also fails to consider the interests of all of the Companies' other stakeholders who stand to benefit from the Transaction, and would therefore benefit if a stay is not granted. As stated above, if the stay is granted and the Transaction does not proceed, the resulting loss of value would exceed $16 million. While the Companies' creditors may be repaid in full should JMAC be permitted to exercise the ROFR at a purchase price of $13.1 million, the residual value available for distribution to the Companies' shareholders would significantly diminish. Shareholders may receive as little as $0.00 to $0.005 per share at such a price, if professional fees and the costs of continuing to litigate this matter do not completely erode those realizations, as compared to $0.15 to $0.19 per share under the Badger Transaction.[46]

52. Furthermore, the granting of a stay would create securities-related complications for the Companies. It is a condition precedent of the Transaction that AMI cease to be a reporting issuer and be delisted from the applicable stock exchanges. Should the Transaction fail to close as anticipated, AMI will be required to fulfill its obligations under relevant securities laws and file its annual securities law disclosure documents.[47] The filing of these documents will result in significant additional costs incurred by AMI, which AMI has not accounted for in its Revised Cash Flow Forecast.[48]

53. Lastly, the six month period prescribed by the BIA for the Companies to present a proposal to their creditors expires on May 13, 2024.[49] Therefore, granting the requested stay increases the probability that the Companies will need to convert these Proposal Proceedings to proceedings under the CCAA.

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[45] *Domain Mortgage*, *supra* at para 52 [**TAB 18**].
[46] Third Churchill Affidavit at para 65.
[47] Fourth Churchill Affidavit at paras 39, 42.
[48] Fourth Churchill Affidavit at paras 39, 42.
[49] First Churchill Affidavit at para 4; BIA, *supra* at ss 50.4(8)-(9) [**TAB 1**].

54. In summary, the detrimental consequences of a stay would be significant and severe to the Companies and their shareholders and creditors. As in *Third Eye* and *Matco*, the potential harm in these circumstances to other stakeholders and the estate as a whole far outweighs any potential benefit to JMAC. Therefore, JMAC also has not satisfied the third element of the *RJR* test, and the Applicants accordingly submit that the balance of convenience indicates that a stay of either the Transaction approval motion or the Transaction itself, should not be granted.

**b. Lifting the Stay of Proceedings is Unreasonable and Unnecessary**

55. The current Stay of Proceedings has been in place since the Companies filed notices under the BIA on November 13, 2023, and has been extended up to and including March 11, 2024, by subsequent orders of this Court.

56. While a party may apply under section 69.4 of the BIA[50] to lift a stay of proceeding in order to commence a claim against a debtor company, JMAC's Cross-Application to lift the Stay of Proceedings in these Proposal Proceedings is an attempt to pervert the powers afforded to the courts under the BIA to benefit JMAC and continue the costly, time consuming, and inefficient US Proceedings. Preservation of the Stay of Proceedings furthers the broad remedial objectives of the BIA[51] and JMAC has failed to meet the required threshold to lift the Stay of Proceedings.

57. The BIA is intended to further two purposes: the equitable distribution of a debtor's assets among their creditors and the debtor's financial rehabilitation.[52] Equitable distribution is achieved through the single proceeding model approach to insolvency proceedings by Canadian courts.[53] Under such model, creditors wishing to pursue a claim against the debtor must participate in one collective proceeding to ensure the fair distribution of the debtor's assets and to facilitate negotiations between a debtor and their creditors.[54] The

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[50] BIA, *supra* at s 69.4 [**TAB 1**].

[51] *Century Services, supra* at paras 1, 15 [**TAB 17**].

[52] *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at para 32 [*Moloney*] [**TAB 20**]; *Maple Homes Canada Ltd, Re*, 2000 BCSC 1443 at para 33 [*Maple Homes*] [**TAB 21**].

[53] *Moloney*, *supra* at para 33 [**TAB 20**].

[54] *Moloney*, *supra* at para 33 [**TAB 20**]; *Century Services*, *supra* at para 22 [**TAB 17**].

single proceeding model is the primary commonality shared across the different statutory schemes that govern insolvency proceedings.[55] The collective proceeding is to supersede the typical civil process available to creditors and prevent the injection of inefficiency and chaos from individual creditor-initiated proceedings.[56] Further, the single proceeding model aims to prevent aggressive creditors from realizing on the debtor's assets while other creditors attempt to reach a compromise.[57] To ensure the integrity of this model, the BIA and CCAA both provide for a stay of proceedings.[58]

58. Given the key purposes of the BIA above, a creditor must demonstrate a "compelling reason" for the courts to lift a stay of proceedings on their behalf.[59] To have a compelling reason, the applicant creditor must demonstrate that they will be materially prejudiced if the stay is continued or that there is an equitable ground to allow an exemption to the stay.[60] The courts in their analysis are not to attempt to determine the proposed claim on its merits, but rather assess if the claim in dispute is one that would survive discharge, whether it could not succeed, and if it did succeed, if it would not result in recovery against the debtor.[61] As continuing an action in insolvency proceedings is considered an exceptional circumstance, the creditor must demonstrate more than pleadings or proposed pleadings disclosing their claim.[62] A creditor must then demonstrate that there is a "fair issue to be tried."[63]

59. The Ontario Supreme Court (as it then was) in *Advocate Mines Ltd, Re* outlined a list of circumstances where a stay of proceedings could be lifted in the bankruptcy context, including: i) the action is for a debt where discharge would not be a defence; ii) the action is for a contingent or unliquidated debt and the proof and valuation of the same would be so complex as to render the summary procedures contained in the BIA inappropriate, iii)

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[55] *Century Services*, *supra* at para 22 [**TAB 17**].
[56] *Century Services*, *supra* at para 22 [**TAB 17**].
[57] *Century Services*, *supra* at para 22 [**TAB 17**].
[58] *Moloney*, *supra* at para 34 [**TAB 20**]; *Century Services*, *supra* at para 22 [**TAB 17**].
[59] *Maple Homes*, *supra* at para 33 [**TAB 21**].
[60] *Maple Homes*, *supra* at para 33 [**TAB 21**].
[61] *Maple Homes*, *supra* at para 33 [**TAB 21**].
[62] *Maple Homes*, *supra* at para 34 [**TAB 21**].
[63] *Maple Homes*, *supra* at para 34 [**TAB 21**].

the action involves other parties and the bankrupt is necessary to the complete adjudication of the matter; iv) the action is to enable the plaintiff to recover under an insurance contract, indemnity, or compensatory legislation, and v) an action that as of the date of the bankruptcy, the matter has progressed to a point where logic dictates the matter be allowed to continue to judgment.[64] While the presence of one of these factors is an important consideration, particularly the first ground, it is not determinative of the matter, and the applicant must still demonstrate material prejudice or an equitable ground to lift the stay.[65] The burden of proof in such analysis is on the party seeking to lift the stay of proceedings.[66]

60. As stated by Romaine J in *Lexin*, lifting the stay of proceedings "is not routine" and there must be "sound reasons" to relieve a party of the stay.[67] In regard to the degree of the material prejudice required to lift the stay, the applicant must demonstrate that it will be treated differently, unfairly, or would suffer worse harm than a debtor's other creditors if they stay remains in place.[68] The mere fact a creditor cannot exercise a contractual right that they bargained for does not give rise to the level of material prejudice required to lift the stay, as all creditors lose, in whole or in part, the benefits of certain contracts entered into with the debtor due to the debtor's insolvency.[69] In this regard, the applicant creditor is not worse off than any other creditor of the same debtor under the stay.[70]

61. JMAC's claim in the US Proceedings is not a claim that meets any of the types of claims listed in *Advocate Mines* that necessitate this Court to lift the stay of proceedings.[71] Further, JMAC is not materially prejudiced by the Stay of Proceedings and there are not equitable grounds to support lifting the Stay of Proceedings as:

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[64] *Advocate Mines Ltd, Re*, 1984 CarswellOnt 156, [1984] OJ No 2330 at paras 2-7 [*Advocate Mines*] [**TAB 22**].

[65] *Maple Homes*, *supra* at para 33 [**TAB 21**]; *Burke v Red Barn at Mattick's Ltd*, 2019 BCSC 69 at para 13 [**TAB 23**]; *Can-Industrial Electric v City of Toronto*, 2022 ONSC 7376 at paras 44-50 [**TAB 24**]; *Alberta Energy Regulator v Lexin Resources Ltd*, 2019 ABQB 23 at para 14 [*Lexin*] [**TAB 25**].

[66] *Lexin*, *supra* at para 14 [**TAB 25**]; *Stone Sapphire Ltd v Transglobal Communications Group Inc*, 2008 ABQB 398 at paras 44-45 [*Stone Sapphire*] [**TAB 26**].

[67] *Lexin*, *supra* at para 15 [**TAB 25**].

[68] *Lexin*, *supra* at para 16 [**TAB 25**].

[69] *Lexin*, *supra* at para 16 [**TAB 25**].

[70] *Lexin*, *supra* at para 16 [**TAB 25**].

[71] *Advocate Mines*, *supra* at paras 2-7 [**TAB 22**].

(a) this Court has the requisite jurisdiction and authority to determine the applicability of JMAC's asserted ROFR as part of these Proposal Proceedings, negating any need for JMAC to pursue the same claim in the State of North Dakota;

(b) JMAC, as the Stalking Horse Bidder, Interim Lender, a secured creditor, AMI shareholder, and 50% joint partner in AMIS LLC stands to benefit from the continuation of these Proposal Proceedings, including the closing of the Transaction;

(c) JMAC commenced the US Proceedings following several months of the Companies' participation in Proposal Proceedings and after the SISP concluded, not only delaying the Companies' final steps to restructure, but creating a multiplicity of proceedings on their own volition;

(d) the continuation of dual cross-border proceedings will create additional costs and inefficiencies in these Proposal Proceedings, in addition to the added expenses already incurred by the Companies in having to retain US legal counsel (separate and apart from an expert witness to address proof of foreign law issues) to respond to the US Proceedings. Such costs strain the Companies cash flow, which funds are already limited due to their insolvent circumstances; and

(e) the preservation of the Stay of Proceedings will allow the Companies to focus their attention and limited funding on continuing and completing their restructuring efforts in order to benefit all of their stakeholders, whereas lifting the Stay of Proceedings to allow JMAC to pursue its claim in the US Proceedings only benefits JMAC. Such a result violates the underlying purposes of the stay of proceedings in the BIA, which, among other things, seeks to prevent an aggressive creditor from realizing on the debtor's assets to the detriment of all other creditors. In the proposal proceedings in *Stone Sapphire*, this Court refused to lift the stay of proceedings in consideration of the interests of the debtor's creditors as a whole and given the applicants inability to point to a specific purpose for lifting the stay. [72]

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[72] *Century Services*, *supra* at para 22 [**TAB 17**]; *Stone Sapphire*, *supra* at para 50 [**TAB 26**].

62. JMAC will not be materially prejudiced by the preservation of the Stay of Proceedings and has otherwise failed to demonstrate equitable grounds to support lifting the Stay of Proceedings. As such, the Applicants submit that JMAC's Cross-Application to lift the Stay of Proceedings should be dismissed.

**c. Approving the Replacement Second Interim Financing is Appropriate and Necessary**

63. Section 50.6(1) of the BIA expressly provides this Court with the authority to grant a charge in respect of interim financing, on notice to affected secured creditors, and with regard to a debtor company's cash flow forecast. The security or charge may not secure pre-filing obligations owing under an interim financing facility[73], but can be given priority over the claim of any secured creditor.[74] In granting such a charge, the Court is to consider, among other things:

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

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

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

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

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

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

(g) the Proposal Trustee's report, if any.[75]

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[73] BIA, *supra* s 50.6(1) [**TAB 1**].

[74] BIA, *supra* s 50.6(3) [**TAB 1**].

[75] BIA, *supra* s 50.6(5) [**TAB 1**]; *Re Eureka 93 Inc et al*, 2020 ONSC 1482 at para 16 [**TAB 27**].

64. No one factor is determinative of the issue; rather, the exercise is necessarily one of balancing the respective interests of the debtor and its stakeholders towards ensuring, if appropriate, that the financing will assist the debtor to obtain the breathing room required to pursue a restructuring.[76]

65. Further, the circumstances in which courts have granted interim financing and a corresponding charge securing same, reflect the remedial purposes of the BIA's proposal provisions to "avoid the social and economic losses resulting from liquidation of an insolvent company".[77]

66. The courts have previously approved secondary interim financing with corresponding charges on several occasions in Canadian insolvency proceedings where the second interim lender is not the same party as the initial interim lender, where additional funding is required, but not available under the first interim financing facility, to continue the debtor company's restructuring.[78]

67. Canadian courts have also granted interim financing in circumstances where a secured creditor objects to such funding. In the CCAA proceedings of White Birch Paper Holding Company, the Quebec Superior Court declined to rescind or otherwise amend an initial order which, among other things, approved an interim financing facility and related charge despite the objections of a senior secured creditor.[79] The Court noted that even if certain creditors were materially affected by such financing and charge, looking to the "broader picture" the positive effects of such funding, including the ability of the debtor company to continue to operate as a going concern business while it restructured, outweighed any

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[76] *Re 1057863 BC Ltd*, 2020 BCSC 1359 at para 35 [**TAB 28**].

[77] *Re Mustang GP Ltd*, 2015 ONSC 6562 at paras 29-31 [**TAB 29**].

[78] Order of the Honourable Justice Koehnen, granted May 8, 2020, *In the Matter of a Plan of Compromise or Arrangement of Green Relief Inc*, Ontario Superior Court of Justice (Commercial List) File No. CV-20-00639217-00CL, paras 3-4 [**Tab 30**]; Affidavit of Neilank Jha, sworn May 1, 2020, paras 6, 22-23 [**Tab 31**]; Order of the Honourable Justice Fitzpatrick, granted October 13, 2011, *In the Matter of Bul River Mineral Corporation et al*, Supreme Court of British Columbia Court File No. S113459, paras 3-4, 6 [**TAB 32**]; Notice of Application, filed October 7, 2011, *In the Matter of Bul River Mineral Corporation et al*, Supreme Court of British Columbia Court File No. S113459, paras 11-14 [**TAB 33**].

[79] Judgment of the Honourable R Mongeon, dated March 25, 2010, *In the Matter of Plan of Arrangement and Compromise of White Birch Paper Holding Company et al*, Quebec Superior Court [Commercial Division] File No. 500-11-038474-108, para 30 [*White Birch*] [**TAB 34**].

compromise to the creditor.[80] Further, the Court imposed a duty upon itself to ensure the debtor company had a sufficient cash flow to support its restructuring over several months.[81]

68. As part of the First Order, this Court authorized the Companies to borrow up to $2.85 million from JMAC pursuant to the terms of the Interim Financing Term Sheet. The Court additionally granted JMAC the benefit of the Interim Lender's Charge (up to the maximum amount of $2,850,000), which is subordinate only to the Administration Charge. That facility was fully drawn shortly after it was granted, in order for the Companies to satisfy a cash call obligation in relation to AMIS LLC.[82]

69. On the present Application, the Applicants are not seeking the approval of a wholly new Interim Lender's Charge, but rather an amendment to the pre-existing Interim Lender's Charge granted by this Court pursuant to the First Order. Such amendment includes replacing JMAC with Badger as the beneficiary under the Interim Lender's Charge and increasing the principal amount of the charge to $5.3 million. The Companies further seek authorization to repay all amounts owing to JMAC under the existing Interim Financing Facility. As set out in the Fourth Churchill Affidavit and the Revised Cash Flow Forecast, the Companies require replacement interim financing in order to repay the Interim Financing Loan in full to JMAC, fund their ongoing expenses until a transaction closes, and pay the fees of professional advisors, particularly given the commencement of the US Proceedings and JMAC's Cross-Application in these Proposal Proceedings.[83]

70. The Companies have agreed upon terms for the provision of such replacement interim financing with Badger acting as the Second Interim Lender as set out in the Second Interim Financing Term Sheet. The Second Interim Financing Term Sheet provides that the Second Interim Lender will provide the Companies with replacement interim financing through a debtor-in-possession loan, up to the principal maximum amount of $5.3 million. As is standard, the Second Interim Financing Facility is conditional upon, among other things,

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[80] *White Birch*, *supra* paras 30-33 [**TAB 34**].

[81] *White Birch*, *supra* para 31 [**TAB 34**].

[82] Fourth Churchill Affidavit at para 12.

[83] Fourth Churchill Affidavit at paras 24, 29-30, 32-34, Exhibit "K".

the issuance of the proposed order approving the Second Interim Financing Facility and granting of an Interim Lender's Charge, in this case by way of amending the existing Interim Lender's Charge.

71. In consultation with the Proposal Trustee, the Applicants have determined that they require the Second Interim Financing Facility provided by Badger instead of JMAC, who has stated they will extend further funds under the existing Interim Financing Facility, given the now litigious nature of the Companies' relationship with JMAC. As stated above, the Companies require the replacement interim financing, in part, to continue to fund their operations until the Transaction closes, which closing JMAC seeks to delay or prevent altogether, and to repay the indebtedness under the Interim Financing Facility owed to JMAC prior to the Maturity Date.[84] Given the current circumstances, it would be contrary to the Companies' restructuring efforts and their ability to respond to the US Proceedings and JMAC's Cross-Application if JMAC controls the funding that the Companies require to do the same.[85]

72. The Applicants submit that it is appropriate for this Court to exercise its discretion to approve the Second Interim Financing Facility and to amend the Interim Lender's Charge as requested by replacing JMAC with Badger as the beneficiary and increasing the principal amount secured to $5.3 million as:

(a) the Second Interim Financing Facility represents the best option available given the Companies' financial position and circumstances, and the availability of such replacement funding is in the best interests of the Companies' stakeholders;[86]

(b) the Second Interim Lender is well-versed in these Proposal Proceedings and well-positioned to provide replacement funding given Badger is the proposed Purchaser;[87]

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[84] Fourth Churchill Affidavit at paras 24-25, 29-30, 32-34, Exhibit "K".

[85] Fourth Churchill Affidavit at para 27.

[86] Fourth Churchill Affidavit at paras 35, 37.

[87] Fourth Churchill Affidavit at paras 28, 35.

(c) the terms of the Second Interim Financing Facility are similar to the terms contained in the Interim Financing Term Sheet that this Court approved under the First Order, including an equivalent rate of interest and transaction fee;[88] and

(d) JMAC will not be materially prejudiced by the approval of the Second Interim Financing Facility or the amendments to the Interim Lender's Charge given:

(i) a portion of the replacement interim financing is marked to repay the loan from JMAC to the Companies under the Interim Financing Facility in full, including accrued interest, and prior to the Maturity Date;[89] and

(ii) Even under the potential scenario where the Companies are required to proceed with JMAC's transaction at $13.1 million, all creditors are anticipated to be repaid in full, which would include JMAC as both a secured and unsecured creditor. Further, while the Companies disagree with this evidence, it is notable that on JMAC's own evidence filed in support of the US Proceedings, shareholders are anticipated to receive meaningful distributions under JMAC's transaction.[90] There is therefore no prejudice to JMAC in granting the requested replacement Second Interim Financing Facility; and

(e) no other creditors of the Companies will be prejudiced by the approval of the Second Interim Financing Facility as such funding will allow the Companies to continue to work towards closing the Transaction to the benefit of all of their stakeholders and JMAC themselves admit in their materials filed in support of their Cross-Application that increased interim financing would not prejudice any other creditor.

73. Without approval of the Second Interim Financing Facility and the amended Interim Lender's Charge, the Companies restructuring efforts will be hindered or terminated

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[88] Fourth Churchill Affidavit at para 36.

[89] Fourth Churchill Affidavit at paras 30, 32.

[90] Fourth Churchill Affidavit at Exhibit "E" at 8.

altogether given that the Companies would not have sufficient funds to repay JMAC under the Interim Financing Facility prior to its Maturity Date, continue operations until the Transaction closes, pay professional advisors, or respond to the US Proceedings.[91]

74. It is therefore appropriate and reasonably necessary to approve the Second Interim Financing Facility, amend the Interim Lender's Charge as requested, and authorize the Companies to repay JMAC in full under the existing Interim Financing Facility.

75. Authorizing the Companies to pay out the amounts owing to JMAC under the existing Interim Financing Facility is also appropriate and necessary given the approaching Maturity Date and to minimize the Companies financial reliance on JMAC as the US Proceedings continue and until the dispute with JMAC in regard to the applicability of the ROFR is resolved.

## V. CONCLUSION:

76. For the reasons set out above, the Applicants request that this Honourable Court exercise its inherent jurisdiction and grant the relief sought in this Application, including dismissing JMAC's cross-application, confirming a litigation plan between the Companies and JMAC in regard to the approval of the Transaction with Badger, and authorizing the Companies to enter into the Second Interim Financing Term Sheet and amending the Interim Lender's Charge accordingly.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4TH DAY OF MARCH, 2024.**

**FASKEN MARTINEAU DUMOULIN LLP**

Per: _____
R. Gurofsky/J. Cameron
Solicitors for the Applicants

[91] Fourth Churchill Affidavit at paras 24, 29-30, Exhibit "K".

## LIST OF AUTHORITIES

1. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3
2. *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 1994 CarswellQue 120.
3. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36.
4. *Royal Bank v Cow Harbour Construction Ltd*, 2010 ABQB 637.
5. *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, 2021 ABCA 304.
6. *British Columbia v Peakhill Capital Inc*, 2023 BCCA 368.
7. *HML Contracting Ltd v Pinder*, 2022 ABCA 185.
8. *R v Canadian Broadcasting Corp*, 2018 SCC 5.
9. *Forbes Energy Group Inc v Parsian Energy Rad Gas*, 2019 ONCA 372.
10. *A1 Pressure Sensitive Products Inc v Bostik Inc*, 2009 ONCA 206.
11. *Homburg Invest Inc (Arrangement relatif à)*, 2014 QCCS 3135.
12. *Taberna Preferred Funding VI Ltd c Stitching Homburg Bonds*, 2015 QCCA 62.
13. *Re Essar Steel Algoma Inc et al*, 2016 ONSC 595.
14. *Van Breda v Village Resorts Ltd,* 2012 SCC 17.
15. *Arrangement relative à Bloom Lake*, 2021 QCCS 3402.
16. *Sam Lévy & Associés v Azco Mining Inc*, 2001 SCC 92.
17. *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60.
18. *1296371 BC Ltd v Domain Mortgage Corp*, 2022 BCCA 331.
19. *Matco Capital Limited v Interex Oilfield Services Ltd*, 2007 ABCA 317.
20. *Alberta (Attorney General) v Moloney*, 2015 SCC 51.
21. *Maple Homes Canada Ltd, Re*, 2000 BCSC 1443.
22. *Advocate Mines Ltd, Re*, 1984 CarswellOnt 156, [1984] OJ No 2330.
23. *Burke v Red Barn at Mattick's Ltd*, 2019 BCSC 69.

24. *Can-Industrial Electric v City of Toronto*, 2022 ONSC 7376.

25. *Alberta Energy Regulator v Lexin Resources Ltd*, 2019 ABQB 23.

26. *Stone Sapphire Ltd v Transglobal Communications Group Inc*, 2008 ABQB 398.

27. *Re Eureka 93 Inc et al*, 2020 ONSC 1482.

28. *Re 1057863 BC Ltd*, 2020 BCSC 1359.

29. *Re Mustang GP Ltd*, 2015 ONSC 6562.

30. In the Matter of a Plan of Compromise or Arrangement of Green Relief Inc, Ontario Superior Court of Justice (Commercial List) File No. CV-20-00639217-00CL, Order of the Honourable Justice Koehnen, granted May 8, 2020,

31. In the Matter of a Plan of Compromise or Arrangement of Green Relief Inc, Ontario Superior Court of Justice (Commercial List) File No. CV-20-00639217-00CL, Affidavit of Neilank Jha, sworn May 1, 2020.

32. In the Matter of Bul River Mineral Corporation et al, Supreme Court of British Columbia Court File No. S113459, Order of the Honourable Justice Fitzpatrick, granted October 13, 2011.

33. In the Matter of Bul River Mineral Corporation et al, Supreme Court of British Columbia Court File No. S113459, Notice of Application, filed October 7, 2011.

34. In the Matter of Plan of Arrangement and Compromise of White Birch Paper Holding Company et al, Quebec Superior Court [Commercial Division] file No. 500-11-038474-108, Judgment of the Honourable R Mongeon, dated March 25, 2010.

# TAB 1

Canada Federal Statutes
Bankruptcy and Insolvency Act
Duty of Good Faith [Heading added 2019, c. 29, s. 133.]



R.S.C. 1985, c. B-3, s. 4.2

s 4.2

Currency

**4.2**
**4.2(1)Good faith**
Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

**4.2(2)Good faith — powers of court**
If the court is satisfied that an interested person fails to act in good faith, on application by any interested person, the court may make any order that it considers appropriate in the circumstances.

**Amendment History**
2019, c. 29, s. 133

**Currency**
Federal English Statutes reflect amendments current to December 6, 2023
Federal English Regulations Current to Gazette Vol. 157:23 (November 8, 2023)

**End of Document**

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals



R.S.C. 1985, c. B-3, s. 50.4

s 50.4

Currency

**50.4**

**50.4(1)Notice of intention**

Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

(a) the insolvent person's intention to make a proposal,

(b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and

(c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

**50.4(2)Certain things to be filed**

Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

(a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

**50.4(3)Creditors may obtain statement**

Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

**50.4(4)Exception**

The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

 

(b) non-release would not unduly prejudice the creditor or creditors in question.

**50.4(5)Trustee protected**
If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

**50.4(6)Trustee to notify creditors**
Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

**50.4(7)Trustee to monitor and report**
Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

**50.4(8)Where assignment deemed to have been made**
Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

**50.4(9)Extension of time for filing proposal**
The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual

 

extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

**50.4(10)Court may not extend time**
Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

**50.4(11)Court may terminate period for making proposal**
The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

**Amendment History**
1992, c. 27, s. 19; 1997, c. 12, s. 32(1); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6

**Currency**
Federal English Statutes reflect amendments current to December 6, 2023
Federal English Regulations Current to Gazette Vol. 157:23 (November 8, 2023)

**End of Document**

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals



R.S.C. 1985, c. B-3, s. 50.6

s 50.6

Currency

**50.6**

**50.6(1)Order — interim financing**

On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

**50.6(2)Individuals**

In the case of an individual,

(a) they may not make an application under subsection (1) unless they are carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

**50.6(3)Priority**

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

**50.6(4)Priority — previous orders**

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

**50.6(5)Factors to be considered**

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

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

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

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

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

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

 

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

(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

**Amendment History**
2005, c. 47, s. 36; 2007, c. 36, s. 18

**Currency**
Federal English Statutes reflect amendments current to December 6, 2023
Federal English Regulations Current to Gazette Vol. 157:23 (November 8, 2023)

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part IV — Property of the Bankrupt (ss. 67-101.2)
Stay of Proceedings

R.S.C. 1985, c. B-3, s. 69.4

# s 69.4 Court may declare that stays, etc., cease

Currency

**69.4Court may declare that stays, etc., cease**

A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

**Note:**

S.C. 1997, c. 12, s. 65(2), provides as follows:

*(2) Subsection (1) [S.C. 1997, c. 12, s. 65(1), which added ss. 69.31 and 69.41 and re-enacted s. 69.4] applies to bankruptcies or proposals in respect of which proceedings are commenced after that subsection comes into force [September 30, 1997].*

**Amendment History**

1992, c. 27, s. 36(1); 1997, c. 12, s. 65(1)

**Currency**

Federal English Statutes reflect amendments current to December 6, 2023
Federal English Regulations Current to Gazette Vol. 157:23 (November 8, 2023)

**End of Document**

# TAB 2

1994 CarswellQue 120
Supreme Court of Canada

RJR — MacDonald Inc. v. Canada (Attorney General)

1994 CarswellQue 120F, 1994 CarswellQue 120, [1994] 1 S.C.R. 311, [1994] A.C.S. No. 17, [1994] S.C.J. No. 17, 111 D.L.R. (4th) 385, 164 N.R. 1, 46 A.C.W.S. (3d) 40, 54 C.P.R. (3d) 114, 5 W.D.C.P. (2d) 136, 60 Q.A.C. 241, J.E. 94-423, EYB 1994-28671

# RJR — MacDonald Inc., Applicant v. The Attorney General of Canada, Respondent and The Attorney General of Quebec, Mis-en-cause and The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada, Interveners on the application for interlocutory relief

Imperial Tobacco Ltd., Applicant v. The Attorney General of Canada, Respondent and The Attorney General of Quebec, Mis-en-cause and The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada, Interveners on the application for interlocutory relief

Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Judgment: October 4, 1993
Judgment: March 3, 1994
Docket: 23460, 23490

Proceedings: Applications for Interlocutory Relief

Counsel: *Colin K. Irving* , for the applicant RJR — MacDonald Inc.
*Simon V. Potter* , for the applicant Imperial Tobacco Inc.
*Claude Joyal* and *Yves Leboeuf* , for the respondent.
*W. Ian C. Binnie, Q.C.* , and *Colin Baxter* , for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

Subject: Constitutional; Intellectual Property; Civil Practice and Procedure; Public; Property

**The judgment of the Court on the applications for interlocutory relief was delivered by *Sopinka and Cory JJ.*:**

## I. Factual Background

1 These applications for relief from compliance with certain *Tobacco Products Control Regulations, amendment* , SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

2 The *Tobacco Products Control Act* , R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

3 The first part of the *Tobacco Products Control Act* , particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

4 Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(*f*) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and

 

prominence" of the mandatory health messages. Section 18(1)(*b* ) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed $100,000, imprisonment for up to one year, or both.

5 Each of the applicants challenged the constitutional validity of the *Tobacco Products Control Act* on the grounds that it is *ultra vires* the Parliament of Canada and invalid as it violates s. 2(*b* ) of the *Canadian Charter of Rights and Freedoms* . The two cases were heard together and decided on common evidence.

6 On July 26, 1991, Chabot J. of the Quebec Superior Court granted the applicants' motions, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449 , finding that the Act was *ultra vires* the Parliament of Canada and that it contravened the *Charter* . The respondent appealed to the Quebec Court of Appeal. Before the Court of Appeal rendered judgment, the applicants applied to this court for interlocutory relief in the form of an order that they would not have to comply with certain provisions of the Act for a period of 60 days following judgment in the Court of Appeal.

7 Up to that point, the applicants had complied with all provisions in the *Tobacco Products Control Act* . However, under the Act, the complete prohibition on all point of sale advertising was not due to come into force until December 31, 1992. The applicants estimated that it would take them approximately 60 days to dismantle all of their advertising displays in stores. They argued that, with the benefit of a Superior Court judgment declaring the Act unconstitutional, they should not be required to take any steps to dismantle their displays until such time as the Court of Appeal might eventually hold the legislation to be valid. On the motion the Court of Appeal held that the penalties for non-compliance with the ban on point of sale advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

8 On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289 , allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not *ultra vires* the government of Canada. The Court of Appeal accepted that the Act infringed s. 2(*b* ) of the *Charter* but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the *Charter* . Brossard J.A. agreed with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the *Charter* . The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

9 On August 11, 1993, the Governor in Council published amendments to the regulations dated July 21, 1993, under the Act: *Tobacco Products Control Regulations, amendment* , SOR/93-389. The amendments stipulate that larger, more prominent health warnings must be placed on all tobacco products packets, and that these warnings can no longer be attributed to Health and Welfare Canada. The packaging changes must be in effect within one year.

10 According to affidavits filed in support of the applicant's motion, compliance with the new regulations would require the tobacco industry to redesign all of its packaging and to purchase thousands of rotogravе cylinders and embossing dies. These changes would take close to a year to effect, at a cost to the industry of about $30,000,000.

11 Before a decision on their leave applications in the main actions had been made, the applicants brought these motions for a stay pursuant to s. 65.1 of the *Supreme Court Act* , R.S.C., 1985, c. S-26 (ad. by S.C. 1990, c. 8, s. 40) or, in the event that leave was granted, pursuant to r. 27 of the *Rules of the Supreme Court of Canada* , SOR/83-74. The applicants seek to stay "the judgment of the Quebec Court of Appeal delivered on January 15, 1993", but "only insofar as that judgment validates sections 3, 4, 5, 6, 7 and 10 of [the new regulations]". In effect, the applicants ask to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. The applicants further request that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of *Tobacco Products Control Act* .

 

12 The applicants contend that the stays requested are necessary to prevent their being required to incur considerable irrecoverable expenses as a result of the new regulations even though this Court may eventually find the enabling legislation to be constitutionally invalid.

13 The applicants' motions were heard by this Court on October 4. Leave to appeal the main actions was granted on October 14.

**II. Relevant Statutory Provisions**

***Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, s. 3:***

14

> *3.* The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (*a* ) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
>
> (*b* ) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
>
> (*c* ) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

***Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1 (ad. S.C. 1990, c. 8, s. 40):***

15

> *65.1* The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

***Rules of the Supreme Court of Canada, SOR/83-74, s. 27:***

16

> 27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

**III. Courts Below**

17 In order to place the applications for the stay in context it is necessary to review briefly the decisions of the courts below.

***Superior Court, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449***

18 Chabot J. concluded that the dominant characteristic of the *Tobacco Products Control Act* was the control of tobacco advertising and that the protection of public health was only an incidental objective of the Act. Chabot J. characterized the *Tobacco Products Control Act* as a law regulating advertising of a particular product, a matter within provincial legislative competence.

19 Chabot J. found that, with respect to s. 2(*b* ) of the *Charter* , the activity prohibited by the Act was a protected activity, and that the notices required by the Regulations violated that *Charter* guarantee. He further held that the evidence demonstrated that the objective of reducing the level of consumption of tobacco products was of sufficient importance to warrant legislation

  

restricting freedom of expression, and that the legislative objectives identified by Parliament to reduce tobacco use were a pressing and substantial concern in a free and democratic society.

20 However, in his view, the Act did not minimally impair freedom of expression, as it did not restrict itself to protecting young people from inducements to smoke, or limit itself to lifestyle advertising. Chabot J. found that the evidence submitted by the respondent in support of its contention that adver tising bans decrease consumption was unreliable and without probative value because it failed to demonstrate that any ban of tobacco advertising would be likely to bring about a reduction of tobacco consumption. Therefore, the respondent had not demonstrated that an advertising ban restricted freedom of expression as little as possible. Chabot J. further concluded that the evidence of a rational connection between the ban of Canadian advertising and the objective of reducing overall consumption of tobacco was deficient, if not non-existent. He held that the Act was a form of censorship and social engineering which was incompatible with a free and democratic society and could not be justified.

***Court of Appeal (on the application for a stay)***

21 In deciding whether or not to exercise its broad power under art. 523 of the *Code of Civil Procedure of Québec* to "make any order necessary to safeguard the rights of the parties", the Court of Appeal made the following observation on the nature of the relief requested:

> But what is at issue here (if the Act is found to be constitutionally valid) is the suspension of the legal effect of part of the Act and the legal duty to comply with it for 60 days, and the suspension, as well, of the power of the appropriate public authorities to enforce the Act. To suspend or delay the effect or the enforcement of a *valid* act of the legislature, particularly one purporting to relate to the protection of public health or safety is a serious matter. The courts should not lightly limit or delay the implementation or enforcement of *valid* legislation where the legislature has brought that legislation into effect. To do so would be to intrude into the legislative and the executive spheres. [Emphasis in original.]

The Court made a partial grant of the relief sought as follows:

> Since the letters of the Department of Health and Welfare and appellants' contestation both suggest the possibility that the applicants may be prosecuted under *Sec. 5* after December 31, 1992 whether or not judgment has been rendered on these appeals by that date, it seems reasonable to order the suspension of enforcement under *Sec. 5* of the Act until judgment has been rendered by this Court on the present appeals. There is, after all, a serious issue as to the validity of the Act, and it would be unfairly onerous to require the applicants to incur substantial expense in dismantling these point of sale displays until we have resolved that issue.
>
> We see no basis, however, for ordering a stay of the coming into effect of the Act for 60 days following our judgment on the appeals.
>
> . . . . .
>
> Indeed, given the public interest aspect of the Act, which purports to be concerned with the protection of public health, if the Act were found to be valid, there is excellent reason why its effect and enforcement should not be suspended (*A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 , 127, 135). [Emphasis in original.]

***Court of Appeal (on the validity of the legislation), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289***

*1. LeBel J.A. (for the majority)*

22 LeBel J.A. characterized the *Tobacco Products Control Act* as legislation relating to public health. He also found that it was valid as legislation enacted for the peace, order and good government of Canada.

23 LeBel J.A. applied the criteria set out in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 , and concluded that the Act satisfied the "national concern" test and could properly rest on a purely theoretical, unproven link between tobacco advertising and the overall consumption of tobacco.

 

24 LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to s. 2(*b* ) of the *Charter* but found that it was justified under s. 1 of the *Charter* . LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment branches of the *Oakes* test have been attenuated by later decisions of the Supreme Court of Canada. He found that the s. 1 test was satisfied since there was a possibility that prohibiting tobacco advertising might lead to a reduction in tobacco consumption, based on the mere existence of a [Translation] "body of opinion" favourable to the adoption of a ban. Further he found that the Act appeared to be consistent with minimal impairment as it did not prohibit consumption, did not prohibit foreign advertising and did not preclude the possibility of obtaining information about tobacco products.

*2. Brossard J.A. (dissenting in part)*

25 Brossard J.A. agreed with LeBel J.A. that the *Tobacco Products Control Act* should be characterized as public health legislation and that the Act satisfied the "national concern" branch of the peace, order and good government power.

26 However, he did not think that the violation of s. 2(*b* ) of the *Charter* could be justified. He reviewed the evidence and found that it did not demonstrate the existence of a connection or even the possibility of a connection between an advertising ban and the use of tobacco. It was his opinion that it must be shown on a balance of probabilities that it was at least possible that the goals sought would be achieved. He also disagreed that the Act met the minimal impairment requirement since in his view the Act's objectives could be met by restricting advertising without the need for a total prohibition.

**IV. Jurisdiction**

27 A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants. Both the Attorney General of Canada and the interveners on the stay (several health organizations, i.e., the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada) argued that this Court lacks jurisdiction to order a stay of execution or of the proceedings which would relieve the applicants of the obligation of complying with the new regulations. Several arguments were advanced in support of this position.

28 First, the Attorney General argued that neither the old nor the new regulations dealing with the health messages were in issue before the lower courts and, as such, the applicants' requests for a stay truly cloaks requests to have this Court exercise an original jurisdiction over the matter. Second, he contended that the judgment of the Quebec Court of Appeal is not subject to execution given that it only declared that the Act was *intra vires* s. 91 of the *Constitution Act, 1867* and justified under s. 1 of the *Charter* . Because the lower court decision amounts to a declaration, there is, therefore, no "proceeding" that can be stayed. Finally, the Attorney General characterized the applicants' requests as being requests for a suspension by anticipation of the 12-month delay in which the new regulations will become effective so that the applicants can continue to sell tobacco products for an extended period in packages containing the health warnings required by the present regulations. He claimed that this Court has no jurisdiction to suspend the operation of the new regulations.

29 The interveners supported and elaborated on these submissions. They also submitted that r. 27 could not apply because leave to appeal had not been granted. In any event, they argued that the words "or other relief" are not broad enough to permit this Court to defer enforcement of regulations that were not even in existence at the time the appeal judgment was rendered.

30 The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the *Supreme Court Act* and r. 27 of the *Rules of the Supreme Court of Canada* .

***Supreme Court Act***

31

> *65.1* The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

 

***Rules of the Supreme Court of Canada***

32

> 27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

33 Rule 27 and its predecessor have existed in substantially the same form since at least 1888 (see *Rules of the Supreme Court of Canada* , 1888, General Order No. 85(17)). Its broad language reflects the language of s. 97 of the Act whence the Court derives its rule-making power. Subsection (1)(*a* ) of that section provides that the rules may be enacted:

> *97.* ...
>
> > (*a* ) for regulating the procedure of and in the Court and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of this Act and the attainment of the intention and objects thereof;

Although the point is now academic, leave to appeal having been granted, we would not read into the rule the limitations suggested by the interveners. Neither the words of the rule nor s. 97 contain such limitations. In our opinion, in interpreting the language of the rule, regard should be had to its purpose, which is best expressed in the terms of the empowering section: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal. Examples of the former, traditionally described as stays of execution, are contained in the subsections of s. 65 of the Act which have been held to be limited to preventing the intervention of a third party such as a sheriff but not the enforcement of an order directed to a party. See *Keable v. Attorney General (Can.)*, [1978] 2 S.C.R. 135 . The stopping or freezing of all proceedings is traditionally referred to as a stay of proceedings. See *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127 (C.A.) . Such relief can be granted pursuant to this Court's powers in r. 27 or s. 65.1 of the Act.

34 Moreover, we cannot agree that the adoption of s. 65.1 in 1992 (S.C. 1990, c. 8, s. 40) was intended to limit the Court's powers under r. 27. The purpose of that amendment was to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. Section 65.1 should, therefore, be interpreted to confer the same broad powers that are included in r. 27.

35 In light of the foregoing and bearing in mind in particular the language of s. 97 of the Act we cannot agree with the first two points raised by the Attorney General that this Court is unable to grant a stay as requested by the applicants. We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court. In this case, the new regulations constitute conduct under a law that has been declared constitutional by the lower courts.

36 This, in our opinion, is the view taken by this Court in *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 594 . The appellant Labatt, in circumstances similar to those in this case, sought to suspend enforcement of regulations which were attacked by it in an action for a declaration that the regulations were inapplicable to Labatt's product. The Federal Court of Appeal reversed a lower court finding in favour of Labatt. Labatt applied for a stay pending an appeal to this Court. Although the parties had apparently agreed to the terms of an order suspending further proceedings, Laskin C.J.

 

dealt with the issue of jurisdiction, an issue that apparently was contested notwithstanding the agreement. The Chief Justice, speaking for the Court, determined that the Court was empowered to make an order suspending the enforcement of the impugned regulation by the Department of Consumer and Corporate Affairs. At page 600, Laskin C.J. responded as follows to arguments advanced on the traditional approach to the power to grant a stay:

> It was contended that the Rule relates to judgments or orders of this Court and not to judgments or orders of the Court appealed from. Its formulation appears to me to be inconsistent with such a limitation. Nor do I think that the position of the respondent that there is no judgment against the appellant to be stayed is a tenable one. Even if it be so, there is certainly an order against the appellant. *Moreover, I do not think that the words of Rule 126, authorizing this Court to grant relief against an adverse order, should be read so narrowly as to invite only intervention directly against the order and not against its effect while an appeal against it is pending in this Court.* I am of the opinion, therefore, that the appellant is entitled to apply for interlocutory relief against the operation of the order dismissing its declaratory action, and that this Court may grant relief on such terms as may be just. [Emphasis added.]

37 While the above passage appears to answer the submission of the respondents on this motion that *Labatt* was distinguishable because the Court acted on a consent order, the matter was put beyond doubt by the following additional statement of Laskin C.J. at p. 601:

> Although I am of the opinion that Rule 126 applies to support the making of an order of the kind here agreed to by counsel for the parties, I would not wish it to be taken that this Court is otherwise without power to prevent proceedings pending before it from being aborted by unilateral action by one of the parties pending final determination of an appeal.

Indeed, an examination of the factums filed by the parties to the motion in *Labatt* reveals that while it was agreed that the dispute would be resolved by an application for a declaration, it was not agreed that pending resolution of the dispute the enforcement of the regulations would be stayed.

38 In our view, this Court has jurisdiction to grant the relief requested by the applicants. This is the case even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with this Court's finding in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 . In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings. While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in *Metropolitan Stores* strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

39 Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the *Charter* . A *Charter* remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

**V. Grounds for Stay of Proceedings**

40 The applicants rely upon the following grounds:

> 1. The challenged *Tobacco Products Control Regulations, amendment* were promulgated pursuant to ss. 9 and 17 of the *Tobacco Products Control Act* , S.C. 1988, c. 20.
>
> 2. The applicants have applied to this Court for leave to appeal a judgment of the Quebec Court of Appeal dated January 15, 1993. The Court of Appeal overturned a decision of the Quebec Superior Court declaring certain sections of the Act to be beyond the powers of the Parliament of Canada and an unjustifiable violation of the *Canadian Charter of Rights and Freedoms* .

  

3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.

4. The tests for granting of a stay are met in this case:

(i) There is a serious constitutional issue to be determined.

(ii) Compliance with the new regulations will cause irreparable harm.

(iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

**VI. Analysis**

41 The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., supra* . If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

***A. Interlocutory Injunctions, Stays of Proceedings and the Charter***

42 The applicants ask this Court to delay the legal effect of regulations which have already been enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

43 On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

44 On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute.

45 Are there, then, special considerations or tests which must be applied by the courts when *Charter* violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

46 Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In *Metropolitan Stores* , at p. 127, Beetz J. expressed the position in these words:

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

47 We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

48 *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious

  

question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

***B. The Strength of the Plaintiff's Case***

49 Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 , an applicant for interlocutory relief was required to demonstrate a "strong *prima facie* case" on the merits in order to satisfy the first test. In *American Cyanamid* , however, Lord Diplock stated that an applicant need no longer demonstrate a strong *prima facie* case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.

50 In *Metropolitan Stores* , Beetz J. advanced several reasons why the *American Cyanamid* test rather than any more stringent review of the merits is appropriate in *Charter* cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

51 The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following *dicta* of this Court in *Laboratoire Pentagone Ltée v. Parke, Davis & Co.*, [1968] S.C.R. 269 , at p. 272:

> The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits. It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

To the same effect were the comments of Kelly J.A. in *Adrian Messenger Services v. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619 (C.A.) , at p. 620:

> Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

And, most recently, of Philp J. in *Bear Island Foundation v. Ontario* (1989), 70 O.R. (2d) 574 (H.C.) , at p. 576:

> While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

52 According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's

 

position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in *Charter* cases.

53 The *Charter* protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged *Charter* violation to review the matter carefully. This is so even when other courts have concluded that no *Charter* breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in *Metropolitan Stores* , at p. 128, that "the *American Cyanamid* 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

54 What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the *Charter* claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores, supra* , at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

55 Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

56 Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the *American Cyanamid* principle in such a situation in *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294 , at p. 1307:

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

57 In *Trieger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (Ont. H.C.) , the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

> This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried *in the sense of a case with enough legal merit* to justify the extraordinary intervention of this court in making the order sought without any trial at all. [Emphasis added.]

58 In *Tremblay v. Daigle*, [1989] 2 S.C.R. 530 , the appellant Daigle was appealing an interlocutory injunction granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy,

 

this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

59 The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

60 The second exception to the *American Cyanamid* prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in *Metropolitan Stores* , at p. 133:

> There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(*a* ) of the *Canadian Charter of Rights and Freedoms* , could not possibly be saved under s. 1 of the *Charter* and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66 , at p. 88. It is trite to say that these cases are exceptional.

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

61 The suggestion has been made in the private law context that a third exception to the *American Cyanamid* "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392 (Ont. H.C.) , at p. 396, it was held that:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong *prima facie* case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

To the extent that this exception exists at all, it should not be applied in *Charter* cases. Even if the facts upon which the *Charter* breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

***C. Irreparable Harm***

62 Beetz J. determined in *Metropolitan Stores* , at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

63 At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

64 "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988),

  

48 D.L.R. (4th) 228 (Sask. Q.B.) ); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra* ); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.) ). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.) ).

65 The assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases.

66 This Court has on several occasions accepted the principle that damages may be awarded for a breach of *Charter* rights: (see, for example, *Mills v. The Queen*, [1986] 1 S.C.R. 863 , at pp. 883, 886, 943 and 971; *Nelles v. Ontario*, [1989] 2 S.C.R. 170 , at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the *Charter* . In light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

***D. The Balance of Inconvenience and Public Interest Considerations***

67 The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.

68 The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid* , Lord Diplock cautioned, at p. 408, that:

> [i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

69 The decision in *Metropolitan Stores* , at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280 , at pp. 303-4:

> Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

*1. The Public Interest*

70 Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in *Metropolitan Stores* . A few additional points may be made. It is the "polycentric" nature of the *Charter* which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives* , 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

  

> While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in *Charter* litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores* . The Attorney General is not the exclusive representative of a monolithic "public" in *Charter* disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

71 It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

72 We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in *Morgentaler v. Ackroyd* (1983), 150 D.L.R. (3d) 59 (Ont. H.C.) , per Linden J., at p. 66.

> The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that *these women* would suffer irreparable harm, such evidence would not indicate any irreparable harm to *these applicants* , which would warrant this court issuing an injunction at their behest. [Emphasis in original.]

73 When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

74 Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791 , which overturned the trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the *Fisheries Act* , R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

> (b) the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

This dictum received the guarded approval of Beetz J. in *Metropolitan Stores* at p. 139. It was applied by the Trial Division of the Federal Court in *Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans)* (1988), 21 F.T.R. 304 .

75 A contrary view was expressed by McQuaid J.A. of the P.E.I. Court of Appeal in *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158 , who, in granting a stay of an order of the Public Utilities Commission pending appeal, stated at p. 164:

> I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The pub lic interest is equally well served, in the same sense, by any appeal....

76 In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function

  

of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

77 A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

78 Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores* , it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law is suspended entirely. See *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439 ; *Vancouver General Hospital v. Stoffman* (1985), 23 D.L.R. (4th) 146 ; *Rio Hotel Ltd. v. Commission des licences et permis d'alcool*, [1986] 2 S.C.R. ix .

79 Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373 (H.C.) , the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

*2. The Status Quo*

80 In the course of discussing the balance of convenience in *American Cyanamid* , Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to ... preserve the status quo." This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the *Charter* is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

***E. Summary***

81 It may be helpful at this stage to review the factors to be considered on an application for interlocutory relief in a *Charter* case.

82 As indicated in *Metropolitan Stores* , the three-part *American Cyanamid* test should be applied to applications for interlocutory injunctions and as well for stays in both private law and *Charter* cases.

83 At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

 

84 At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

85 The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

86 We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

**VII. Application of the Principles to these Cases**

***A. A Serious Question to be Tried***

87 The applicants contend that these cases raise several serious issues to be tried. Among these is the question of the application of the rational connection and the minimal impairment tests in order to justify the infringement upon freedom of expression occasioned by a blanket ban on tobacco advertising. On this issue, Chabot J. of the Quebec Superior Court and Brossard J.A. in dissent in the Court of Appeal held that the government had not satisfied these tests and that the ban could not be justified under s. 1 of the *Charter* . The majority of the Court of Appeal held that the ban was justified. The conflict in the reasons arises from different interpretations of the extent to which recent jurisprudence has relaxed the onus fixed upon the state in *R. v. Oakes*, [1986] 1 S.C.R. 103 , to justify its action in public welfare initiatives. This Court has granted leave to hear the appeals on the merits. When faced with separate motions for interlocutory relief pertaining to these cases, the Quebec Court of Appeal stated that "[w]hatever the outcome of these appeals, they clearly raise serious constitutional issues." This observation of the Quebec Court of Appeal and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law.

***B. Irreparable Harm***

88 The applicants allege that if they are not granted interlocutory relief they will be forced to spend very large sums of money immediately in order to comply with the regulations. In the event that their appeals are allowed by this Court, the applicants contend that they will not be able either to recover their costs from the government or to revert to their current packaging practices without again incurring the same expense.

89 Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

***C. Balance of Inconvenience***

90 Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

 

91 The losses which the applicants would suffer should relief be denied are strictly financial in nature. The required expenditure is significant and would undoubtedly impose considerable economic hardship on the two companies. Nonetheless, as pointed out by the respondent, the applicants are large and very successful corporations, each with annual earnings well in excess of $50,000,000. They have a greater capacity to absorb any loss than would many smaller enterprises. Secondarily, assuming that the demand for cigarettes is not solely a function of price, the companies may also be able to pass on some of their losses to their customers in the form of price increases. Therefore, although the harm suffered may be irreparable, it will not affect the long-term viability of the applicants.

92 Second, the applicants are two companies who seek to be exempted from compliance with the latest regulations published under the *Tobacco Products Control Act* . On the face of the matter, this case appears to be an "exemption case" as that phrase was used by Beetz J. in *Metropolitan Stores* . However, since there are only three tobacco producing companies operating in Canada, the application really is in the nature of a "suspension case". The applicants admitted in argument that they were in effect seeking to suspend the application of the new regulations to all tobacco producing companies in Canada for a period of one year following the judgment of this Court on the merits. The result of these motions will therefore affect the whole of the Canadian tobacco producing industry. Further, the impugned provisions are broad in nature. Thus it is appropriate to classify these applications as suspension cases and therefore ones in which "the public interest normally carries greater weight in favour of compliance with existing legislation" (p. 147).

93 The weight accorded to public interest concerns is partly a function of the nature of legislation generally, and partly a function of the purposes of the specific piece of legislation under attack. As Beetz J. explained, at p. 135, in *Metropolitan Stores* :

> Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by demo cratically-elected legislatures and are generally passed for the common good, for instance: ... *the protection of public health* .... It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good. [Emphasis added.]

94 The regulations under attack were adopted pursuant to s. 3 of the *Tobacco Products Control Act* which states:

> *3.* The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (*a* ) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
>
> (*b* ) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
>
> (*c* ) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

95 The Regulatory Impact Analysis Statement, in the *Canada Gazette* , Part II, Vol. 127, No. 16, p. 3284, at p. 3285, which accompanied the regulations stated:

> The increased number and revised format of the health messages reflect the strong consensus of the public health community that the serious health hazards of using these products be more fully and effectively communicated to consumers. Support for these changes has been manifested by hundreds of letters and a number of submissions by public health groups highly critical of the initial regulatory requirements under this legislation as well as a number of Departmental studies indicating their need.

96 These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good. Further, both parties agree that past studies have shown that health warnings on tobacco

  

product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have any positive public benefits. We do not think that such an argument assists the applicants at this interlocutory stage.

97 When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. That is particularly so in this case, where this very matter is one of the main issues to be resolved in the appeal. Rather, it is for the applicants to offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation.

98 The applicants in these cases made no attempt to argue any public interest in the continued application of current packaging requirements rather than the new requirements. The only possible public interest is that of smokers' not having the price of a package of cigarettes increase. Such an increase is not likely to be excessive and is purely economic in nature. Therefore, any public interest in maintaining the current price of tobacco products cannot carry much weight. This is particularly so when it is balanced against the undeniable importance of the public interest in health and in the pre vention of the widespread and serious medical problems directly attributable to smoking.

99 The balance of inconvenience weighs strongly in favour of the respondent and is not offset by the irreparable harm that the applicants may suffer if relief is denied. The public interest in health is of such compelling importance that the applications for a stay must be dismissed with costs to the successful party on the appeal.

*Applications dismissed.*

Solicitors of record:
Solicitors for the applicant RJR — MacDonald Inc.: *Mackenzie, Gervais* , Montreal.
Solicitors for the applicant Imperial Tobacco Inc.: *Ogilvy, Renault* , Montreal.
Solicitors for the respondent: *Côté & Ouellet* , Montreal.
Solicitors for the interveners on the application for interlocutory relief the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada: *McCarthy, Tétrault* , Toronto.

# TAB 3

Canada Federal Statutes
Companies' Creditors Arrangement Act
Short Title

R.S.C. 1985, c. C-36, s. 1

# s 1. Short title

Currency

**1.Short title**
This Act may be cited as the *Companies' Creditors Arrangement Act*.

**Currency**
Federal English Statutes reflect amendments current to December 6, 2023
Federal English Regulations Current to Gazette Vol. 157:23 (November 8, 2023)

**End of Document**

# TAB 4

2010 ABQB 637
Alberta Court of Queen's Bench

Royal Bank v. Cow Harbour Construction Ltd.

2010 CarswellAlta 2027, 2010 ABQB 637, [2011] A.W.L.D. 7, 193
A.C.W.S. (3d) 710, 37 Alta. L.R. (5th) 82, 504 A.R. 319, 72 C.B.R. (5th) 261

# Royal Bank of Canada (Plaintiff) and Cow Harbour Construction Ltd. and 1134252 Alberta Ltd. (Defendants)

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

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

And In the Matter of a Plan of Compromise or Arrangement of Cow Harbour Construction Ltd.

K.D. Yamauchi J.

Heard: September 22, 2010
Judgment: October 5, 2010
Docket: Edmonton 1003-11241, 1003-05560, BKCY 24-115359

Counsel: Ray Rutman for Royal Bank Canada
Stuart Weatherill, Kyle Kawanami for John Deere Credit Inc., DeLage Landen Financial Services, LiftCapital Corp.
Howard Gorman, Randal Van de Mosselaer for PricewaterHouseCoopers, in it capacity as receiver of Cow Harbour Ltd.
Frances Dearlove for Aecon Group Inc.

Subject: Insolvency

APPLICATION by lessor for leave to appeal and stay of proceedings under *Companies' Creditors Arrangement Act.*

***K.D. Yamauchi J.*:**

**I. Background**

1 On April 7, 2010, Cow Harbour Construction Ltd. ("Cow Harbour") applied for a stay of proceedings against it under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). This Court granted that order (the "Initial Order") in *CCAA* action 1003 05560 (the "CCAA Action"). This Court extended the stay of proceedings from time to time by a number of subsequent orders. It should be noted that this Court did not want to extend the stay for a lengthy period at any given time. Accordingly, this Court required the parties to this action, of which there are many, to appear before it often and regularly, so that Cow Harbour and the various professionals involved in this matter could provide this Court with regular updates on the status and progress of the restructuring.

2 It became clear as this matter progressed that Cow Harbour was not going to be able to restructure it affairs through a refinancing, a compromise or an equity restructuring. Rather, this matter evolved into a liquidation. This Court approved a process that would permit Cow Harbour to restructure by way of a sale of its assets. The process involved inviting potential purchasers to present proposals to purchase Cow Harbour's assets and undertaking. The intent behind this process was to effect a sale of Cow Harbour as a going concern. This process resulted in this Court being presented with three proposals to purchase certain of Cow Harbour's assets.

 

3 Aecon Group Inc. ("Aecon") presented a letter of intent to purchase a significant portion of Cow Harbour's assets (the "Original Aecon Proposal"). The Original Aecon Proposal was subject to a number of terms and conditions. This Court appointed PricewaterhouseCoopers Inc. ("PWC") to act as a transaction facilitator to assist the various parties' in their negotiations. As the transaction facilitator, PWC successfully negotiated a higher purchase price with Aecon. Aecon eventually presented a Letter of Intent to Purchase (the "LOI").

4 On August 5, 2010, this Court endorsed PWC's acceptance of the LOI, with a view that the parties would return to this Court to seek this Court's approval of an asset purchase agreement and vesting order.

5 One of Cow Harbour's assets that Aecon wanted to purchase was a Hitachi EX5500, serial number FF018NQ001008 (the "Equipment"). The Equipment was in Cow Harbour's possession as a result of an agreement dated April 1, 2009, between De Lage Landen Financial Services Canada Inc. ("DLL") and Cow Harbour (the "Agreement"). In the Agreement, DLL agreed to lease the Equipment to Cow Harbour for a 37-month term. The Agreement contained no option in which Cow Harbour could purchase the Equipment at the end of the term of the Agreement or otherwise.

6 After this Court granted the Initial Order, on May 14, 2010, DLL filed a notice of motion, returnable May 21, 2010. In it, DLL sought a declaration that, for the purposes of *CCAA* s.11.01, the Agreement was a true lease, and not a financing lease.

7 On May 21, 2010, this Court directed that Cow Harbour make certain payments to McLennan Ross LLP, counsel for the monitor this Court appointed pursuant to the Initial Order. Those payments represented all monthly payments from April 1, 2010, that Cow Harbour would have paid to lessors under leases for which there was a dispute as whether they were true leases or financing leases, or which the monitor's counsel had not been able to categorize as either (the "Disputed Lease Funds"). This Court directed McLennan Ross LLP to hold the Disputed Lease Funds, pending resolution of disputes pertaining to the categorization of the disputed leases.

8 The Agreement was one of the disputed leases. Accordingly, included in the Disputed Lease Funds was approximately $900,000 representing payments that Cow Harbour should have been making to DLL under the Agreement.

9 As part of the sale process, PWC prepared a proposed allocation of Aecon's purchase price, indicating the portion of the overall purchase price that Aecon allocated among Cow Harbour's assets. This Court received that allocation and placed it under seal. It was of the view that the creditors need not know how much of Aecon's purchase price was going to be allocated to the claims of other creditors.

10 DLL did not agree that the Equipment could be sold to Aecon without DLL's consent. At no time did DLL provide its consent to a sale of the Equipment to Aecon or anyone else.

11 The parties returned to court on August 25, 2010, at which time this Court heard a number of applications, including the following:

> (a) DLL's application in the CCAA Action for an order declaring that DLL's interest in the Equipment is that of owner and lessor under a true lease. This application was made by way of a notice of motion in the CCAA Action only and was originally returnable May 21, 2010. It had previously been adjourned;
>
> (b) DLL's application for an adjournment of the pending applications for an approval of the sale of Cow Harbour's assets to Aecon and a vesting order;
>
> (c) RBC's application to appoint a PWC as receiver in action number 1003 11241 (the "Receivership Action"); and
>
> (d) PWC's application for approval of the asset purchase agreement among Aecon, PWC, in its capacity as receiver of Cow Harbour and PWC, in its capacity as transaction facilitator (the "Asset Purchase Agreement") and a vesting order, vesting title of Cow Harbour's assets which formed the subject-matter of the Asset Purchase Agreement into Aecon's name (the "Vesting Order").

 

12 Counsel made their submissions on the DLL application during the morning of August 25, 2010. This Court took a recess of about 3 hours to consider the positions of the respective parties. This Court rendered its judgment, with oral reasons, that the Agreement constituted a financing lease and not a true lease. This Court then granted RBC's application for a receivership order, and granted an order approving the Asset Purchase Agreement and the Vesting Order. The Vesting Order included the Equipment. This Court granted those orders sequentially, in the sense that:

(a) first, it dealt with DLL's applications in the CCAA Action;

(b) second, it dealt with the receivership application; and

(c) third, it dealt with the applications to approve the Asset Purchase Agreement and the Vesting Order.

The second and third orders were dependent on the Court's determination of the nature of the Agreement.

13 Once this Court granted these orders, the transaction contemplated by the Asset Purchase Agreement closed on August 26, 2010.

14 On August 31, 2010, DLL served all parties to these proceedings with a notice of motion returnable September 3, 2010, for an order staying the provisions of the August 25, 2010 orders, as they related to the Equipment, in the Receivership Action and the CCAA Action. On September 2, 2010, DLL filed a Civil Notice of Appeal relating to issues in the Receivership Action and (notwithstanding the absence of leave to appeal) in the CCAA Action. On September 3, 2010, the parties argued the stay application. This Court denied the application on the basis that the issue was moot and further, that DLL had not met the test for a stay pending its appeal. This Court said:

> There was no appeal, there was no seeking of stay of the effect of my orders and this matter has closed. The issue is now moot., Transcript of Proceedings, September 3, 2010, p. 24, ll. 3-6.

**II. Nature of the Applications**

15 DLL brings two applications, being:

1. An application pursuant to *CCAA* s. 13, for leave to appeal this Court's August 25, 2010 order, which declared that the Agreement was a financing lease and not a true lease (the "Leave Application"); and

2. An application seeking an order in the nature of a stay pending appeal, holding back the Disputed Lease Funds insofar as they relate to funds payable under the Agreement and an order holding back from distribution a portion of the sale proceeds resulting from the Asset Purchase Agreement, equivalent to the net book value of the Equipment (the "Stay Application").

16 The Royal Bank of Canada ("RBC") and PWC, the court-appointed receiver, oppose these applications.

**III. Leave Application**

17 DLL seeks leave to appeal pursuant to *CCAA* s.13, which provides:

> 13. Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

18 DLL has the right to seek leave from this Court or from the Court of Appeal or from a judge of the Court of Appeal. The legislation provides for this. If an applicant for leave is not successful at one level, does that preclude the applicant from making a further application to the "next level"? There can be no doubt that if a judge of the court of appeal refuses the applicant's leave to appeal, a judge of the lower court, even the judge who made the original order, could not overturn the court of appeal's

  

decision. The converse, however, was not so clear. In *Westar Mining Ltd., Re*, 1993 CarswellBC 529, 17 C.B.R. (3d) 202 (B.C. C.A.) at para. 7, the majority held that "an application for leave to appeal may be commenced in any one of three ways, and that once that choice is made a party does not have any further right to pursue an application for leave to appeal." McEachern C.J.B.C., at para. 45, dissented and analyzed the issue as follows:

> Section 13 of the C.C.A.A. provides for an appeal with leave, and further provides that leave may be obtained from the judge who made the order, from this court, or from a judge of this court. I do not find any support in the language of s. 13 for my colleagues' conclusion that these are exclusive alternatives, so that the refusal of leave at any level precludes an application at another level. Maxwell on *Interpretation of Statutes*, 12th ed. (1969), pp. 232-233, suggests that in some cases "and" and "or" may be substituted for each other. While it is true that the C.C.A.A. must prevail, I see no conflict between it and the *Court of Appeal Act*, or with the practice which is followed in this province to obtain leave from the Court.

19 The Supreme Court of Canada allowed the appeal "for the reasons given by McEachern C.J.B.C.", *Westar Mining Ltd., Re*, 1993 CarswellBC 553, [1993] 2 S.C.R. 448 (S.C.C.). Thus, if DLL is unsuccessful in its application for leave before this Court, there is nothing preventing it from making a further leave application to "the court or a judge of the court to which the appeal lies."

20 Is this matter properly before this Court? In *General Publishing Co., Re*, 2002 CarswellOnt 2215, 34 C.B.R. (4th) 183 (Ont. S.C.J.) at para. 4, Justice Ground said, "the usual and preferred route to appeal an order under the CCAA is to bring the motion for leave before a judge of the Court of Appeal." In fact, in that case, Justice Ground was not prepared to hear the application, "as it would undoubtedly result in a non-productive, additional step in trying to resolve this issue." This Court agrees with the concern Justice Ground expressed for the reasons that follow.

21 Before moving on to consider those reasons, it is worthwhile noting how the Alberta Court of Appeal has dealt with this "concurrent" jurisdiction in another context. In *R. v. Harness*, 2005 CarswellAlta 963, 200 C.C.C. (3d) 431 (Alta. C.A.), the court was considering the effect of the *Criminal Code*, R.S.C. 1985, c. C-46, s. 678(2), which provides:

> 678(2) The court of appeal or a judge thereof may at any time extend the time within which notice of appeal or notice of an application for leave to appeal may be given.

22 The *Harness* court at para. 23, explained how it would deal with this "concurrent jurisdiction" when it said:

> 23 Based on the rules of statutory interpretation and the case authorities, it is clear that s. 678(2) provides concurrent jurisdiction to hear applications to extend time, rather than a right of review or right to appeal the decision of a single judge to a full panel of the court. Both a single judge and the court have jurisdiction to grant a time extension, though often the rules of practice established by the court limit the applicant's right to choose which one will hear the application. Once a decision on an application to extend has been made, whether by a single judge or by a full panel of the court, there is no right of appeal within the court. However, a panel or a judge can consider the application afresh when the interests of justice so require, particularly when circumstances or conditions have changed since the last application. No such change is alleged here, nor does Harness suggest that there are new facts that might affect the outcome of his application. [emphasis added]

23 The *CCAA* permits DLL to apply to this Court to seek leave to appeal this Court's earlier decisions. Accordingly, despite the approach that the *General Publishing* court took in similar circumstances, this Court will consider this application. Whether the Alberta Court of Appeal will apply reasonaing similar to that which it applied in *Harness* is not a question that this Court needs to answer.

24 For DLL to obtain leave to appeal under the *CCAA*, it must meet the test set out by the Alberta Court of Appeal in *Fairmont Resort Properties Ltd., Re*, 2009 ABCA 360 (Alta. C.A.) at para. 10, where the court said:

> The test for leave involves a single criterion subsuming four factors. The single criterion is that there must be serious and arguable grounds that are of real and significant interest to the parties. The four factors used to assess whether this

  

criterion is present are (1) whether the point on appeal is of significance to the practice; (2) whether the point raised is of significance to the action itself; (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; (4) whether the appeal will unduly hinder the progress of the action.

25 Before this Court considers the factors involved in the "test for leave," it is worthwhile to outline the applicable standard of review that the Court of Appeal will apply if leave were to be granted. In *Canadian Airlines Corp., Re*, 2000 ABCA 149 (Alta. C.A. [In Chambers]) at paras. 28-29, the court held that:

> 28 The elements of the general criterion cannot be properly considered in a leave application without regard to the standard of review that this Court applies to appeals under the CCAA. If leave to appeal were to be granted, the applicable standard of review is succinctly set forth by Fruman, J.A. in *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93 (Alta. C.A.) where she stated for the Court at p. 95:
>
> > .... this is a court of review. It is not our task to reconsider the merits of the various offers and decide which proposal might be best. The decisions made by the Chambers judge involve a good measure of discretion, and are owed considerable deference. Whether or not we agree, we will only interfere if we conclude that she acted unreasonably, erred in principle or made a manifest error.

26 In *Smoky River Coal Ltd., Re* (1999), 237 A.R. 326 (Alta. C.A.), Hunt, J.A., speaking for the unanimous Court, extensively reviewed the *CCAA*'s history and purpose, and observed at p. 341:

> The fact that an appeal lies only with leave of an appellate court (s. 13 CCAA) suggests that Parliament, mindful that CCAA cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.
>
> The standard of review of this Court, in reviewing the CCAA decision of the supervising judge, is therefore one of correctness if there is an error of law. Otherwise, for an appellate court to interfere with the decision of the supervising judge, there must be a palpable and overriding error in the exercise of discretion or in findings of fact.

27 It appears that this is the reason why the *General Publishing* court and this Court has difficulty in analyzing its own decisions. It is awkward, if not difficult, for a court to consider whether it has made a palpable and overriding error in its exercise of discretion or in findings of fact. These are the foundations on which it built its original decision and it undermines this Court's original decision if it were to second guess itself.

28 Nonetheless, Parliament has given this task to the "judge appealed from" so this Court will undertake that task.

29 *Fairmont Resort* provides us with the "test for leave." The test is but one test, in which "there must be serious and arguable grounds that are of real and significant interest to the parties." To determine whether DLL has met its onus, we must consider the four factors that *Fairmont Resort* outlines. The question then becomes whether DLL must satisfy all the factors. In other words, if it fails on one (or more), does fail to meet the test? The answer to this question lies in the decision of O'Brien J.A. in *Ketch Resources Ltd. v. Gauntlet Energy Corp. (Monitor of)*, 2005 CarswellAlta 1527, 15 C.B.R. (5th) 235 (Alta. C.A. [In Chambers]). In that case, Justice O'Brien went through and applied the four factors to the facts with which he was dealing. The applicant in that case had met some of the factors, but not others. Justice O'Brien at para. 15, made his decision not to grant leave after "weighing all the factors." In other words, success or failure to prove one or more of the factors does not guarantee that the applicant has met the "test for leave." The court must weigh all the factors.

***Whether the point on appeal is of significance to the practice***

30 DLL argues that the distinction between true leases and financing leases is one of significance to the practice. RBC argues, on the other hand, that the issue is of no significance to the practice. The finding that DLL's Equipment was the subject of a financing lease rather than a true lease is a factual finding that is specific only to that particular lease and does not have any impact on the practice in general.

  

31 DLL argues that this Court erred in holding that an agreement without a purchase option or any other contractual mechanism of transferring ownership from the purported lessor to the purported lessee, can be characterized as a financing lease. RBC argues that there is no single overriding factor in determining whether a particular lease is a true lease or a financing lease.

32 When characterizing leases pursuant to *CCAA* s.11.01, the court must have regard to the substance, rather than simply the form of the arrangement, *Smith Brothers Contracting Ltd., Re*, 1998 CarswellBC 678, 53 B.C.L.R. (3d) 264 (B.C. S.C.). In fact, when making its decision, this Court considered the non-exhaustive list of criteria that the *Smith Brothers* court suggested that courts look to when determining whether a document is a true lease or a financing lease. This Court outlined those criteria in its oral reasons, Transcript of Proceedings, August 25, 2010, pp. 57-59, and concluded that:

> [T]here is not one factor that is the *sine qua non* for determining whether a document is a true lease or a financing lease. One must look at the whole document to get a flavour of the [parties'] intentions, Transcript of Proceedings, August 25, 2010, p. 59, ll. 11-13.

33 This Court concluded that "When one examines the De Lage Landen Financial Services Canada document as a whole, it is clear that it is a security lease and not a true lease," Transcript of Proceedings, August 25, 2010, p. 59, ll. 23-24.

34 DLL argues that the characterization of a lease without a purchase option or any other mechanism of transferring ownership from the purported lessor to the purported lessee is a novel proposition in law and is an unresolved issue that is of significance to the practice, *Kerr Interior Systems Ltd., Re*, 2008 ABCA 291 (Alta. C.A.) at para. 9 . If that were the sole basis on which this Court rendered its decision, it might indeed be novel. However, this Court was guided by the broader principle of examining the whole document, which is an approach that is already well-established in the case law. Thus, there is nothing novel about this approach and this Court's finding that the Agreement was a financing lease, rather than a true lease, has no broad significance to the practice.

35 Furthermore, in *Philip Services Corp., Re*, 1999 CarswellOnt 4495, 15 C.B.R. (4th) 107 (Ont. S.C.J. [Commercial List]) at para. 4, Justice Farley determined that a lease which "does not specifically indicate that there is an option to buy the (hardware) assets at the end of the lease" could indeed be characterized as a capital or financing lease, having regard to the criteria set out in *Smith Brothers*. Notwithstanding the absence of an option to purchase in the agreement, Justice Farley undertook the same analysis set out in *Smith Brothers* to determine the nature of the lease. He said, at para. 3:

> That involves a functional analysis of the relationship - based on substance as opposed to form. Unfortunately there are no tags or labels which may be read with ease and "certainty" ("certainty" in the same way that a laboratory is able to conduct a DNA test and give probabilities or odds). Rather the task involves the weighing of the various materials involved. It is not a simple analysis of determining between black and white but rather the shade of grey where all factors are weighed and the balance as to whether the scales would tip towards a true lease relationship - or alternatively against being a true lease relationship.

36 DLL pointed out that the parties in *Philip Services* had a course of conduct thatresulted in the lessee purchasing leased assets from the lessor, although Justice Farley, at para. 1, described the course of conduct between the parties as "rather informal, flexible and sloppy." The fact that Justice Farley took care to point out that the leases themselves did not contain an option to buy assets at the end of the lease term indicates that this factor was in his mind when he balanced the various *Smith Brothers* factors. Depending on the circumstances of each case, the presence or absence of an option to purchase may or may not loom large in the court's analysis. In the case with which this Court was dealing, this "tag" or "label" was but one factor it considered.

37 Thus, this Court finds that the issue is of no importance to the practise.

***Whether the point on appeal is of significance to the action itself***

  

38 This Court acknowledges that the point on any potential appeal has significance to DLL. Otherwise why would this matter have come before this Court? That, however, is not the nature of this factor. This factor requires this Court to look at the action as a whole.

39 RBC argues that the appeal is of no significance to the action because the appeal is moot and, as such, it would be impossible to "unscramble the egg" even if DLL were successful, *Minister of National Revenue v. Temple City Housing Inc.*, 2008 ABCA 1 (Alta. C.A.) at para. 14. Indeed, DLL acknowledges this fact. However, DLL goes on to argue that while the CCAA Action has been concluded, there still remains the issue of the Disputed Lease Funds. DLL claims entitlement to approximately $900,000, representing the monthly lease payments to which it would be entitled if classified as a true lessor under *CCAA* s.11.01. DLL's claim to these funds rests on it being categorized as a true lessor. Additionally, the allocation of restructuring costs against DLL in these proceedings is dependent on whether DLL is classified as a true lessor.

40 It is important, at this stage, to explain the process that resulted in the Vesting Order. This Court appointed PWC to facilitate negotiations with the various parties and finalization of the transaction. From August 5, 2010, when this Court endorsed PWC's acceptance of the LOI, to August 25, 2010, when this Court approved the Agreement of Purchase and Sale and granted the Vesting Order, Aecon and PWC negotiated the allocation of the purchase price among the various creditors. At the beginning of the process, there was not overwhelming support from the general body of creditors for the Aecon transaction. However, through persistent and effective negotiations, PWC secured the support of holders of 92.8 percent of the debt that Cow Harbour owed to its creditors, representing a majority in number of 90.625 percent. As well, Aecon committed to running Cow Harbour's business and employing almost all of Cow Harbour's employees, except for certain management personnel.

41 Because of the circumstances involving certain of Cow Harbour's management, Cow Harbour would not put Aecon's transaction before the creditors as a plan of arrangement. Besides, it would have been impossible to meet the time requirements set forth in the *CCAA* to allow a plan of arrangement to be considered and approved. Cow Harbour's financial situation was deteriorating with each day. It had to meet payroll and other expenses and it did not have the financial wherewithal to meet those expenses. Aecon advised this Court that for it to facilitate the survival of Cow Harbour's business, this Court had to approve the transaction and allow a closing before the end of August, 2010. Like the parties in *General Publishing*, the parties in this case had a sword of Damocles hanging over their heads, as the failure of this Court to approve this transaction would surely have resulted in Aecon withdrawing its offer or, if it did not, Cow Harbour's continued financial difficulties would have resulted in its demise, whether or not it was in the Aecon's hands.

42 Given the support that the creditors showed, and the fact that Cow Harbour's business would continue to operate, this Court felt it was in the best interests of the stakeholders to approve the sale and grant the Vesting Order. To do otherwise might have resulted in a piecemeal liquidation of Cow Harbour's assets and a closing-down of its business. In other words, although this transaction was consummated under the Receivership Action, this Court considered the public policy reasons underlying *CCAA* proceedings, when it approved the Aecon transaction and granted the Vesting Order.

43 The Aecon transaction was carefully negotiated and each of the creditors sacrificed part of their respective claims. No creditor obtained everything it was seeking. Aecon advised this Court on August 25, 2010, that it would not consummate the transaction if it did not receive an order vesting all of the assets it was purchasing into its name, free and clear of all charges, liens and encumbrances. If this Court were to give one creditor, even a creditor that was owed a trifling amount, preferential treatment, the other creditors would not have supported the Aecon transaction.

44 An appeal of this matter might be of significance to DLL specifically. However, this Court's characterization of the Agreement is of no significance to this action generally.

***Whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous***

45 RBC argues that DLL has not demonstrated that it has a *prima facie* meritorious case. On September 3, 2010, DLL sought a stay of the various orders this Court granted on August 25, 2010. This Court held that because there was no appeal pending and that DLL did not seek a stay of the effect of the various orders this Court granted on that date after they were granted or at

  

least before the Aecon transaction closed, this Court denied DLL's application on the ground of mootness. In other words, even if the Court of Appeal were to overturn this Court's August 25, 2010 decisions, DLL could not succeed in its claim to have the Equipment returned to it. The Equipment was part of a larger transaction.

46 Does this, of itself, mean that the proposed appeal lacks merit or is otherwise frivolous? The simple answer is no. Allowing the appeal may not provide DLL with a remedy, but that does not make the proposed appeal frivolous or one that lacks merit. Rather, we must analyze the strength of the appeal on the basis of the standard of review that would govern the appeal, *Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158 (Alta. C.A.) at para. 20; *Canadian Airlines Corp., Re*, 2000 ABCA 149 (Alta. C.A. [In Chambers]) at paras. 28-29.

47 As stated earlier in these reasons, it is difficult for this Court to find that it made an overriding and palpable error in its consideration of the issues the parties placed before it. Surely, this is the same awkwardness that Justice Ground faced in *General Publishing*. This Court gave its oral reasons for why it held the Agreement to be a financing lease rather than a true lease. Even taking an objective view of this with the benefit of hindsight, this Court would come to the same conclusion today.

48 This Court acknowledges that it is not necessary for DLL to show that it is guaranteed to win an appeal. It only needs to show that it has an arguable case, *Kerr Interior Systems Ltd., Re*, 2008 ABCA 291 (Alta. C.A.) at para. 11. Given this Court's various findings, it is difficult to see that DLL has an arguable case, in these circumstances. On these bases, this Court finds that any proposed appeal is not on its face meritorious.

***Whether the appeal will unduly hinder the progress of the action***

49 RBC and PWC argue that an appeal would unduly hinder the CCAA Action and the Receivership Action and create tremendous uncertainty concerning the various transition orders this Court granted in the CCAA Action. It should be noted at this stage that as part of the transition, this Court ordered that Disputed Lease Funds would be transferred from the monitor's counsel to the receiver's counsel, under the same terms as the May 21, 2010 order.

50 DLL, on the other hand argues that an appeal would not unduly hinder the progress of this action. The CCAA Action has been completed. The assets have been sold to Aecon. The hearing at which the other parties with disputed leases will have their agreements categorized has not yet been scheduled. DLL's application for a stay against Aecon has been denied, so there is no issue as to uncertainty surrounding Aecon's use of the Equipment. Accordingly, DLL argues that the progress of neither action would be unduly hindered by an appeal.

51 This Court finds that any appeal would unduly hinder the progress of the actions. Pursuant to the transition orders this Court granted on August 25, 2010, this Court must deal with many issues, including those concerning the remuneration of the chief restructuring advisor, the distribution of the Disputed Lease Funds, and who will be paying the administrative expenses. DLL is correct that Aecon's use of the Equipment is not an issue. However, the creditors seek a distribution of their respective share of the $180 million purchase price. This cannot happen if there is a pending appeal that could have an effect on the allocation. Thus, the progress of this action would be unduly hindered by the appeal to the prejudice of the creditors who supported the Aecon transaction.

52 More importantly, the transaction that PWC and Aecon negotiated with all the creditors rests on a fine balance. The uncertainty surrounding the finality of these issues unduly hinders the progress of these actions. A more thorough discussion of this fine balance will be undertaken when this Court discusses the Stay Application.

53 As a result of the foregoing, this Court dismisses DLL's application for leave to appeal. This result deals sufficiently with the Stay Application. However, as a courtesy to DLL, this Court will comment briefly on it.

**IV. Stay Application**

54 Earlier, this Court referred to DLL's application for a stay of this Court's orders approving the Aecon Asset Purchase Agreement and the Vesting Order. On September 3, 2010, the parties argued the stay application. This Court denied the

  

application on the basis that the issue was moot and further, that DLL had not met the test for a stay. DLL argues that the application now before this Court differs from the one it argued on September 3, 2010, as it is not challenging the sale and Vesting Order. Rather, it is seeking to have this Court hold back monies representing DLL's alleged share of the Disputed Lease Funds and the net book value of the Equipment.

55 For DLL to obtain a stay of a stay of proceedings it must satisfy a tripartite test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), being:

(a) Is there a serious question to be argued on appeal?

(b) Will DLL suffer irreparable harm if this Court does not grant a stay?

(c) Does the balance of convenience weigh in favour of a stay?

56 Unlike the factors that make up the "test for leave," the tripartite test does not require or permit courts to weigh these factors. The applicant must satisfy all three elements before a court will grant the stay. In other words, if the applicant does not establish one of the elements, its application will fail. Because of this, this Court will focus on the third element of the tripartite test; the balance of convenience.

57 On August 25, 2010, the Court heard Aecon's submissions that the Equipment is critical to the work that Aecon will be undertaking under contracts with Syncrude. For its negotiations to be successful, Aecon would have to satisfy Syncrude that it could fulfill the requirements under the Syncrude contracts. For this to occur, Aecon required the Equipment. Without the Equipment, Aecon would not have proceeded with the transaction.

58 As well, this Court heard submissions that outlined many details regarding the negotiations and work of Aecon, PWC and numerous creditors which led to the Asset Purchase Agreement. The negotiations were undertaken by these parties in good faith, which required significant compromise by the creditors, including RBC, Cow Harbour's largest creditor. PWC struck a balance among numerous interests.

59 Creditors representing 90.625 percent of all creditors negotiated in good faith and compromised their claims. Granting a stay in these circumstances would undermine the processes that Aecon, PWC, and the other creditors undertook in good faith. Holding back the net book value of the Equipment seriously upsets the fine balance that resulted from these negotiations. The creditors did not agree to compromise their claims so they could recover "something." They compromised their claims so they could receive a definite amount, as negotiated. Their receiving something less than that negotiated amount will result in this Court sanctioning an "unscrambling of the egg" and undermines the process that this Court approved and monitored. It should be noted also that DLL will be receiving an allocation of the purchase price representing a substantial portion of its claim.

60 DLL argues that this Court's finding that it holds a financing lease prejudices its right to argue that it should obtain a portion of the Disputed Lease Funds. That may be so, but it chose to have this Court deal with the nature of the Agreement in a summary fashion. Given this Court's finding that the Agreement is a financing lease, in the end, this argument carries little weight. However, this Court has dealt with that issue and it is not now open to DLL to attempt to re-argue it.

61 As a result, the balance of convenience favours this Court dening the stay.

**V. Conclusion**

62 For the foregoing reasons this Court dismisses DLL's application pursuant to *CCAA* s. 13, for leave to appeal this Court's August 25, 2010 order, which declared that the Agreement was a financing lease and not a true lease. As well, it dismisses DLL's application seeking an order in the nature of a stay pending appeal, holding back the Disputed Lease Funds insofar as they relate to funds payable under the Agreement and an order holding back from distribution a portion of the sale proceeds resulting from the Asset Purchase Agreement, equivalent to the net book value of the Equipment.

*Application dismissed.*

 

**End of Document**

# TAB 5

2021 ABCA 304
Alberta Court of Appeal

DGDP-BC Holdings Ltd v. Third Eye Capital Corporation

2021 CarswellAlta 2194, 2021 ABCA 304, [2022] A.W.L.D. 3254, 2021 A.C.W.S. 709

# DGDP-BC Holdings Ltd. (Applicant) and Third Eye Capital Corporation (Respondent) and PricewaterhouseCoopers Inc. in its capacity as the Court-Appointed Receiver for Accel Canada Holdings Limited and Accel Energy Canada Limited (Respondent)

Kevin Feehan J.A.

Heard: September 3, 2021
Judgment: September 13, 2021
Docket: Calgary Appeal 2101-0173-AC

Counsel: I. Aversa, T.L. Czechowskyj, Q.C., S. Babe (no appearance), for Applicant
K.R. Cameron, C.D. Simard (no appearance), for Respondent, Third Eye Capital Corporation
R. Gurofsky, J. L. Cameron (no appearance), for Respondent, PricewaterhouseCoopers Inc in its capacity as Court-Appointed Receiver for Accel Canada Holdings Limited and Accel Energy Canada Limited

Subject: Civil Practice and Procedure; Insolvency

APPLICATION by interim lender for stay pending application for leave to appeal to Supreme Court of Canada.

***Kevin Feehan J.A.*:**

## I. Overview

1 DGDP-BC Holdings Ltd applies for a stay of two June 14, 2021 orders of a supervising judge under the Bankruptcy and Insolvency Act, RSC 1985, c B–3. These orders a) approved the sale transaction of assets from Accel Canada Holdings Limited and Accel Energy Canada Limited, between PricewaterhouseCoopers Inc, the Receiver, and Conifer Energy Inc; and b) granted the gross overriding royalty from Conifer to DGDP. The stay is sought pending DGDP's application for leave to appeal to the Supreme Court of Canada from the August 10, 2021 order of a single judge of this Court refusing leave to appeal from the June 14, 2021 orders: 2021 ABCA 284.

2 DGDP was an interim lender in the bankruptcy proceedings of the Accel Entities, and has unsuccessfully appealed earlier orders in these proceedings: 2021 ABCA 226. The factual background is set out in detail in the attached Appendix A: Chronology of Events, prepared by PricewaterhouseCoopers, and an overview of the proceedings is given below.

## II. Facts

3 In October 2019, the Accel Entities both filed Notices of Intention to make a proposal pursuant to the *Bankruptcy and Insolvency Act*. The proceedings were converted and continued under the Companies' Creditors Arrangement Act, RSC 1985 c C–36, and in November 2019 an Amended and Restated Initial Order was granted by the Court. This order authorized an interim financing loan, secured by an Interim Lenders' Charge. The monies were borrowed jointly and severally from two interim lenders: DGDP (through its predecessor 2228139 Alberta Ltd), and Third Eye Capital Corporation. This interim financing loan was described in the Second Amended and Restated Debtor-in-Possession Financing Term Sheet as a "super priority (debtor-in-possession), interim, revolving credit facility". The Court granted the debtor-in-possession loans priority over the Accel Entities' other creditors through the Interim Lenders' Charge, and approximately $38 million was authorized at that time. PricewaterhouseCoopers was appointed as the Monitor.

 

4 On May 29, 2020, the Court approved a process for the sale of the Accel Entities' assets to Third Eye, to be negotiated by PricewaterhouseCoopers. The combined sale of the Accel Entities was not found to be viable, so the Accel Energy sale proceeded, and the sale of Accel Holdings was anticipated to follow later.

5 Third Eye then brought a receivership application under the *Bankruptcy and Insolvency Act*, with PricewaterhouseCoopers appointed as Receiver, which was granted by the Court on June 12, 2020. At this stage, Third Eye was both an interim lender and the successful bidder, pursuant to a credit bid, for the purchase of the Accel Entities' assets. Third Eye did not merely want PricewaterhouseCoopers appointed as Receiver, it also wanted a Receiver to be appointed with the power to borrow, and for the Receiver's Borrowings Charge to take priority over all other charges, including the Interim Lenders' Charge. The receivership order provided:

> The priority of the charges created in the CCAA Proceedings (and continued by this Order) in relation to the Receiver's Charge and the Receiver's Borrowing Charge created hereunder, shall be as follows:
>
> First - the Receiver's Charge;
>
> Second - the Receiver's Borrowings Charge;
>
> Third - the Administration Charge as defined in the CCAA Proceedings;
>
> Fourth - the Interim Lenders' Charge as defined in the CCAA Proceedings;
>
> Fifth - the Intercompany Advance Charge as defined in the CCAA Proceedings;
>
> Sixth - the Directors' Charge as defined in the CCAA Proceedings.

6 The Receiver borrowed over $10 million after being appointed with the power to borrow. DGDP objected to the granting of this order, and later appealed it, arguing that the transaction should not have been approved unless the Interim Lenders' Charge was paid in full. This Court dismissed DGDP's appeal, holding that the supervising judge had the discretion and jurisdiction to approve the sale, and there was no indication of any error in principle in the way she exercised her discretion, nor was it unreasonable: 2021 ABCA 226, paras 20–22, 27, 36. See also Canada v Canada North Group Inc, 2021 SCC 30, para 22.

7 On May 10, 2021, the Receiver brought an application for:

> 1) Advice and direction as to whether the Receiver may enter into a revised purchase and sale agreement with a subsidiary of Third Eye (Conifer), and
>
> 2) An order regarding the transaction contemplated by the revised purchase and sale agreement (and the assets subject thereto), providing that either:
>
> i. the Interim Lenders, including DGDP, agree to accept gross overriding royalties from the subsidiary of Third Eye, Conifer, as repayment in full of the interim financing facility; or
>
> ii. the Court otherwise advises and directs the Receiver to enter into the revised purchase and sale agreement.

8 On May 12, 2021, amended June 4, 2021, Third Eye brought an application for an order:

> 1) Approving the granting of a gross overriding royalty from Conifer to DGDP, and
>
> 2) Declaring that this gross overriding royalty shall fully and finally satisfy and repay all amounts owing to DGDP under the interim financing facility.

 

9 DGDP opposed the validity of the revised purchase and sale agreement to Conifer, and in response brought its own application on May 21, 2021 to direct Conifer to grant a gross overriding royalty to DGDP with a proposal that differed from Third Eye's proposal in a number of ways. DGDP's proposal would apply to both current and future wells, whereas Third Eye's would only apply to existing wells. Also, the proposals differed on the opening balance amount, and on a number of technical terms. DGDP opposed Third Eye's proposed gross overriding royalty and objected to receiving it. PricewaterhouseCoopers says the real issues in dispute at that time were really only the commercial terms of the approved gross overriding royalty.

10 On June 14, 2021, the Court granted the Receiver's application, granted Third Eye's application, and approved Third Eye's proposed gross overriding royalty, holding that "[t]here is no commercial reason here to include future wells as the original bargain did not include these either" and that "[t]o do so here would be to unfairly burden Conifer on a going forward basis in very uncertain economic circumstances". The gross overriding royalty was granted in full and final satisfaction of DGDP's advances under the debtor-in-possession financing terms sheet. In making this order, the Court rejected DGDP's proposed alternative gross overriding royalty.

11 After the June 14, 2021 orders, DGDP applied for the following orders:

> 1) An order granting permission to appeal the entirety of the June 14, 2021 orders, or in the alternative, an order granting permission to appeal paragraphs 2 and 5 of the June 14, 2021 order that addressed the gross overriding royalty provisions; and
>
> 2) A stay (pending the determination of relief sought on appeal) of the June 14, 2021 orders which a) approved the sale transaction between the Receiver and Conifer, and b) granted the gross overriding royalty from Conifer to DGDP.

12 DGDP said the sale to Third Eye constituted an "illegal preference". PricewaterhouseCoopers opposed this application and sought a lifting of the stay that automatically arises under the *Bankruptcy and Insolvency Act* if leave is granted, arguing that if the stay was not lifted the transaction with Conifer would likely not close and there would be insufficient funds to continue the insolvency proceedings into September.

13 On August 10, 2021, a single judge of this Court dismissed DGDP's application for leave to appeal, and therefore the stay issue did not arise. It was held that the supervising judge was not prohibited from approving the sale, and was well-positioned to understand the impact of the order on DGDP's interests: 2021 ABCA 284. There was no evidence of an "illegal preference", para 56:

> Additionally, far from being inferior, DGDP obtains an advantage through the GORR [gross overriding royalty]: its debt is ranked *pari passu* with the receivers borrowing charge, and the GORR attaches to Accel Energy's lands, which were transferred free and clear of the Interim Lenders Charge earlier this year.

14 As indicated, DGDP now applies for a stay of the June 14, 2021 orders pending DGDP's application for leave to appeal the August 10, 2021 order to the Supreme Court of Canada.

**III. The test for a stay**

15 Pursuant to s 65.1 of the Supreme Court Act, RSC 1985, c S–26, a judge of this Court may, on request of the party who has filed and served an application for leave to appeal, or before such filing and service if satisfied that the party seeking the stay intends to apply for leave to appeal and delay would result in a miscarriage of justice, order that the proceedings be stayed with respect to the judgment from which leave to appeal is being sought: Baier v Alberta, 2006 ABCA 187, para 10, 26 CPC (6th) 234; Lamouche v Calaheson, 2016 ABCA 227, paras 6, 8, 10, 15–16; Ville de Montréal c Litwin Boyadjian inc (Syndic de Société de vélo en libre–service),2019 QCCA 1152, para 35.

16 The familiar tripartite test for a stay pending appeal is set out in RJR–MacDonald Inc v Canada (Attorney General),[1994] 1 SCR 311, 334, 111 DLR (4th) 385. The applicant has the burden of showing that:

  

> 1) there is a serious question to be tried, or an arguable issue that is not frivolous or vexatious;
>
> 2) there will be irreparable harm if the stay is not granted; and
>
> 3) the balance of convenience favours granting the stay.

See also Santoro v Bank of Montreal, 2019 ABCA 423, paras 13–15; Poole v City Wide Towing and Recovery Service Ltd, 2020 ABCA 400, para 4.

***a) Serious question to be tried***

17 Generally, whether there is a serious question to be tried assesses whether the applicant's position is reasonably arguable and not frivolous or vexatious. However, in the context of a leave motion to the Supreme Court of Canada, there is an additional consideration of whether the Court might regard the matter as one of public and national importance: Wenzel Downhole Tools Ltd v National Oilwell Varco, Inc,2008 ABCA 434, para 3, 446 AR 93; *Santoro*, paras 19-20; *City Wide*, para 5.

18 This Court has also held that where there has already been an adjudication on the merits, rather than, for example, an interlocutory injunction application, the bar must be higher: CNOOC Petroleum North America ULC v 801 Seventh Inc,2020 ABCA 212, paras 16–17.

19 In the August 10, 2021 decision DGDP wishes to appeal, it was held that the issues at play here are "of little significance to bankruptcy practice generally and this action in particular", 2021 ABCA 284, para 50. Third Eye and PricewaterhouseCoopers say the issues on appeal are not of public or national importance.

20 DGDP submits that in the August 10, 2021 decision, the Court mischaracterized the issues by finding that the matter of the chambers judge's jurisdiction and discretion had been already addressed in DGDP's prior appeal of the June 12, 2020 order; the *Bankruptcy and Insolvency Act* contains no provisions applicable to the Court overturning existing priorities between secured creditors or altering contractual payment rights on approval of a receivership sale; and in order for a Court to have statutory discretion to strip a party of its legal rights, the empowering statute must have explicit language to that effect, citing Crystalline Investments Ltd v Domgroup Ltd, 2004 SCC 3, para 43, [2004] 1 SCR 60.

21 I agree that the decisions below are not obviously of public or national importance. What DGDP seeks in essence is to be paid in priority in cash, not through the Third Eye gross overriding royalty, or in the alternative through its own proposed gross overriding royalty, a commercial dispute unique on these facts to these parties. Given the higher bar for the first tripartite factor after the detailed decisions on the merits, it is doubtful that DGDP meets the first criterion; however, given my findings below on irreparable harm, it is ultimately immaterial.

***b) Irreparable harm***

22 Irreparable harm is limited to harm that cannot be compensated by an award of costs or damages or otherwise satisfactorily redressed, rectified, or made right at some later point in time: *CNOOC*, paras 40-41; *City Wide*, para 9.

23 The August 10, 2021 decision held that DGDP will obtain an advantage from the gross overriding royalty, as its priority position will be improved and DGDP's share of the Interim Facility will be satisfied in full, particularly, says Third Eye, since it is grounded in an interest in land. The gross overriding royalty was considered to be a form of repayment, para 55:

> There can be no question that the GORR [gross overriding royalty] constitutes a form of repayment. The GORR provides for a stream of cash paid over time, with a put option that will force Conifer to repay the outstanding balance when the conditions of the put option are met.

24 DGDP disagrees, and argues that the Court cannot conclude that it will be repaid by the gross overriding royalty, because it is possible it will not be provided repayment in full due to royalties or through the put option. However, given that the issue

  

of repayment is a solely financial matter in a commercial dispute, I am not convinced DGDP has established irreparable harm if the stay is not granted. Monetary disputes may be compensated by an award of damages or costs, or can be otherwise redressed or rectified, and do not constitute irreparable harm in this commercial context.

***c) Balance of convenience***

25 Given my findings on irreparable harm, it is unnecessary to address the balance of convenience. I make brief comments nonetheless.

26 The issue here is whether "the interests of the appellants in a stay outweigh the interests of the other stakeholders and the estate as a whole": Matco Capital Limited v Interex Oilfield Services Ltd, 2007 ABCA 317, para 11.

27 Third Eye and PricewaterhouseCoopers submit that if the transaction is not closed expeditiously, this will render it likely unfeasible to do so in the future, and the entirety of the receivership proceedings may collapse due to the financial realities facing the estate, to the detriment of the whole body of stakeholders. Third Eye has advised that there are no further funds to run the operations or carry out another sales process. It is important, they argue, that this transaction close promptly to get the assets into the hands of a solvent entity, Conifer. In comparison, if a stay is not granted, they say DGDP will be repaid in full through the gross overriding royalty and thus suffer no prejudice.

28 I agree. The balance of convenience favours Third Eye and PricewaterhouseCoopers in this case.

29 Additionally, the denial of a stay will not result in a miscarriage of justice in this commercial context.

**IV. Conclusion**

30 The applicant has not met the test for a stay pending leave to appeal to the Supreme Court of Canada. Accordingly, the application is dismissed.

*Application dismissed.*

**Appendix: Chronology of Events"A"**

| Date | Event |
|---|---|
| October 21, 2019 | Energy and Holdings each filed a notice of intention to make a proposal pursuant to the Bankruptcy and Insolvency Act. PricewaterhouseCoopers Inc. LIT acted as the proposal trustee. {30} |
| November 22, 2019 | Energy and Holdings' BIA proposal proceedings are converted and continued under the Companies' Creditors Arrangement Act by the issuance of an Initial Order by Mah J. PricewaterhouseCoopers Inc. LIT was appointed as the Monitor.{31} |
| November 27, 2019 | The Initial Order is amended and restated by Horner J. (the "ARIO"). Amongst other things, the ARIO authorized Accel to borrow monies under the Interim Facility, provided jointly by two lenders arranged by Third Eye Capital Corporation ("TEC") and 2228139 Alberta Ltd. ("222") as to 53.33% and 46.67% respectively of the Interim Facility, and granted them the Interim Lender's Charge as security for such advances. Energy and Holdings are jointly and severally liable for the Interim Facility and cross-guaranteed advances thereunder. Further, TEC is the Interim Lenders' agent ("DIP Agent") and is authorized to act in its sole discretion pursuant to the applicable Interim Financing Agreement and agency—agreement.{32} |
| December 13, 2019 | Horner J. granted an order approving a sales and investment solicitation process—("CCAA SISP") to be conducted by Accel with the assistance of TD Securities as selling agent and oversight of the Monitor. 33 |
| May 29, 2020 | Horner J. granted an order: i) declaring the TEC Bid to be the Successful Bid—pursuant to the CCAA SISP; ii) approving the Support Agreement between inter |

30 Receiver's Key Evidence, pp 010-022: Lu Affidavit, Exhibit I: Application by Receiver: Advice & Directions at para 8.

  

31 Receiver's Key Evidence, pp 491-509: Affidavit of Christopher Morris, sworn November 30, 2020 **[Morris Affidavit]**, Exhibit D: Initial CCAA Order.

32 Receiver's Key Evidence, pp 436-479: Morris Affidavit, Exhibit A: Second Amended and Restated DIP Financing Term Sheet; Receiver's Key Evidence, pp 480-490: Morris Affidavit, Exhibit B: Agency Agreement; Receiver's Key Evidence, pp 510-534: Morris Affidavit: Exhibit E: ARIO.

33 Receiver's Key Evidence, pp 597-614: Affidavit of Stella Kim, sworn November 24, 2020 **[Kim Affidavit]**, Exhibit

B: Order Approving Sale and Investment Solicitation Process.

| | |
|---|---|
| | alia TEC and Stream Asset Financial Winterfresh LP ("Stream"), whereby Stream agreed support the TEC Bid; and iii) authorizing and directing the Monitor to negotiate a definitiv purchase and sale agreement with TEC in—accordance with the TEC Bid.{34} |
| June 10, 2020 | DGDP took an assignment of 222's interest in the Interim Facility. At the time of the assignment, DGDP was aware of a pending receivership application by TEC against Acce and the priorities sought with such receivership order. DGDP objected to the contemplated subordination of the Interim Lenders' Charge to the—Receiver's Borrowings Charge.{35} |
| June 11, 2020 | TEC offers DGDP the opportunity to fund the Receiver's Borrowings. 36 |
| June 12, 2020 | Horner J. granted TEC's application for a receivership order over Accel. Amongst other th the Receivership Order: i) appointed PwC as Receiver over Accel and its Property; and ii) granted two additional Court-ordered charges, being the Receiver's Charge and the Receiv Borrowings Charge, both of which were given priority over the previously granted Interim Lenders' Charge.37 |
| June 25, 2020 | DGDP filed its first application for leave to appeal the terms of the Receivership—Order granted the Receiver's Borrowings Charge priority over the Interim Lenders' Charge ("DG Leave to Appeal #1").38 |
| July 13, 2020 | Hughes J.A. enters a Consent Order whereby DGDP, TEC and the Receiver all agreed to: adjourn DGDP Leave to Appeal #1 sine die; ii) that there would be no stay of proceedings pursuant to s. 195 of the BIA; and iii) that all funding provided by TEC to the Receiver in accordance with Receiver's Certificates would enjoy the benefit of the Receiver's Borrowi Charge, subject to the—outcome of DGDP Leave to Appeal #1.39 |

34 Receiver's Key Evidence, pp 551-557: Morris Affidavit, Exhibit H: Order (Selection of Successful Bid, Approval of Support Agreement, Sealing).

35 Receiver's Key Evidence, pp 542-550: Morris Affidavit, Exhibit G: Assignment of DIP Indebtedness and Security; Receiver's Key Evidence, pp 580-582: Affidavit of Dominique Huber, sworn June 11, 2020 **[Huber Affidavit],** Exhibit I: June I 0, 2020 letter from DGDP counsel to TEC counsel.

36 Receiver's Key Evidence, pp 583-586: Huber Affidavit, Exhibit 2: June 11, 2020 letter from TEC counsel to DGDP counsel.

37 Receiver's Key Evidence, pp 558-577: Morris Affidavit, Exhibit J: Consent Receivership Order.

38 Receiver's Key Evidence, pp 587-589: Application for Permission to Appeal, filed June 25, 2020.

39 Receiver's Key Evidence, pp 590-592: Consent Order of Justice Hughes, filed July 13, 2020.

| | |
|---|---|
| October 23, 2020 | DGDP requested that DGDP Leave to Appeal #1 be returned to the chambers list—fo hearing.{40} |

  

| | |
|---|---|
| December 4, 2020 | McDonald J.A. grants DGDP leave to appeal in DGDP Leave to Appeal # l.41 |
| December 4, 2020 | Horner J. granted an order (the "Energy SAVO") approving the Energy—Transaction the opposition raised by DGDP.42 |
| December 14, 2020 | DGDP filed its second application for leave to appeal the Energy SAVO on the basis Horner J. did not have the jurisdiction to vest out the Interim Lenders' Charge against Energy assets, without its consent, in circumstances where Holdings' obligations und Interim Facility remained outstanding ("DGDP—Leave to Appeal #2").{43} |
| January 29, 202 l | Wakeling J.A. grants DGDP leave to appeal in DGDP Leave to Appeal #2;—howeve grants TEC's cross-application to lift the stay of proceedings to allow the Energy Tra close. {44} |
| February 23, 202 l | The Energy Transaction closes and DGDP receives a cash payment in full—satisfact amount borrowed by Energy under the Interim Facility, being over $7 million.45 |
| April 22, 202 l | TEC proposed a draft asset purchase and sale agreement to the Receiver to complete Holdings Transaction, through which Conifer would acquire the majority of Holding substantially via a credit bid of a material portion of the pre-filing debt owed to it by (the "Holdings APA"). As the cash consideration set out in the original en bloc TEC less the cash already utilized in the Energy Transaction, was insufficient to repay in c remaining amounts secured by the Interim Lenders' Charge, the Holdings APA conte repayment of the Interim Lenders' Charge and Receiver's Borrowings Charge (funde through a GORR prior to closing (the |

40 Receiver's Key Evidence, pp 615-620: Kim Affidavit, Exhibit J: October 23, 2020 correspondence to ABCA requesting hearing of Leave to Appeal Application.

41 *DGDP-BC Holdings Ltd v Third Eye Capital Corporation.* 2020 ABCA 442.

42 Receiver's Key Evidence, pp 621-711: Sale Approval and Vesting Order of Justice Horner, filed December 4, 2020.

43 Receiver's Key Evidence, pp 712-716: Application for Permission to Appeal, filed December 14, 2020.

44 *DGDP-BC Holdings v Third Eye Capital Corp, Pricewaterhouse Coopers.* 2021 ABCA 33.

45 Receiver's Key Evidence, pp 717-725: Second Report of the Receiver to the Court of Appeal **[Receiver's Second Report]** at paras 2.1-2.7, Appendices "A", "B".

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| | "Conifer GORR"). The Conifer GORR contemplated being applied to the assets in th Holdings APA, as well as the previously-acquired Energy and "ACRL assets". At the Holdings owed approximately $23.9 million under the Interim Facility, approximatel million of which was owed to DGDP. The TEC related Interim Lenders agreed to acc satisfaction of the Interim Facility—through the granting of the Conifer GORR. DGI {46} |
| May 10, 2021 | The Receiver filed an application for advice and direction with respect to the propose Holdings APA, and specifically whether the Receiver could enter into same given the contemplated repayment of the Interim Lenders' Charge by way of the granting of the GORR. Subject to the Court answering that question in the affirmative, the Receiver sought a sale approval and vesting order—respecting the Holdings APA (the "Holdin SAVO").47 |
| May 12, 2021 | TEC filed an application for approval of the Holdings SAVO and the Conifer GORR final satisfaction ofall amounts advanced by DGDP to Holdings—(the "TEC GORR' |
| May 21, 2021 | DGDP filed an application for approval of a GORR, albeit on different commercial te the TEC GORR (the "DGDP GORR"). One of the variations in terms was the inclusi DGDP's outstanding legal fees and accrued interest in the "Opening Balance" of the |

  

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| | GORR. The TEC GORR did not include the legal fees and the interest varied due to a waiver given—by TEC as DIP Agent in February 2021. {49} |
| June 7, 2021 | Watson J.A., Slatter J.A. and Khullar J.A. heard oral argument from respective couns DGDP, TEC and the Receiver on the two appeals underlying DGDP—Leave to Appe DGDP Leave to Appeal #2.50 |

46 Receiver's Key Evidence, pp 048-066: Lu Affidavit, Exhibit 5: Fourth Report of the Receiver at paras 5.3-5.6; Receiver's Key Evidence, pp 067-122: Lu Affidavit, Exhibit 9: Supplement to the Fourth Report of the Receiver **[Supplement]** at Appendix C, Recital H, para 3.2(d). "ACRL Assets" are assets that were previously owned by Accel Canada Resources Limited and sold to TEC in separate receivership proceedings. Receiver's Key Evidence, pp 346- 412: Lu Affidavit, Exhibit 13: Transcript of Proceedings dated June 14, 2021 **[Oral Decision),** 2:21-29.

47 Receiver's Key Evidence, pp 0 I 0-022: Lu Affidavit, Exhibit I: Application by Receiver: Advice & Directions.

48 Receiver's Key Evidence, pp 005-009 and 023-034: Lu Affidavit at para 3, Exhibit 2: TEC Application (as amended).

49 Receiver's Key Evidence, pp 035-047: Lu Affidavit, Exhibit 3: DGDP Application.

50 *DGDP-BC Holdings Ltd v Third Eye Capital Corporation.* 2021 ABC,A 226.

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| June 11, 2021 | Horner J. heard the Receiver's May 10th Application, TEC's May 12th Application— amended on June 4{th}{,} 2021), and DGDP's May 21{st} Application, concurrently DGDP seemingly acknowledging it would accept a GORR as a means of satisfying t Facility, the Receiver sought approval of the Holdings APA and SAVO if, as a prelim matter, the Court found it had jurisdiction to grant—either GORR. {51} |
| June 14, 2021 | Horner J. granted the Holdings SAVO, authorizing the Receiver to enter into the Hol APA, and granted TEC's Application in favour of the TEC GORR, subject to revising Opening Balance thereunder to include DGDP's requested legal fees and interest (set the purported interest waiver) in full and final satisfaction of DGDP's advances to Ho under the Interim Facility (the—"Holdings SAVO/GORR Decision").52 |
| June 17, 2021 | Watson J.A., Slatter J.A. and Khullar J.A. delivered a concurring decision dismissing appeals raised in each of DGDP Leave to Appeal #1 and—DGDP Leave to Appeal # |
| June 24, 2021 | DGDP filed its third application for leave to appeal the Holdings SAVO/GORR Deci the basis that Horner J. did not have the jurisdiction to grant such orders, without its in circumstances where a credit bid would "clearly—constitute an illegal preference" Leave to Appeal #3").{54} |
| August 10, 2021 | Veldhuis J.A. dismissed DGDP Leave to Appeal #3.55—TEC notified DGDP of the anticipated closing date of the Holdings Transaction,—and requests copies of DGDP invoices for the purposes of calculating the Opening Balance under the TEC GORR. |

51 Receiver's Key Evidence, pp 067-122: Lu Affidavit, Exhibit 9: Supplement at para 6; Receiver's Key Evidence, pp 346-412: Lu Affidavit, Exhibit 12: Transcript of Proceedings dated June 11, 2021, 55:32-56:22.

52 Receiver's Key Evidence, pp 413-424: Lu Affidavit, Exhibit 13: Oral Decision, 5:21-37; Receiver's Key Evidence, pp 123-341: Lu Affidavit, Exhibit I 0: Sale Approval and Vesting Order of Justice Horner; Receiver's Key Evidence, pp 342-345: Lu Affidavit, Exhibit 11: TEC GORR Order.

53 *DGDP-BC Holdings Ltd v Third Eye Capital Corporation,.* 2021 ABCA 226.

  

54 Receiver's Key Evidence, pp 726-729: Application for Permission to Appeal, filed June 24, 2021.

*55* *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, 2021 ABCA 284.

56 Third Report, Appendix "B".

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| August 13, 2021 | DGDP advised TEC and the Receiver of its intention to seek leave to appeal Veldhui Decision dismissing leave to appeal to the Supreme Court of Canada, and a stay of ex of the Decision pending leave. DGDP also delivers the requested legal invoices.{57} Receiver advised DGDP that it expects DGDP to imminently make—scheduling arra with the Court of Appeal for the hearing of the stay application.58 |
| August 17, 2021 | DGDP advised the parties that based on its communications with the Court of Appea earliest possible hearing date for DGDP's application for a stay was either September September 23rd, 2021. 59—The Receiver wrote to the Case Management Office of th of Appeal requesting assistance in scheduling DGDP's application for a stay on an ur expedited basis.60 |
| August 18, 2021 | The Court of Appeal Registry, on behalf of the CMO, advised the parties to file—the application materials forthwith for consideration of an expedited and urgent hearing b Duty Justice .61 |
| August 20, 2021 | DGDP files its Application for a Stay of Proceedings Pending Leave to Appeal to—t Supreme Court of Canada. |

*57* Third Report, Appendix "B".
58 Third Report, Appendix "B".
59 Third Report, Appendix "B".
60 Third Report, Appendix "B".
61 Third Report, Appendix "B".

**End of Document**

# TAB 6

2023 BCCA 368
British Columbia Court of Appeal

British Columbia v. Peakhill Capital Inc.

2023 CarswellBC 2801, 2023 BCCA 368, 2023 A.C.W.S. 4758

# His Majesty the King in Right of the Province of British Columbia (Appellant / Respondent) and Peakhill Capital Inc. (Respondent / Petitioner) and KSV Restructuring Inc., Cenyard Pacific Developments Inc., and Cenyard Southview Gardens Ltd. (Respondents / Respondents)

Saunders J.A., In Chambers

Heard: September 25, 2023
Judgment: September 25, 2023
Docket: Vancouver CA49320

Counsel: O.J. James, for Appellant
W.L. Roberts, A.T. Paczkowski, for Respondent, Cenyard Southview Gardens Ltd.
J.D. Schultz, E. Newbery, for Respondent, Cenyard Pacific Developments Inc.
V.L. Tickle, for Respondent, KSV Restructuring Inc.
E. Laskin, for Respondent, Peakhill Capital Inc.

Subject: Civil Practice and Procedure; Insolvency; Property; Provincial Tax

APPLICATION for order lifting stay of proceedings.

***Saunders J.A., In Chambers*:**

1 The applicant, Cenyard Southview Gardens Ltd., applies for an order lifting a stay of proceedings that was triggered by s. 195 of the Bankruptcy and Insolvency Act, R.S.C., 1985, c. B–3.

2 The creditor protection proceedings were commenced under the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C–36, by Coromandel Properties (2016) Ltd. KSV Restructuring Inc. is the receiver of Coromandel's assets pursuant to s. 243(1) of the Bankruptcy and Insolvency Act, and it has, in particular, the purpose of conducting the court-supervised sale of land that is the subject of disagreement between the parties.

3 The appeal arises from a reverse vesting order granted by Mr. Justice Loo on August 25, 2023, approving a sale transaction in respect of lands in the city of Vancouver, British Columbia. The Province of British Columbia took the position before Mr. Justice Loo that the reverse vesting order should not be granted and that the property should be transferred the way we are usually accustomed to property transferring, attracting property transfer tax. The result of this transaction going by reverse vesting order is that no property transfer tax is payable.

4 The Province is the appellant and is appealing the order approving the sale. The appeal triggered s. 195 of the Bankruptcy and Insolvency Act which automatically stays all the proceedings under a judgment until the appeal is disposed of.

5 The issues on appeal are likely to be a jurisdictional point as to whether a reverse vesting order can be made under the *Bankruptcy and Insolvency Act* and, also, the implications of the transaction on payment of property transfer tax that would be payable were the property to be disposed of through the alterative of a normal vesting order.

 

6 The sale transaction is scheduled to close on September 29, 2023, and the appeal cannot be heard before that date. In fact, some confidence is required earlier than that date in order to free up the financing for the closing on September 29. This is the reason we are hearing this on short notice today.

7 Cenyard applies for an order lifting the statutory stay so that the sale transaction can complete on time and the application has been prepared so as to acknowledge that the funds should be secured in an appropriate way so that the Province is not prejudiced.

8 The application is conceptually a stay of the statutory stay. The test to consider for lifting the stay of proceedings here is the same three-part test that this court usually applies to stays under *RJR-MacDonald Inc. v. Canada (Attorney General)*,, [1994] 1 S.C.R. 311:

a) there is some merit to the appeal in the sense that there is a serious question to be determined;

b) the party seeking the stay will suffer irreparable harm if the stay is not granted; and

c) the balance of convenience favours a stay.

9 I certainly recognize that there is a serious question here to be determined, it is of importance to the parties and it is of importance to the practice. There is some merit to the appeal - I understand that the large issue of jurisdiction has not been looked at by appellate courts and so this is a new issue in bankruptcy practice. And one cannot say that the applicant has not met that first test.

10 There will be irreparable harm if the stay is not lifted - the transaction is highly unlikely to proceed, the offers that were made other than this offer were quite inferior to this one so there will be financial losses to the parties, and other matters will fall out from the collapse of the transaction - including a loss of deposit. Third, the balance of convenience clearly favours lifting the stay with the terms proposed.

11 The parties have worked together to prepare an order that they either consent to, or do not oppose. I think, as I hear it today, they are consenting to at least some of the terms, if not all of the terms. I am certainly satisfied that the order applied for should issue and I will read it into the record.

12 The transaction is referred to as the "Primary Transaction" and I will order that the stay imposed by operation of s. 195 of the Bankruptcy and Insolvency Act of the order of Mr. Justice Loo pronounced on August 25, 2023 granting a reverse vesting order in the action below is lifted on these terms:

1. Upon closing of the Primary Transaction, the Applicant, or its assignee Cenyard Investments Ltd. (the "Assignee"), will pay $3,342,100 (the "Disputed Amount") into trust with its solicitors, Lawson Lundell LLP, and the Disputed Amount will be held in trust by Lawson Lundell LLP on the terms set out in paragraph (2) below, unless otherwise agreed to in writing by the Applicant, or the Assignee and the Appellant, or pursuant to a further order of this Court;

2. If the appeal is allowed, the Disputed Amount will be paid to the Appellant upon the expiry of the applicable appeal period. If the Appeal is dismissed, the Disputed Amount will be repaid to the Applicant or the Assignee upon the expiry of the applicable appeal period. If a further appeal, or an application for leave to appeal from the Court of Appeal's decision is filed, the Disputed Amount shall remain in trust with Lawson Lundell LLP, pending determination of the further appeal or application for leave to appeal, as the case may be;

3. By consent, no party to this appeal, including the Assignee, may assert the appeal is moot as a result of the closing of the Primary Transaction referred to in the reverse vesting order, or assert that the appeal ought not to be allowed as a result of this order; and

 

4. By consent, if the Primary Transaction referred to in the reverse vesting order closes, the remedies on appeal will be limited to remedies related to the Disputed Amount and costs of the appeal, and the Primary Transaction will stand and will not be reversed.

13 Costs of this application will be in the cause.

[Discussion with counsel re: clarifying order and dispensing with signatures]

14 Because this order is by consent, I ask that counsel sign the order.

*Application granted.*

# TAB 7

2022 ABCA 185
Alberta Court of Appeal

HML Contracting Ltd v. Pinder

2022 CarswellAlta 1240, 2022 ABCA 185, [2022] A.W.L.D. 2764, 2022 A.C.W.S. 1442, 47 Alta. L.R. (7th) 263

# HML Contracting Ltd. (Respondent / Plaintiff) and Daniel Pinder (Appellant / Defendant) and Twisted Pair Technical Services Inc. (Not a Party to the Appeal / Defendant)

Frederica Schutz, Elizabeth Hughes, Bernette Ho JJ.A.

Heard: March 1, 2022
Judgment: May 17, 2022
Docket: Edmonton Appeal 2103-0265AC

Proceedings: affirming *HML Contracting Ltd. v. Twisted Pair Technical Services Inc.* (2021), 38 Alta. L.R. (7th) 392, 2021 ABQB 8992021 CarswellAlta 2831, L.K. Harris J. (Alta. Q.B.)

Counsel: B.W. Mielke, M. Deren-Dube, for Respondent
M.P. Blimke, P.J.C. Prowse (No Appearance), M. Boyles (No Appearance), for Appellant

Subject: Civil Practice and Procedure
**Related Abridgment Classifications**
Civil practice and procedure
XXIII Practice on appeal
XXIII.12 Staying of proceedings pending appeal
XXIII.12.b Stay of execution
**Headnote**
Civil practice and procedure --- Practice on appeal — Staying of proceedings pending appeal — Stay of execution
Plaintiff was granted judgment against defendant guarantor — There was second action by defendant against plaintiff and others, in which defendant alleged he was squeezed out of business in breach of unanimous shareholders agreement, and this resulted in default on loan — Defendant brought appeal from judgment granted against him pursuant to guarantee — Defendant's application for stay of execution pending appeal was dismissed — Defendant appealed — Appeal dismissed — Notwithstanding error in conflating test for equitable set-off with test for a stay of execution, trial judge ultimately applied correct legal test for stay of execution.
**Table of Authorities**
**Cases considered:**
*Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.* (2015), 2015 ABQB 429, 2015 CarswellAlta 1235, 605 A.R. 357 (Alta. Q.B.) — considered
*Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.* (2015), 2015 ABCA 406, 2015 CarswellAlta 2342, 609 A.R. 313, 656 W.A.C. 313, 52 C.L.R. (4th) 17 (Alta. C.A.) — referred to
*Bernum Petroleum Ltd. v. Birch Lake Energy Inc.* (2014), 2014 ABQB 652, 2014 CarswellAlta 1965, 35 B.L.R. (5th) 234, 598 A.R. 172, 14 Alta. L.R. (6th) 294 (Alta. Q.B.) — referred to
*Chubak v. Corner Brook Farms Ltd.* (2015), 2015 ABQB 806, 2015 CarswellAlta 2338, [2016] 6 W.W.R. 752, 32 Alta. L.R. (6th) 421, 52 B.L.R. (5th) 83 (Alta. Q.B.) — considered
*Desautels Creative Printing Papers Inc. v. Printcrafters Inc.* (1999), 1999 CarswellMan 472, 138 Man. R. (2d) 309, 202 W.A.C. 309, [2000] 4 W.W.R. 575 (Man. C.A.) — referred to
*HML Contracting Ltd v. Pinder* (2022), 2022 ABCA 184, 2022 CarswellAlta 1239 (Alta. C.A.) — referred to

 

*Royal Trust Corp. of Canada v. Kendal Adjusters Ltd.* (1984), 32 Alta. L.R. (2d) 383, 54 A.R. 393, 33 R.P.R. 21, 13 D.L.R. (4th) 472, 1984 CarswellAlta 98, 1984 ABCA 241 (Alta. C.A.) — referred to

*Schacher v. National Bailiff Services* (1999), 1999 CarswellAlta 32, 1999 ABQB 46 (Alta. Q.B.) — referred to

*Telford v. Holt* (1987), 21 C.P.C. (2d) 1, [1987] 2 S.C.R. 193, 41 D.L.R. (4th) 385, 78 N.R. 321, *(*sub nom. *Holt v. Telford)* [1987] 6 W.W.R. 385, 54 Alta. L.R. (2d) 193, 81 A.R. 385, 37 B.L.R. 241, 46 R.P.R. 234, 1987 CarswellAlta 188, 1987 CarswellAlta 583 (S.C.C.) — considered

**Statutes considered:**

*Judicature Act*, R.S.A. 2000, c. J-2

s. 17(1) — referred to

**Rules considered:**

*Alberta Rules of Court*, Alta. Reg. 124/2010

R. 1.4(2)(h) — referred to

APPEAL by defendant from judgment reported at *HML Contracting Ltd. v. Twisted Pair Technical Services Inc.* (2021), 2021 ABQB 899, 2021 CarswellAlta 2831, 38 Alta. L.R. (7th) 392 (Alta. Q.B.), dismissing defendant's application for stay of proceedings pending appeal.

***Per curiam*:**

1 The appellant, Daniel Pinder, appeals the dismissal of his application for a stay of execution of a summary judgment granted against him pending the resolution of a separate but related action.

2 For the reasons that follow, the appeal is dismissed.

**Background**

3 This appeal concerns two related actions that arise out of the same series of transactions. The first action relates to the enforcement of a guarantee and the second action is a shareholder dispute.

4 In 2015, Mr. Pinder's company, Twisted Pair Technical Services Inc. (Twisted Pair), and its competitor HML Contracting Ltd. (HML) merged. As part of the merger, Mr. Pinder agreed to sell his interest in Twisted Pair and buy shares in 1917959 Alberta Ltd (191). The parties signed a unanimous shareholder agreement to give effect to the arrangement. As part of this transaction HML also agreed to advance a loan to Twisted Pair in the amount of $300,000 by way of promissory note. As a condition of the loan, HML sought an executed personal guarantee from Mr. Pinder.

5 In early 2016, HML demanded payment on the loan and then filed a Statement of Claim against Twisted Pair and Mr. Pinder (the Guarantee Action). By the end of 2016, a receiver was appointed over Twisted Pair and Twisted Pair was assigned into bankruptcy. In 2020, HML obtained summary judgment against Mr. Pinder in the amount of $176,900.59 for the outstanding balance of the loan plus costs of $111,906.58 for a total of $288,807.17. That judgment was upheld on appeal: *HML Contracting Ltd v Pinder*, 2022 ABCA 184.

6 In 2021, Mr. Pinder applied, under section 17(1) of the Judicature Act, RSA 2000, c J–2, for a stay of execution of the summary judgment in the Guarantee Action pending the resolution of the separate but related shareholder dispute. In the ongoing shareholder dispute, Mr. Pinder — in his capacity as shareholder of 191 — is a plaintiff and HML is one of the defendants (the Shareholder Action). In 2019, Mr. Pinder filed a claim seeking $3 million in damages for breach of contract, breach of fiduciary duty, and oppression from HML, GCS General Contracting Services Inc., and their principals: Mark Beck and Casey Beckhuson. The claim was later amended in 2021 to add 191 as a plaintiff and add another corporate defendant. Mr. Pinder submits that the only assets that could be used to satisfy the summary judgment are his shares in 191, and if the stay is not granted the respondent could seize those shares bringing the Shareholder Action to an end. Alternatively, he submits that HML could petition him into bankruptcy.

  

7 The chambers judge dismissed Mr. Pinder's application for a stay of execution: *HML Contracting Ltd v Twisted Pair Technical Services Inc*, 2021 ABQB 899. The chambers judge interpreted Royal Trust Corporation of Canada v Kendal Adjusters Ltd (Dairy Queen), 1984 ABCA 241 (Alta. C.A.) as standing for the proposition that the court has "discretion to order a stay of execution under the *Judicature Act*, and further, that it [has] inherent jurisdiction to order a stay of proceedings to allow time for related proceedings to conclude where the related proceedings provided the judgment debtor with a just claim for damages that could be set off against the judgment already obtained": 2021 ABQB 899 at para 8. The chambers judge held that this discretion was not unfettered and may only be exercised in circumstances where there is a "plausible counterclaim or set off" or "where exceptional circumstances exist", relying on Schacher v National Bailiff Services, 1999 ABQB 46 at para 61 and Attila Dogan Construction and Installation Co Inc v AMEC Americas Limited (AMEC E&C Services Limited and AGRA Monenco Inc), 2015 ABQB 429 at para 12, aff'd 2015 ABCA 406 (Alta. C.A.) [*Attila QB*, ].

8 The chambers judge held that to satisfy either the "plausible counterclaim or set off" or "exceptional circumstances" requirement, it was necessary that both actions have mutuality of parties: 2021 ABQB 899 at para 37 citing *Chubak v Corner Brook Farms Ltd*, 2015 ABQB 806. The chambers judge noted that while *Schacher* and *Royal Trust* were silent on mutuality, that silence was likely due to mutuality of parties not being an issue in either of those cases. The chambers judge found that there was a lack of mutuality of parties as between the Guarantee Action and the Shareholder Action, and therefore Mr. Pinder could not establish that there exists either a "plausible counterclaim or set off" or "exceptional circumstances" to justify a stay (2021 ABQB 899 at para 36):

> HML has a judgment against Pinder. But it is Pinder who claims against not only HML, but also Mark Beck, Casey Beckhuson and GCS General Contracting Services Inc. for the breach of the USA. Conceivably Pinder could obtain a judgment against Defendants other than HML, in which case there could be no set off.

9 For that reason, the application for a stay of execution pending resolution of the Shareholder Action was dismissed.

10 In the alternative, the chambers judge held that Mr. Pinder could not meet the tripartite test for a stay of proceedings *pending appeal* because he would not suffer irreparable harm if the summary judgment was enforced, and the balance of convenience was not in Mr. Pinder's favour.

11 Both parties acknowledge that the chambers judge's reasons wrongly state that Mr. Pinder was seeking a stay pending appeal.

**Grounds of Appeal and Parties' Positions**

12 While Mr. Pinder's factum argues two separate grounds of appeal, these are merely restatements of the same ground of appeal, namely that the chambers judge applied the wrong test for a stay of execution pending resolution of a second action.

13 Mr. Pinder argues that the chambers judge erred in stating that he was seeking a stay pending appeal and that this error tainted the remainder of the chambers judge's analysis. He argues that this error caused her to apply the wrong test and to consider the wrong facts. Mr. Pinder points to paragraph 56 of the chambers judge's decision where, with respect to the balance of convenience under the tripartite test, the chambers judge considered that the appeal in the Guarantee Action was scheduled to be heard in four months. Mr. Pinder argues that the timing of the appeal in the Guarantee Action was irrelevant to the remedy sought.

14 The respondent argues that this error is of no consequence, and that it is clear from the entirety of the chambers judge's reasons that the relevant considerations for a stay of execution pending resolution of the Shareholder Action were considered.

**Standard of Review**

15 The applicable standard of review is set out in Attila Dogan Construction and Installation Co Inc v AMEC Americas Limited, 2015 ABCA 406 at para 13 [Attila CA]:

  

> The statement of the legal test for a stay is a question of law reviewed for correctness. Findings of fact, such as those relating to irreparable harm and the balance of convenience, are entitled to deference. The ultimate exercise of . . . discretion in granting or denying a stay will not be overruled unless it is based on an error of principle, or is unreasonable: *WestJet v ELS Marketing Inc*., 2014 ABCA 372 at para. 4, 13 Alta LR (6th) 181; *Alberta (Treasury Branches) v Ghermezian*, 2000 ABCA 61 at para. 10, 250 AR 327.

**Analysis**

16 Section 17(1) of the Judicature Act states:

> **Stay of proceedings**
>
> 17(1) In a proceeding
>
> (a) for the recovery of a debt or liquidated demand,
>
> (b) for the enforcement of a security or charge on land,
>
> (c) for the determination or specific performance of an agreement for the sale of land, or
>
> (d) for the possession of land,
>
> the Court in its discretion may at any stage of the proceeding grant a stay of proceedings on any terms that the Court may prescribe, and in like manner the Court in its discretion may with or without imposing terms, after final judgment in any proceeding whatsoever, grant a stay of execution of an order for sale or of other similar process, including a stay of an order for possession of land, and may by an order granting the stay extend the time for payment of a judgment debt or the time for doing any act or making any payment prescribed by a previous order of the Court.

17 As noted by the chambers judge, Rule 1.4(2)(h) of the Alberta Rules of Court, Alta Reg 124/2010 also authorizes the court to "adjourn or stay all or any part of an action, application or proceeding, extend the time for doing anything in the proceeding, or stay the effect of a judgment or order".

18 The test for a stay of execution of a judgment pending resolution of a second action is the well-known tripartite test. The applicant must show (1) that there is an arguable issue, (2) that it will suffer irreparable harm if the stay is not granted, and (3) that the balance of convenience between the parties favors the granting of a stay: *Attila CA* at para 33; see also *Desautels Creative Printing Papers Inc v Printcrafters Inc*, (1999), 138 Man R (2d) 309, [2000] 4 WWR 575 (CA).

19 Even if the tripartite test is not met, the court has a residual discretion to grant a stay "when the interests of justice so require": *Attila CA* at para 33.

20 Lack of mutuality of parties is not a bar to a stay of execution of a summary judgment. The chambers judge erred in finding that *Chubak* establishes a threshold requirement of mutuality by conflating the test for equitable set-off with the test for a stay of execution.

21 In *Chubak*, the party resisting summary judgment raised the defence of equitable set-off on the basis of a separate action that sought damages for breaches of separate agreements. Whether equitable set-off requires mutuality of parties was the issue squarely before Master Robertson. Relying on the leading authority *Holt v Telford*, [1987] 2 SCR 193, as well as the legal distinction between a corporate entity and its shareholders, Master Robertson held that the resisting party could not rely on the defence of equitable set-off and summary judgment was granted. Master Robertson then considered the alternative argument of whether to grant a stay of execution of the summary judgment. At para 61, Master Robertson correctly stated that the test for a stay of execution is the tripartite test. As there was no evidence on irreparable harm, he went on to consider whether a stay ought to be granted under the court's inherent jurisdiction but declined to do so.

 

22 While claims for equitable set-off and applications for a stay of execution of a judgment often arise at the same time, they are distinct legal concepts for which separate considerations apply. A stay of execution pending the determination of a second action is not a set-off although it may ultimately produce a situation where there might be a set-off: *Royal Trust* at para 14. On the flip side, the existence of a plausible counterclaim or set-off does not on its own justify a stay: *Attila QB* at para 26 citing Bernum Petroleum Ltd v Birch Lake Energy Inc,2014 ABQB 652 at para 114.

23 Notwithstanding the chambers judge's error in conflating the test for equitable set-off with the test for a stay of execution, given the alternate analysis starting at paragraph 39 of her reasons we are not persuaded that the chambers judge erred by applying the wrong test for a stay. While the chambers judge misstated that Mr. Pinder sought a stay of the judgment obtained in the Guarantee Action pending its appeal, rather than pending the outcome of the Shareholder Action, we are of the view that this did not materially affect her decision because she considered the substance of each of the arguments advanced by Mr. Pinder.

24 The chambers judge started her consideration of the tripartite test by reviewing the merits of the Shareholder Action, thus she was aware the Shareholder Action was relevant to deciding the application before her. She ultimately agreed with Mr. Pinder that he only needed to establish that he had an arguable case to meet the first part of the tripartite test, which was a low threshold. She concluded that Mr. Pinder met the first part of the test.

25 The chambers judge then turned to whether Mr. Pinder had established he would suffer irreparable harm should a stay not be granted. She determined that the evidence did not support a conclusion that Mr. Pinder would suffer irreparable harm. She did not accept that Mr. Pinder would suffer irreparable harm if his shares in 191 were seized because there was no evidence as to what those shares might be worth. She considered Mr. Pinder's argument that a bankruptcy would cause him to lose control over the Shareholder Action to be speculative, and that he provided no details as to his net worth, assets, or liabilities to demonstrate that he did not have enough cash and assets to pay the judgment granted in the Guarantee Action.

26 We conclude that the chambers judge ultimately applied the correct legal test for a stay of execution of a judgment pending resolution of a second action and her findings relative to the evidence before her are entitled to deference. She was also aware of the court's inherent jurisdiction to issue a stay. In the end result, based on the record, we are not satisfied that the chambers judge's misapprehension of the length of time that the stay would be in place caused her to err in principle or exercise her discretion in an unreasonable manner when she refused to grant a stay.

**Conclusion**

27 The appeal is dismissed.

*Appeal dismissed.*

# TAB 8

**Most Negative Treatment:** Check subsequent history and related treatments.

2018 SCC 5, 2018 CSC 5
Supreme Court of Canada

R. v. Canadian Broadcasting Corp.

2018 CarswellAlta 206, 2018 CarswellAlta 207, 2018 SCC 5, 2018 CSC 5, [2018] 1 S.C.R. 196, [2018] 1 R.C.S. 196, [2018] 2 W.W.R. 431, [2018] A.W.L.D. 832, [2018] A.W.L.D. 861, 11 C.P.C. (8th) 221, 144 W.C.B. (2d) 163, 287 A.C.W.S. (3d) 745, 358 C.C.C. (3d) 143, 417 D.L.R. (4th) 587, 44 C.R. (7th) 1, 63 Alta. L.R. (6th) 1

# Canadian Broadcasting Corporation (Appellant) and Her Majesty The Queen (Respondent) and CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Postmedia Network Inc., Vice Studio Canada Inc., Aboriginal Peoples Television Network and AD IDEM/Canadian Media Lawyers Association (Interveners)

McLachlin C.J.C., Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown, Rowe JJ.

Heard: November 1, 2017
Judgment: February 9, 2018
Docket: 37360

Proceedings: reversing *R. v. Canadian Broadcasting Corp.* (2016), [2017] 3 W.W.R. 413, 2016 ABCA 326, 2016 CarswellAlta 2034, 43 Alta. L.R. (6th) 213, 404 D.L.R. (4th) 318, 93 C.P.C. (7th) 269, [2016] A.J. No. 1085, Frans Slatter J.A., J.D. Bruce McDonald J.A., Sheila Greckol J.A. (Alta. C.A.); reversing *R. v. Canadian Broadcasting Corp.* (2016), [2016] A.J. No. 336, 2016 ABQB 204, 2016 CarswellAlta 620, 37 Alta. L.R. (6th) 299, [2016] 9 W.W.R. 613, 86 C.P.C. (7th) 373, Peter Michalyshyn J. (Alta. Q.B.)

Counsel: Frederick S. Kozak, Q.C., Sean Ward, Tess Layton, Sean Moreman, for Appellant
Iwona Kuklicz, Julie Snowdon, for Respondent
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Subject: Civil Practice and Procedure; Criminal

**Related Abridgment Classifications**

Judges and courts
XIX Contempt of court
XIX.6 Practice and procedure
XIX.6.g Miscellaneous
Remedies
II Injunctions
II.4 Mandatory injunctions
II.4.a Threshold test
II.4.a.i Strength of applicant's case

**Headnote**

Remedies --- Injunctions — Availability of injunctions — Mandatory injunctions — Threshold test — Strength of applicant's case

Accused was charged with first degree murder of person under age of 18 — Upon Crown's request, mandatory ban prohibiting publication, broadcast or transmission in any way of any information that could identify victim was ordered pursuant to s. 486.4(2.2) of Criminal Code — Before publication ban was issued, defendant broadcaster posted information revealing identity of victim on its website — Because defendant would not remove victim's identifying information from its website,

  

Crown sought order citing defendant in criminal contempt of publication ban and interlocutory injunction directing removal of information from defendant's website — Chambers judge dismissed Crown's application — Majority of Court of Appeal allowed Crown's appeal and granted injunction — Defendant appealed — Appeal allowed — On application for mandatory interlocutory injunction, appropriate criterion for assessing strength of applicant's case at first stage of test was not whether there was serious issue to be tried, but rather whether applicant had shown strong prima facie case — It was not for Court of Appeal to re-cast Crown's case as civil application for interlocutory injunction pending permanent injunction — Crown was bound to show strong prima facie case of criminal contempt of court — There was nothing in chambers judge's reasons or in reasons of majority of Court of Appeal which established that chambers judge, in refusing interlocutory injunction, committed any errors justifying appellate intervention.

Judges and courts --- Contempt of court — Practice and procedure — General principles

Accused was charged with first degree murder of person under age of 18 — Upon Crown's request, mandatory ban prohibiting publication, broadcast or transmission in any way of any information that could identify victim was ordered pursuant to s. 486.4(2.2) of Criminal Code — Before publication ban was issued, defendant broadcaster posted information revealing identity of victim on its website — Because defendant would not remove victim's identifying information from its website, Crown sought order citing defendant in criminal contempt of publication ban and interlocutory injunction directing removal of information from defendant's website — Chambers judge dismissed Crown's application — Majority of Court of Appeal allowed Crown's appeal and granted injunction — Defendant appealed — Appeal allowed — On application for mandatory interlocutory injunction, appropriate criterion for assessing strength of applicant's case at first stage of test was not whether there was serious issue to be tried, but rather whether applicant had shown strong prima facie case — It was not for Court of Appeal to re-cast Crown's case as civil application for interlocutory injunction pending permanent injunction — Crown was bound to show strong prima facie case of criminal contempt of court — There was nothing in chambers judge's reasons or in reasons of majority of Court of Appeal which established that chambers judge, in refusing interlocutory injunction, committed any errors justifying appellate intervention.

Réparations --- Injonctions — Disponibilité des injonctions — Injonctions mandatoires — Critère d'application — Solidité de la preuve du demandeur

Accusé a été inculpé du meurtre au premier degré d'une personne âgée de moins de 18 ans — À la demande du ministère public, une interdiction mandatoire de publier ou de diffuser de quelque façon que ce soit tout renseignement permettant d'identifier la victime a été délivrée en vertu de l'art. 486.4(2.2) du Code criminel — Avant la délivrance de l'interdiction de publication, le radiodiffuseur défendeur a affiché sur son site Web des renseignements qui révélaient l'identité de la victime — Compte tenu du refus du défendeur de retirer ces renseignements de son site Web, le ministère public a sollicité une assignation pour outrage criminel contre le défendeur pour violation de l'interdiction en question ainsi qu'une injonction interlocutoire exigeant que les renseignements identifiant la victime soient retirés du site Web du défendeur — Juge siégeant en son cabinet a rejeté la demande du ministère public — Juges majoritaires de la Cour d'appel ont accueilli l'appel et accordé l'injonction interlocutoire — Défendeur a formé un pourvoi — Pourvoi accueilli — Lorsqu'il s'agit d'examiner une demande d'injonction interlocutoire mandatoire, le critère approprié pour juger de la solidité de la preuve du demandeur à la première étape du test applicable n'est pas celui de l'existence d'une question sérieuse à juger, mais plutôt celui de savoir si le demandeur a établi une forte apparence de droit — Il n'appartenait pas à la Cour d'appel de reformuler la thèse du ministère public comme s'il s'agissait d'une demande d'injonction interlocutoire au civil en attendant qu'une injonction permanente soit accordée — Ministère public était tenu d'établir une forte apparence de droit quant à l'existence d'un outrage criminel au tribunal — Rien dans les motifs du juge siégeant en son cabinet, ni d'ailleurs dans les motifs des juges majoritaires de la Cour d'appel, ne laissait croire que le juge siégeant en son cabinet a commis une erreur justifiant une intervention en appel lorsqu'il a rejeté la demande d'injonction interlocutoire.

Juges et tribunaux --- Outrage au tribunal — Procédure — Principes généraux

Accusé a été inculpé du meurtre au premier degré d'une personne âgée de moins de 18 ans — À la demande du ministère public, une interdiction mandatoire de publier ou de diffuser de quelque façon que ce soit tout renseignement permettant d'identifier la victime a été délivrée en vertu de l'art. 486.4(2.2) du Code criminel — Avant la délivrance de l'interdiction de publication, le radiodiffuseur défendeur a affiché sur son site Web des renseignements qui révélaient l'identité de la victime — Compte tenu du refus du défendeur de retirer ces renseignements de son site Web, le ministère public a sollicité une assignation pour outrage criminel contre le défendeur pour violation de l'interdiction en question ainsi qu'une injonction interlocutoire exigeant

  

que les renseignements identifiant la victime soient retirés du site Web du défendeur — Juge siégeant en son cabinet a rejeté la demande du ministère public — Juges majoritaires de la Cour d'appel ont accueilli l'appel et accordé l'injonction interlocutoire — Défendeur a formé un pourvoi — Pourvoi accueilli — Lorsqu'il s'agit d'examiner une demande d'injonction interlocutoire mandatoire, le critère approprié pour juger de la solidité de la preuve du demandeur à la première étape du test applicable n'est pas celui de l'existence d'une question sérieuse à juger, mais plutôt celui de savoir si le demandeur a établi une forte apparence de droit — Il n'appartenait pas à la Cour d'appel de reformuler la thèse du ministère public comme s'il s'agissait d'une demande d'injonction interlocutoire au civil en attendant qu'une injonction permanente soit accordée — Ministère public était tenu d'établir une forte apparence de droit quant à l'existence d'un outrage criminel au tribunal — Rien dans les motifs du juge siégeant en son cabinet, ni d'ailleurs dans les motifs des juges majoritaires de la Cour d'appel, ne laissait croire que le juge siégeant en son cabinet a commis une erreur justifiant une intervention en appel lorsqu'il a rejeté la demande d'injonction interlocutoire.

The accused was charged with the first degree murder of a person under the age of 18. Upon the Crown's request, a mandatory ban prohibiting the publication, broadcast or transmission in any way of any information that could identify the victim was ordered pursuant to s. 486.4(2.2) of the Criminal Code. Before the publication ban was issued, the defendant broadcaster posted information revealing the identity of the victim on its website. Because the defendant would not remove the victim's identifying information from its website, the Crown sought an order citing the defendant in criminal contempt of the publication ban and an interlocutory injunction directing removal of the information from the defendant's website. The chambers judge concluded that the Crown had not established the requirements for a mandatory interlocutory injunction and dismissed its application. The majority of the Court of Appeal allowed the Crown's appeal and granted the injunction. The defendant appealed.

**Held:** The appeal was allowed.

Per Brown J. (McLachlin C.J.C., Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Rowe JJ. concurring): On an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the test was not whether there was a serious issue to be tried but rather whether the applicant had shown a strong prima facie case. The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction further demand an extensive review of the merits at the interlocutory stage. Upon a preliminary review of the case, the application judge must be satisfied that there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.

It was unnecessary to apply the "clearest of cases" threshold as this was not a case of "pure" speech, comprising the expression of the non-commercial speaker where there is no tangible, immediate utility arising from the expression other than the freedom of expression itself. In this appeal the chambers judge correctly identified a "tangible, immediate utility" to the defendant's posting of the identifying information, being the "public's interest" in the defendant's right to express that information, and in freedom of the press.

It was not for the Court of Appeal to re-cast the Crown's case as a civil application for an interlocutory injunction pending a permanent injunction. The Crown's originating notice disclosed only a single basis for seeking the remedy of an injunction, the defendant's alleged criminal contempt of court. The originating notice in this case, and the sequencing therein of the relief sought, belied its putatively hybrid character. Each prayer for relief did not launch an independent proceeding, rather, both related to the alleged criminal contempt. The Crown was bound to show a strong prima facie case of criminal contempt of court. There was nothing in the chambers judge's reasons or in the reasons of the majority of the Court of Appeal which established that the chambers judge, in refusing the interlocutory injunction, committed any errors justifying appellate intervention. The majority of the Court of Appeal conceded that "either position was arguable" which was, in substance, an acknowledgment that the Crown had not shown a strong prima facie case of criminal contempt.

L'accusé a été inculpé du meurtre au premier degré d'une personne âgée de moins de 18 ans. À la demande du ministère public, une interdiction mandatoire de publier ou de diffuser de quelque façon que ce soit tout renseignement permettant d'identifier la victime a été délivrée en vertu de l'art. 486.4(2.2) du Code criminel. Avant la délivrance de l'interdiction de publication, le radiodiffuseur défendeur a affiché sur son site Web des renseignements qui révélaient l'identité de la victime. Compte tenu du refus du défendeur de retirer ces renseignements de son site Web, le ministère public a sollicité une assignation pour outrage criminel contre le défendeur pour violation de l'interdiction en question ainsi qu'une injonction interlocutoire exigeant que les renseignements identifiant la victime soient retirés du site Web du défendeur. Le juge siégeant en son cabinet a conclu que le ministère public n'avait pas satisfait aux exigences relatives à l'injonction interlocutoire mandatoire et a rejeté sa demande.

  

Les juges majoritaires de la Cour d'appel ont accueilli l'appel et accordé l'injonction interlocutoire mandatoire. Le défendeur a formé un pourvoi.

**Arrêt:** Le pourvoi a été accueilli.

Brown, J. (McLachlin, J.C.C., Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Rowe, JJ., souscrivant à son opinion) : Lorsqu'il s'agit d'examiner une demande d'injonction interlocutoire mandatoire, le critère approprié pour juger de la solidité de la preuve du demandeur à la première étape du test applicable n'est pas celui de l'existence d'une question sérieuse à juger, mais plutôt celui de savoir si le demandeur a établi une forte apparence de droit. Les conséquences potentiellement sérieuses pour un défendeur du prononcé d'une injonction interlocutoire mandatoire exigent en outre un examen approfondi sur le fond à l'étape interlocutoire. Lors de l'examen préliminaire de la preuve, le juge des requêtes doit être convaincu qu'il y a une forte chance au regard du droit et de la preuve présentée qu'au procès, le demandeur réussira ultimement à prouver les allégations énoncées dans l'acte introductif d'instance.

Il n'était pas nécessaire d'appliquer le seuil du cas parmi « les plus manifestes » puisqu'il ne s'agissait pas, en l'espèce, d'une question de liberté d'expression « seulement », ce qui comprend celle de la personne qui s'exprime en dehors du contexte commercial, lorsque le discours en cause n'a pas d'utilité concrète et directe à part la liberté d'expression elle-même. Dans le présent dossier, le juge siégeant en son cabinet a correctement discerné une « utilité concrète et directe » à ce que le défendeur diffuse l'information permettant d'établir l'identité de la victime, soit « l'intérêt public » à ce que le défendeur ait le droit d'exprimer la teneur de ces renseignements, et la liberté de la presse.

Il n'appartenait pas à la Cour d'appel de reformuler la thèse du ministère public comme s'il s'agissait d'une demande d'injonction interlocutoire au civil en attendant qu'une injonction permanente soit accordée. La demande introductive d'instance du ministère public n'indiquait qu'un motif pour lequel il voulait obtenir cette réparation, soit l'outrage criminel au tribunal reproché au défendeur. L'avis introductif d'instance et l'ordre dans lequel les réparations y étaient demandées ne permettaient pas de conclure qu'il pouvait avoir un caractère théoriquement hybride. Chaque demande de réparation ne donnait pas lieu à une instance distincte; elles étaient plutôt toutes les deux liées à l'outrage criminel reproché. Le ministère public était tenu d'établir une forte apparence de droit quant à l'existence d'un outrage criminel au tribunal.

Rien dans les motifs du juge siégeant en son cabinet, ni d'ailleurs dans les motifs des juges majoritaires de la Cour d'appel, ne laissait croire que le juge siégeant en son cabinet a commis une erreur justifiant une intervention en appel lorsqu'il a rejeté la demande d'injonction interlocutoire. Les juges majoritaires de la Cour d'appel ont reconnu que « les deux thèses sont défendables », ce qui constituait essentiellement une reconnaissance que le ministère public n'avait pas établi une forte apparence de droit quant à l'existence d'un outrage criminel.

**Table of Authorities**

**Cases considered by *Brown J.*:**

*Amchem Products Inc. v. British Columbia (Workers' Compensation Board)* (1993), [1993] 3 W.W.R. 441, 14 C.P.C. (3d) 1, [1993] 1 S.C.R. 897, 150 N.R. 321, 23 B.C.A.C. 1, 39 W.A.C. 1, 102 D.L.R. (4th) 96, 77 B.C.L.R. (2d) 62, 1993 CarswellBC 47, 1993 CarswellBC 1257, [1993] I.L.Pr. 689 (S.C.C.) — referred to

*Amec E & C Services Ltd. v. Whitman Benn & Associates Ltd.* (2003), 2003 NSSC 112, 2003 CarswellNS 183, 214 N.S.R. (2d) 369, 671 A.P.R. 369, 25 C.P.R. (4th) 435, 35 C.P.C. (5th) 139 (N.S. S.C.) — referred to

*Amec E & C Services Ltd. v. Whitman Benn & Associates Ltd.* (2003), 2003 NSCA 126, 2003 CarswellNS 412, 38 C.P.C. (5th) 274, 219 N.S.R. (2d) 126, 692 A.P.R. 126, 29 C.P.R. (4th) 423 (N.S. C.A.) — referred to

*American Cyanamid Co. v. Ethicon Ltd.* (1975), [1975] A.C. 396, [1975] 1 All E.R. 504, [1975] F.S.R. 101, [1975] R.P.C. 531, 119 Sol. Jo. 136, [1975] 2 W.L.R. 316, [1975] UKHL 1 (U.K. H.L.) — considered

*Bark & Fitz Inc. v. 2139138 Ontario Inc.* (2010), 2010 ONSC 1793, 2010 CarswellOnt 2082 (Ont. S.C.J.) — referred to

*Barton-Reid Canada Ltd. v. Alfresh Beverages Canada Corp.* (2002), 2002 CarswellOnt 3653, [2002] O.T.C. 799 (Ont. S.C.J.) — referred to

*Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.* (1998), 1998 CarswellOnt 3893, 83 C.P.R. (3d) 51, 77 O.T.C. 36 (Ont. Gen. Div.) — referred to

*British Columbia (Attorney General) v. Wale* (1986), [1987] 2 W.W.R. 331, 120 N.R. 212, [1987] 2 C.N.L.R. 36, 9 B.C.L.R. (2d) 333, 1986 CarswellBC 413 (B.C. C.A.) — referred to

  

*British Columbia (Attorney General) v. Wale* (1991), [1991] 2 W.W.R. 568, (sub nom. *Wale v. British Columbia (Attorney General))* [1991] 1 S.C.R. 62, 53 B.C.L.R. (2d) 189, 120 N.R. 208, 1991 CarswellBC 15, 1991 CarswellBC 914 (S.C.C.) — referred to

*Canada (Human Rights Commission) v. Canadian Liberty Net* (1998), 1998 CarswellNat 387, 1998 CarswellNat 388, 157 D.L.R. (4th) 385, 224 N.R. 241, 50 C.R.R. (2d) 189, [1998] 1 S.C.R. 626, 31 C.H.R.R. D/433, 147 F.T.R. 305 (note), 6 Admin. L.R. (3d) 1, 22 C.P.C. (4th) 1, [1998] 2 F.C. i (S.C.C.) — distinguished

*Conway v. Zinkhofer* (2006), 2006 ABCA 74, 2006 CarswellAlta 228 (Alta. C.A.) — referred to

*Cytrynbaum v. Look Communications Inc.* (2013), 2013 ONCA 455, 2013 CarswellOnt 9090, 116 O.R. (3d) 241, 307 O.A.C. 152, 366 D.L.R. (4th) 415 (Ont. C.A.) — referred to

*D.E. & Son Fisheries Ltd. v. Goreham* (2004), 2004 NSCA 53, 2004 CarswellNS 133, 223 N.S.R. (2d) 1, 705 A.P.R. 1 (N.S. C.A.) — referred to

*Fradenburgh v. Ontario Lottery & Gaming Corp.* (2010), 2010 ONSC 5387, 2010 CarswellOnt 7316 (Ont. S.C.J.) — referred to

*Google Inc. v. Equustek Solutions Inc.* (2017), 2017 SCC 34, 2017 CSC 34, 2017 CarswellBC 1727, 2017 CarswellBC 1728, 410 D.L.R. (4th) 625, 3 C.P.C. (8th) 219, 98 B.C.L.R. (5th) 1, [2017] 10 W.W.R. 1 (S.C.C.) — considered

*H&R Block Canada Inc. v. Inisoft Corp. (Ontario)* (2009), 2009 CarswellOnt 4261 (Ont. S.C.J. [Commercial List]) — referred to

*Hadmor Productions Ltd. v. Hamilton* (1982), [1983] 1 A.C. 191, [1982] 1 All E.R. 1042 (U.K. H.L.) — considered

*Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC* (2015), 2015 FCA 104, 2015 CarswellNat 1437, 2015 CAF 104, 2015 CarswellNat 4700, 130 C.P.R. (4th) 414 (F.C.A.) — referred to

*La Plante v. Saskatchewan Society for the Prevention of Cruelty to Animals* (2011), 2011 SKCA 43, 2011 CarswellSask 251, 371 Sask. R. 123, 518 W.A.C. 123, [2012] 3 W.W.R. 293 (Sask. C.A.) — referred to

*Medical Laboratory Consultants Inc. v. Calgary Health Region* (2005), 2005 ABCA 97, 2005 CarswellAlta 333, 19 C.C.L.I. (4th) 161, 363 A.R. 283, 343 W.A.C. 283, 43 Alta. L.R. (4th) 5 (Alta. C.A.) — referred to

*Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832* (1987), 38 D.L.R. (4th) 321, 73 N.R. 341, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* [1987] 3 W.W.R. 1, 46 Man. R. (2d) 241, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* 25 Admin. L.R. 20, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* 87 C.L.L.C. 14,015, 18 C.P.C. (2d) 273, [1987] D.L.Q. 235, 1987 CarswellMan 176, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores Ltd.)* [1987] 1 S.C.R. 110, 1987 CarswellMan 272 (S.C.C.) — considered

*Modry v. Alberta Health Services* (2015), 2015 ABCA 265, 2015 CarswellAlta 1530, 388 D.L.R. (4th) 352, [2015] 11 W.W.R. 81, 23 Alta. L.R. (6th) 247, 606 A.R. 373, 652 W.A.C. 373 (Alta. C.A.) — referred to

*Musqueam Indian Band v. Canada* (2008), 2008 FCA 214, 2008 CarswellNat 1894, 2008 CAF 214, 2008 CarswellNat 2960, (sub nom. *Musqueam Indian Band v. Canada (Public Works and Government Services))* [2008] 3 C.N.L.R. 265, (sub nom. *Musquean Indian Band v. Canada (Minister of Public Works & Government Services))* 378 N.R. 335, 297 D.L.R. (4th) 349 (F.C.A.) — referred to

*Musqueam Indian Band v. Canada* (2008), 2008 CarswellNat 4404, 2008 CarswellNat 4405, (sub nom. *Musqueam Indian Band v. Canada (Minister of Public Works and Government Services))* 392 N.R. 388 (note), [2008] 3 S.C.R. viii (note) (S.C.C.) — referred to

*National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd.* (2009), [2009] 1 W.L.R. 1405, [2009] UKPC 16 (Jamaica P.C.) — referred to

*Parker v. Canadian Tire Corp.* (1998), 1998 CarswellOnt 1633, 67 O.T.C. 196 (Ont. Gen. Div.) — referred to

*Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Ltd. Partnership* (2011), 2011 SKCA 120, 2011 CarswellSask 678, [2012] 2 W.W.R. 659, 341 D.L.R. (4th) 407, 377 Sask. R. 78, 528 W.A.C. 78 (Sask. C.A.) — referred to

*Quality Pallets & Recycling Inc. v. Canadian Pacific Railway* (2007), 2007 CarswellOnt 2477 (Ont. S.C.J.) — referred to

*RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 54 C.P.R. (3d) 114, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — followed

  

*Sawridge Band v. R.* (2004), 2004 FCA 16, 2004 CarswellNat 130, 2004 CAF 16, 2004 CarswellNat 966, (sub nom. *Sawridge Indian Band v. Canada)* 316 N.R. 332, [2004] 2 C.N.L.R. 316, (sub nom. *Sawridge Indian Band v. Canada)* 247 F.T.R. 160 (note), (sub nom. *Sawridge Indian Band v. Canada)* [2004] 3 F.C.R. 274 (F.C.A.) — referred to

*Shepherd Homes Ltd. v. Sandham* (1970), [1971] 1 Ch. 340, [1970] 3 All E.R. 402, 21 P. & C.R. 863, [1970] 3 W.L.R. 348 (Eng. Ch. Div.) — referred to

*Summerside Seafood Supreme Inc. v. Prince Edward Island (Minister of Fisheries, Aquaculture & Environment)* (2006), 2006 PESCAD 11, 2006 CarswellPEI 25, 256 Nfld. & P.E.I.R. 277, 773 A.P.R. 277, 271 D.L.R. (4th) 530, 48 Admin. L.R. (4th) 1, 41 C.P.C. (6th) 285 (P.E.I. C.A.) — referred to

*U.N.A. v. Alberta (Attorney General)* (1992), [1992] 3 W.W.R. 481, 89 D.L.R. (4th) 609, 71 C.C.C. (3d) 225, 135 N.R. 321, 92 C.L.L.C. 14,023, 1 Alta. L.R. (3d) 129, 13 C.R. (4th) 1, 125 A.R. 241, 14 W.A.C. 241, [1992] 1 S.C.R. 901, 9 C.R.R. (2d) 29, [1992] Alta. L.R.B.R. 137, 1992 CarswellAlta 10, 1992 CarswellAlta 465 (S.C.C.) — considered

*West Nipissing Economic Development Corp. v. Weyerhaeuser Co.* (2002), 2002 CarswellOnt 4165 (Ont. S.C.J.) — referred to

*White Room Ltd. v. Calgary (City)* (1998), 1998 CarswellAlta 314, 216 A.R. 44, 175 W.A.C. 44, 62 Alta. L.R. (3d) 177, [1999] 2 W.W.R. 502, 1998 ABCA 120 (Alta. C.A.) — referred to

**Statutes considered:**

*Criminal Code*, R.S.C. 1985, c. C-46

Generally — referred to

s. 486.4 [en. 2005, c. 32, s. 15] — referred to

s. 486.4(2.1) [en. 2015, c. 13, s. 18(4)] — considered

s. 486.4(2.2) [en. 2015, c. 13, s. 18(4)] — considered

**Rules considered:**

*Alberta Rules of Court*, Alta. Reg. 124/2010

R. 3.8(1) — considered

APPEAL by defendant from judgment reported at *R. v. Canadian Broadcasting Corp.* (2016), 2016 ABCA 326, 2016 CarswellAlta 2034, [2016] A.J. No. 1085, 93 C.P.C. (7th) 269, 404 D.L.R. (4th) 318, 43 Alta. L.R. (6th) 213, [2017] 3 W.W.R. 413 (Alta. C.A.), allowing Crown's appeal and granting mandatory interlocutory injunction.

POURVOI formé par le défendeur à l'encontre d'un jugement publié à *R. v. Canadian Broadcasting Corp.* (2016), 2016 ABCA 326, 2016 CarswellAlta 2034, [2016] A.J. No. 1085, 93 C.P.C. (7th) 269, 404 D.L.R. (4th) 318, 43 Alta. L.R. (6th) 213, [2017] 3 W.W.R. 413 (Alta. C.A.), ayant accueilli l'appel interjeté par le ministère public et accordé une injonction interlocutoire mandatoire.

***Brown J.* :**

**I. Introduction**

1 The background leading to this appeal was summarized in the reasons of the chambers judge: [1]

> On March 5, 2016, [the accused], was charged with the first degree murder of D.H., a person under the age of 18 ("the victim"). On March 15, 2016 the Crown requested and a judge ordered a mandatory ban under s. 486.4(2.2) of the *Criminal Code*, R.S.C., 1985, c. C-46. The order prohibits the publication, broadcast or transmission in any way of information that could identify the victim.
>
> As of March 16, 2016, two articles which pre-existed the publication ban, and which identified the victim by name and photograph ("the articles"), continued to exist on the CBC Edmonton website.

  

> In response to a March 16, 2016 Edmonton Police Service inquiry, a senior digital producer with CBC Edmonton advised that no future stories would contain the victim's identifying information.
>
> On March 18, 2016, however, the pre-publication ban articles remained on the website, unaltered.
>
> One of the articles contains some evidence that the victim's identity appears already in wide circulation, by way of social media, but also by reason of the fact the victim attended school and lived in a smaller Alberta community where the murder is alleged to have occurred.

2 Because CBC would not remove from its website the victim's identifying information published prior to the order granting a publication ban, the Crown filed an Originating Notice seeking an order citing CBC in criminal contempt of the publication ban, and an interlocutory injunction [2] directing removal of that information from CBC's website. As the terms of that Originating Notice are important to my proposed disposition of this appeal, I reproduce them here, in relevant part: [3]

> TAKE NOTICE that an Application will be made by the Attorney General of Alberta on behalf of her Majesty the Queen before the presiding Justice of the Court of Queen's Bench, ... for an Order citing [CBC] in criminal contempt of court.
>
> AND FURTHER TAKE NOTICE that an application will be made for an interim injunction, directing that [CBC] remove any information from their website that could identify the complainant in the [subject] case.
>
> RELIEF SOUGHT:
>
> 1. That [CBC] be cited in criminal contempt of court.
>
> 2. That [CBC] be directed to remove any information from their website that could identify the complainant in the [subject] case.
>
> 3. That an appropriate sentence be imposed against [CBC].
>
> 4. Any such further order appropriate that this Honourable Court deems.

3 The chambers judge concluded that the Crown had not established the requirements for a mandatory interlocutory injunction, and dismissed its application. On appeal, the Court of Appeal divided on whether the Crown was entitled to a mandatory interlocutory injunction. While the majority allowed the appeal and granted the injunction, Greckol J.A., in dissent, would have dismissed the appeal, finding that the majority applied incorrect legal principles to the Crown's application. [4]

4 For the reasons that follow, I would allow the appeal. In my respectful view, the chambers judge applied the correct legal test in deciding the Crown's application, and his decision that the Crown's case failed to satisfy that test did not, in these circumstances, warrant appellate intervention.

## II. Legislative Provisions

5 Sections 486.4(2.1) and 486.4(2.2) of the *Criminal Code*, [5] taken together, provide that a presiding judge or justice shall make an order, upon application by the victim or the prosecutor, for a publication ban in cases involving offences against victims under the age of 18 years. Specifically, the Crown or the victim is entitled to an order "directing that any information that could identify the victim *shall not be published* in any document or broadcast *or transmitted* in any way".

## III. Judicial History

### *A. The Chambers Judge's Reasons*

  

6 Acceding to the parties' submissions, the chambers judge applied a modified version of the tripartite test for an interlocutory injunction stated in *RJR-MacDonald Inc. v. Canada (Attorney General)*. [6] This required the Crown to prove (1) a strong *prima facie* case for finding CBC in criminal contempt; (2) that the Crown would suffer irreparable harm were the injunction refused; and (3) that the balance of convenience favoured granting the injunction.

7 As to the requirement of a strong *prima facie* case, the Crown had argued for a "broad interpretation" of s. 486.4(2.1)'s terms "publish[ed]" and "transmit[ted]", such that it would catch web-based articles posted *prior* to the publication ban. [7] The chambers judge, however, concluded that the case authorities did not support such an interpretation. In these circumstances, and applying the test for criminal contempt stated in *U.N.A. v. Alberta (Attorney General)*, [8] he found that the Crown could not "likely succeed" in proving beyond a reasonable doubt that CBC, by leaving the victim's identifying information on its website after the publication ban had been issued, was in "open and public defiance" of that order. [9]

8 Regarding the requirement of irreparable harm, the Crown had argued such harm would be suffered by the administration of justice, since the ongoing display of the victim's identifying information on CBC's website would deter others from seeking assistance or remedies. The chambers judge declined to so find, however, noting that the underlying policy objective of protecting a victim's anonymity loses significance where the victim is deceased. And, in assessing balance of convenience, the chambers judge determined that the compromising of CBC's freedom of expression, and of the public's interest in that expression, outweighed any harm to the administration of justice that would result from leaving the two impugned articles on CBC's website.

***B. The Court of Appeal***

9 At the Court of Appeal, the majority (Slatter and McDonald JJ.A.) reversed the chambers judge's decision and granted the mandatory interlocutory injunction sought by the Crown. The chambers judge, it held, had erred by characterizing this matter as requiring the Crown to demonstrate a strong *prima facie* case of criminal contempt. Rather, the Originating Notice, "[w]hile essentially civil in nature, ... has a 'hybrid' aspect to it" [10] , in that it seeks both a citation for criminal contempt *and* the removal of the victim's identifying information from CBC's website. The request for the interlocutory injunction, the majority explained, is "tied back" to the latter request for an order removing the identifying information, and not to the request for a criminal contempt citation. [11] The issue, therefore, was "whether the Crown has demonstrated a strong *prima facie* case entitling it to a mandatory order directing removal of the identifying material from the website". [12]

10 As to whether or not s. 486.4(2.1)'s reference to identifying information that is "published" is (as the Crown contends) met by the ongoing appearance of such information on a website after it is first posted, the majority conceded that "either position is arguable". [13] That said, the majority viewed the Crown as having a strong *prima facie* case for a mandatory interlocutory injunction, since, if "published" is construed as a continuous activity, CBC is arguably wilfully disobeying the publication ban. Further, such disobedience is harmful to the integrity of the administration of justice, and contrary to Parliament's direction that such orders are to be mandatory. [14] Finally, the balance of convenience did not favour CBC, since the publication ban must be presumed to be constitutional at this stage of the proceedings, and freedom of expression would not, in any case, be a defence against the contempt charge.

11 Justice Greckol would have dismissed the appeal. In her view, the majority's characterization of the relief sought in the Originating Notice as "hybrid" was misplaced, since the Crown's application for an interlocutory injunction was brought in respect of the sought-after citation for criminal contempt. The chambers judge asked the right question (being, whether the Crown could show a strong *prima facie* case of criminal contempt), and his exercise of discretion to refuse an injunction was entitled to deference. And here, where the proscriptions against "publish[ing]" and "transmitt[ing]" may reasonably bear two meanings, one capturing the impugned articles and one not, no strong *prima facie* case of criminal contempt could be shown. Further, and even allowing that open defiance of a facially valid court order may amount to irreparable harm to the administration of justice, the ambit of s. 486.4's proscriptions is an unsettled question. And, as the victim in this case is deceased, the privacy

  

of the victim is not vulnerable to harm. Finally, and even if the pertinent provisions of the *Criminal Code* are presumed constitutional, the chambers judge was entitled to consider freedom of expression in assessing the balance of convenience.

## IV. Analysis

### *A. What Is the Applicable Framework for Granting a Mandatory Interlocutory Injunction?*

12 In *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*.[15] and then again in *RJR — MacDonald*, this Court has said that applications for an interlocutory injunction must satisfy each of the three elements of a test which finds its origins in the judgment of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*.[16] At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious.[17] The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused.[18] Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.[19]

13 This general framework is, however, just that — general. (Indeed, in *RJR — MacDonald* the Court identified two exceptions which may call for "an extensive review of the merits" at the first stage of the analysis.[20]) In this case, the parties have at every level of court agreed that, where a *mandatory* interlocutory injunction is sought, the appropriate inquiry at the first stage of the *RJR — MacDonald* test is into whether the applicants have shown a strong *prima facie* case. I note that this heightened threshold was not applied by this Court in upholding such an injunction in*Google Inc. v. Equustek Solutions Inc.*[21] In *Google*, however, the appellant did not argue that the first stage of the *RJR — MacDonald* test should be modified. Rather, the appellant agreed that only a "serious issue to be tried" needed to be shown and therefore the Court was not asked to consider whether a heightened threshold should apply.[22] By contrast, in this case, the application by the courts below of a heightened threshold raises for the first time the question of just what threshold ought to be applied at the first stage where the applicant seeks a mandatory interlocutory injunction.

14 Canadian courts have, since *RJR — MacDonald*, been divided on this question. In Alberta, Nova Scotia and Ontario, for example, the applicant must establish a strong *prima facie* case.[23] Conversely, other courts have applied the less searching "serious issue to be tried" threshold.[24]

15 In my view, on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR — MacDonald* test is *not* whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie* case. A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel.[25] Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, "the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial".[26] The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in *RJR — MacDonald* as "extensive review of the merits" at the interlocutory stage.[27]

16 A final consideration that may arise in some cases is that, because mandatory interlocutory injunctions require a defendant to take positive action, they can be more burdensome or costly for the defendant. It must, however, be borne in mind that complying with prohibitive injunctions can also entail costs that are just as burdensome as mandatory injunctions.[28] While holding that applications for mandatory interlocutory injunctions are to be subjected to a modified *RJR — MacDonald* test, I acknowledge that distinguishing between mandatory and prohibitive injunctions can be difficult, since an interlocutory

  

injunction which is framed in prohibitive language may "have the effect of forcing the enjoined party to take ... positive actions".[29] For example, in this case, ceasing to transmit the victim's identifying information would require an employee of CBC to take the necessary action to remove that information from its website. Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, "what the practical consequences of the ... injunction are likely to be".[30] In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to *do* something, or to *refrain from doing* something.

17 This brings me to just what is entailed by showing a "strong *prima facie* case". Courts have employed various formulations, requiring the applicant to establish a "strong and clear chance of success";[31] a "strong and clear" or "unusually strong and clear" case;[32] that he or she is "clearly right" or "clearly in the right";[33] that he or she enjoys a "high probability" or "great likelihood of success";[34] a "high degree of assurance" of success;[35] a "significant prospect" of success;[36] or "almost certain" success.[37] Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.

18 In sum, to obtain a mandatory interlocutory injunction, an applicant must meet a modified *RJR — MacDonald* test, which proceeds as follows:

> (1) The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;
>
> (2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and
>
> (3) The applicant must show that the balance of convenience favours granting the injunction.

***B. Does the Liberty Net "Rarest and Clearest of Cases" Test Apply in These Circumstances?***

19 CBC argues that, on an application for an interlocutory injunction where a media organization's right to free expression is at stake, the application judge should apply the test stated in *Canada (Human Rights Commission) v. Canadian Liberty Net*.[38] This would entail the applicant showing "the rarest and clearest of cases"[39] , such that the conduct complained of would be impossible to defend.

20 In *Liberty Net*, the Court explained that the *RJR — MacDonald* tripartite test is not appropriately applied to cases of "pure" speech, comprising the expression of "the non-commercial speaker where there is no tangible, immediate utility arising from the expression other than the freedom of expression itself".[40] This appeal does not present such a case. The reason the Court gave in *Liberty Net* for not applying the *RJR — MacDonald* test to "pure" speech was that the defendant in such cases "has no tangible or measurable interest [also described as a 'tangible, immediate utility'] *other than the expression itself*".[41] Where discriminatory hate speech or other potentially low-value speech is at issue (as was the case in *Liberty Net*), the *RJR — MacDonald* test would "stac[k] the cards" against the defendant at the second and third stages.[42] In this appeal, however, the chambers judge correctly identified a "tangible, immediate utility" to CBC's posting of the identifying information, being the "public's interest" in CBC's right to express that information, and in freedom of the press.[43] Because CBC does not therefore face the same disadvantage as defendants face at the second and third stages of the *RJR — MacDonald* test in cases of low- to no-value speech, it is unnecessary to apply the "clearest of cases" threshold, and I would not do so.

***C. What Strong Prima Facie Case Must the Crown Show?***

  

21 As I have already canvassed, in this case, the majority at the Court of Appeal, in reversing the chambers judge, reasoned that he had mischaracterized the basis for which the Crown had sought the injunction. Specifically, the majority said that the Originating Notice, properly read, was "hybrid" [44] , such that the application for the injunction did not "relate directly" [45] to the criminal contempt citation, but to the direction sought that CBC remove the victim's identifying information from its website. The identical wording shared by part of the Originating Notice's preamble ("AND FURTHER TAKE NOTICE that an application will be made for an interim injunction, directing that [CBC] remove any information from their website that could identify the complainant in the [subject] case") and the part of the Originating Notice which sought an injunction ("That [CBC] be directed to remove any information from their website that could identify the complainant in the [subject] case") was said to demonstrate "that the request for an interim injunction is tied back ... to ... the removal of the objectionable postings". [46] The "strong *prima facie* case" which the Crown was bound to show, then, was *not* one of criminal contempt, but rather of an "entitl[ement] ... to a mandatory order directing removal of the identifying material from the website". [47]

22 In dissent, Greckol J.A. saw the matter differently. "A literal reading of the Originating Notice", she said, "shows that the Crown brought an application for criminal contempt and sought an interim injunction *in that proceeding*". [48] This was in her view confirmed by the record which reveals that the Crown had proceeded on the basis that its application for an interlocutory injunction was sought in respect of the citation for criminal contempt.

23 For two reasons, I agree with Greckol J.A. First, the Originating Notice itself, and the sequencing therein of the relief sought, belies its putatively hybrid character. It begins by giving notice ("TAKE NOTICE") of an "an [a]pplication ... for an Order citing [CBC] in criminal contempt of court". That notice is immediately followed by a *further* notice ("AND FURTHER TAKE NOTICE") of an "application ... for an interim injunction, directing that [CBC] remove any information from [its] website that could identify the complainant in the [subject] case". [49] The text "AND FURTHER TAKE NOTICE" makes plain that the two applications are linked, such that the latter is tied *not* to the mere placement by CBC of the victim's identifying information on its website, but to the sought-after criminal contempt citation. In other words, each prayer for relief does not launch an independent proceeding; rather, both relate to the alleged criminal contempt.

24 The second reason goes to the fundamental nature of an injunction and its relation to a cause of action. Rule 3.8(1) of the *Alberta Rules of Court* [50] requires that an originating application state *both* "the claim and the basis for it", *and* "the remedy sought". In other words, an applicant must record both "a basis" *and* "[a] remedy". An injunction is generally "*a remedy ancillary to a cause of action*". [51] And here, the Crown's Originating Notice discloses only a single basis for seeking that remedy: CBC's alleged criminal contempt of court. As I have already noted, this is consistent with how the Crown framed its case at the courts below.

25 The majority's conclusion at the Court of Appeal that the basis for the injunction is an "entitl[ement] ... to a mandatory order directing removal of the identifying material from the website" [52] , therefore, simply begs the question: what, precisely, is the source in law of that entitlement? An injunction is not a cause of action, in the sense of containing its own authorizing force. It is, I repeat, a remedy. This is undoubtedly why, before both the chambers judge and the Court of Appeal, the Crown framed the matter as an application for an interlocutory injunction in the proceedings for a criminal contempt citation. [53] And, on that point, I respectfully endorse Greckol J.A.'s conclusion that it was not for the Court of Appeal to re-cast the Crown's case as a civil application for an interlocutory injunction pending a permanent injunction. The Crown was bound to show a strong *prima facie* case of criminal contempt of court.

26 I add this. It is implicit in the foregoing analysis that, in some circumstances, an interlocutory injunction may be sought and issued to enjoin allegedly criminal conduct. The delineation of those circumstances, however, I would not decide here. To be clear, the disposition of this appeal should not be taken as standing for the proposition that injunctive relief is ordinarily or readily available in criminal matters, or that — even had the Crown been able to show in this case a strong *prima facie* case of criminal contempt — an injunction would have been available.

  

***D. Is the Crown Entitled to a Mandatory Interlocutory Injunction?***

27 The decision to grant or refuse an interlocutory injunction is a discretionary exercise, with which an appellate court must not interfere solely because it would have exercised the discretion differently. In *Metropolitan Stores*, [54] the Court endorsed this statement of Lord Diplock in *Hadmor Productions Ltd. v. Hamilton* [55] about the circumstances in which that exercise of discretion may be set aside. Appellate intervention is justified only where the chambers judge proceeded "on a misunderstanding of the law or of the evidence before him", where an inference "can be demonstrated to be wrong by further evidence that has [since] become available", where there has been a change of circumstances, or where the "decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge ... could have reached it". [56] This principle was recently affirmed in *Google*. [57]

28 In this case, and as I have explained, the first stage of the modified *RJR — MacDonald* test required the Crown to satisfy the chambers judge that there was a strong likelihood on the law and the evidence presented that it would be successful in proving CBC's guilt of criminal contempt of court. This is not an easy burden to discharge and, as I shall explain, the Crown has failed to do so here.

29 In *United Nurses of Alberta*, McLachlin J. (as she then was) described the elements of criminal contempt of court in these terms:

> To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*). The Crown must prove these elements beyond a reasonable doubt. [58]

30 As to the *actus reus* — that is, as to whether the Crown could demonstrate a strong *prima facie* case that CBC "defied or disobeyed [the publication ban] in a public way" [59] by leaving the victim's identifying information on its website — the chambers judge rejected the Crown's submission that s. 486.4(2.1)'s terms "publish[ed]" and "transmit[ted]" should be "broad[ly]" interpreted. [60] In his view, the meaning of that text was not so obvious that the Crown could "likely succeed at trial" in showing that s. 486.4(2.1) would capture the impugned articles on CBC's website, since they had been posted *prior* to the issuance of a publication ban. In other words, and as CBC argued before the chambers judge, the statutory text might also be reasonably taken as prohibiting only publication which occurred for the first time *after* a publication ban.

31 Significantly, the majority at the Court of Appeal conceded that "either position is arguable". [61] In my respectful view, that was, in substance, an acknowledgment that the Crown had not shown a strong *prima facie* case of criminal contempt. Before us, the Crown urged this Court to infer that the majority nevertheless "leaned" towards the Crown's preferred interpretation of "publish[ed]" when it stated that to see the matter otherwise would "significantly limit the scope of many legal rights and obligations that depend on making information available to third parties [and] [i]f publishing is a continuous activity, then it is also arguable that [CBC] is wilfully disobeying the court order". [62] But, even allowing that this may be so, the Crown's burden was not to show a case for criminal contempt that "leans" one way or another, but rather a case, based on the law and evidence presented, that has a *strong likelihood* of success at trial. And, again with respect, I see nothing in the chambers judge's reasons or, for that matter, in the majority reasons which persuades me that the chambers judge, in refusing the interlocutory injunction sought here, committed any of the errors described in *Hadmor* as justifying appellate intervention.

32 My finding on this point is determinative, and obviates the need to consider *mens rea*, or the other two stages of the *RJR — MacDonald* test.

**V. Conclusion**

33 I would allow this appeal.

*Appeal allowed.*

  

*Pourvoi accueilli.*

Footnotes

1 2016 ABQB 204, [2016] 9 W.W.R. 613 (Alta. Q.B.), at paras. 2-6 (emphasis added).

2 The Crown's Originating Notice uses the term "interim injunction". In substance, however, the Crown's application was for an interlocutory injunction. (See R.J. Sharpe, *Injunctions and Specific Performance* (4th ed. 2012), at paras. 2.15 and 2.55.)

3 A.R., at pp. 39-40.

4 2016 ABCA 326, 404 D.L.R. (4th) 318 (Alta. C.A.).

5 R.S.C. 1985, c. C-46.

6 [1994] 1 S.C.R. 311 (S.C.C.).

7 Chambers judge's reasons, at para. 26.

8 [1992] 1 S.C.R. 901 (S.C.C.), at p. 933.

9 Chambers judge's reasons, at para. 34.

10 para. 5.

11 para. 6.

12 para. 7.

13 para. 10.

14 para. 11.

15 [1987] 1 S.C.R. 110 (S.C.C.).

16 [1975] A.C. 396 (U.K. H.L.).

17 *RJR — MacDonald*, at pp. 334-35.

18 *RJR — MacDonald*, at pp. 334 and 348.

19 *RJR — MacDonald*, at p. 334.

20 pp. 338-39.

21 2017 SCC 34 (S.C.C.), [2017] 1 S.C.R. 824.

22 *Google*, at paras. 25-27.

23 *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 19 C.C.L.I. (4th) 161 (Alta. C.A.), at para. 4; *Modry v. Alberta Health Services*, 2015 ABCA 265, 388 D.L.R. (4th) 352 (Alta. C.A.), at para. 40; *Conway v. Zinkhofer*, 2006 ABCA 74 (Alta. C.A.), at paras. 28-29; *D.E. & Son Fisheries Ltd. v. Goreham*, 2004 NSCA 53, 223 N.S.R. (2d) 1 (N.S. C.A.), at para. 10; *Amec E & C Services Ltd. v. Whitman Benn & Associates Ltd.*, 2003 NSSC 112, 214 N.S.R. (2d) 369 (N.S. S.C.), at para. 20, aff'd 2003 NSCA 126, 219 N.S.R. (2d) 126 (N.S. C.A.); and *Cytrynbaum v. Look Communications Inc.*, 2013 ONCA 455, 307 O.A.C. 152 (Ont. C.A.), at para. 54.

 

24 *Sawridge Band v. R.*, 2004 FCA 16, [2004] 3 F.C.R. 274 (F.C.A.), at para. 45; *Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC*, 2015 FCA 104, 130 C.P.R. (4th) 414 (F.C.A.), at paras. 1 and 22-25; *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Ltd. Partnership*, 2011 SKCA 120, 341 D.L.R. (4th) 407 (Sask. C.A.), at para. 42; *La Plante v. Saskatchewan Society for the Prevention of Cruelty to Animals*, 2011 SKCA 43, [2012] 3 W.W.R. 293 (Sask. C.A.), at paras. 16-17; *Summerside Seafood Supreme Inc. v. Prince Edward Island (Minister of Fisheries, Aquaculture & Environment)*, 2006 PESCAD 11, 256 Nfld. & P.E.I.R. 277 (P.E.I. C.A.), at para. 65.

25 *Injunctions and Specific Performance*, at paras. 1.510, 1.530 and 2.640.

26 *Injunctions and Specific Performance*, at para. 2.640.

27 *RJR — MacDonald*, at pp. 338-39.

28 *Injunctions and Specific Performance*, at paras. 1.530 and 1.540. See also *Potash*, at paras. 43-44.

29 *Potash*, at para. 44; see also *Injunctions and Specific Performance*, at para. 1.540.

30 *National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd.*, [2009] UKPC 16, [2009] 1 W.L.R. 1405 (Jamaica P.C.), at para. 20.

31 *H&R Block Canada Inc. v. Inisoft Corp. (Ontario)* [2009 CarswellOnt 4261 (Ont. S.C.J. [Commercial List])], 2009 CanLII 37911, at para. 24.

32 *Fradenburgh v. Ontario Lottery & Gaming Corp.*, 2010 ONSC 5387 (Ont. S.C.J.), at para. 14; *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51 (Ont. Gen. Div.), at paras. 49 and 52 (citing *Shepherd Homes Ltd. v. Sandham*, [1970] 3 All E.R. 402 (Eng. Ch. Div.), at p. 409).

33 *Barton-Reid Canada Ltd. v. Alfresh Beverages Canada Corp.* [2002 CarswellOnt 3653 (Ont. S.C.J.)], 2002 CanLII 34862, at para. 9; *Bark & Fitz Inc. v. 2139138 Ontario Inc.*, 2010 ONSC 1793 (Ont. S.C.J.), at para. 12.

34 *Quality Pallets & Recycling Inc. v. Canadian Pacific Railway* [2007 CarswellOnt 2477 (Ont. S.C.J.)], 2007 CanLII 13712, at para. 16.

35 *West Nipissing Economic Development Corp. v. Weyerhaeuser Co.* [2002 CarswellOnt 4165 (Ont. S.C.J.)], 2002 CanLII 26148, at para. 16.

36 *Parker v. Canadian Tire Corp.*, [1998] O.J. No. 1720 (Ont. Gen. Div.), at para. 11.

37 *Barton-Reid*, at paras. 9, 12 and 17. (See, generally, M. A. Vermette, "A Strong Prima Facie Case for Rationalizing the Test Applicable to Interlocutory Mandatory Injunctions" in T. L. Archibald and R. S. Echlin eds., *Annual Review of Civil Litigation, 2011* (2011) 367, at pp. 378-79.)

38 [1998] 1 S.C.R. 626 (S.C.C.).

39 *Liberty Net*, at para. 49.

40 paras. 47 and 49.

41 para. 47 (emphasis in original).

42 para. 47.

43 Chambers judge's reasons, at para. 59.

44 para. 5.

45 para. 6.

  

46 C.A. reasons, at para. 6.

47 C.A. reasons, at para. 7.

48 C.A. reasons, at para. 23 (emphasis added).

49 A.R., at p. 39.

50 Alta. Reg. 124/2010.

51 *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 (S.C.C.), at p. 930 (emphasis added).

52 C.A. reasons, at para. 7.

53 C.A. reasons, at paras. 25-26; chambers judge's reasons, at para. 7.

54 pp. 154-55.

55 [1982] 1 All E.R. 1042 (U.K. H.L.), at p. 1046.

56 See also *British Columbia (Attorney General) v. Wale* (1986), [1987] 2 W.W.R. 331 (B.C. C.A.), aff'd [1991] 1 S.C.R. 62 (S.C.C.); *White Room Ltd. v. Calgary (City)*, 1998 ABCA 120, 62 Alta. L.R. (3d) 177 (Alta. C.A.); *Musqueam Indian Band v. Canada*, 2008 FCA 214, 378 N.R. 335 (F.C.A.), at para. 37, leave to appeal refused, [2008] 3 S.C.R. viii (note) (S.C.C.).

57 para. 22.

58 p. 933 (emphasis added).

59 Chambers judge's reasons, at para. 12.

60 para. 33.

61 C.A. reasons, at para. 10.

62 C.A. reasons, at para. 10; Transcript, at pp. 65 and 70-71.

# TAB 9

2019 ONCA 372
Ontario Court of Appeal

Forbes Energy Group Inc. v. Parsian Energy Rad Gas

2019 CarswellOnt 6863, 2019 ONCA 372, 306 A.C.W.S. (3d) 74, 93 B.L.R. (5th) 169

# Forbes Energy Group Inc. (Plaintiff / Appellant) and Parsian Energy Rad Gas, Pergas Oil & Gas DMCC and Frontier Corporate Holdings Ltd. (Defendants / Respondents)

Doherty, Paul Rouleau, David Brown JJ.A.

Heard: May 1, 2019
Judgment: May 7, 2019
Docket: CA C65957

Proceedings: reversing *Forbes Energy Group Inc. v. Parsian Energy Rad Gas* (2018), 2018 CarswellOnt 14193, 2018 ONSC 5103, Nishikawa J. (Ont. S.C.J.)

Counsel: Robert Staley, Jason Berall, for Appellant
Martin Mendelzon, for Respondents

Subject: Civil Practice and Procedure; Contracts; International

APPEAL by plaintiff from judgment reported at *Forbes Energy Group Inc. v. Parsian Energy Rad Gas* (2018), 2018 ONSC 5103, 2018 CarswellOnt 14193 (Ont. S.C.J.), granting defendants' motion for stay of proceedings.

***Per curiam*:**

1 At issue on this appeal is whether the motion judge erred in staying the Ontario action commenced by the appellant, Forbes Energy Group Inc. ("Forbes"), on the basis of *forum non conveniens*. In that action, Forbes seeks a declaration that it is under no obligation to make certain payments to the respondents, Pergas Oil & Gas DMCC ("DMCC"), Parsian Energy Rad Gas ("Parsian") and Frontier Corporate Holdings Ltd. ("Frontier"), under the Term Sheet entered into by the parties regarding an upstream oil and gas rights transaction in Iran.

2 The Term Sheet contains the following clause: "This term sheet shall be governed by and construed in accordance with the laws of England and the Parties agree to attorn to the courts of England" (hereafter the "Clause").

3 In December 2016, DMCC and Parsian demanded that Forbes make certain payments under the Term Sheet. Forbes disputed its obligation to do so and commenced this action in Ontario for a declaration that it was under no obligation to make the payments, together with other relief.

4 Relying on the Clause, DMCC and Frontier moved to stay the action in favour of the courts of England. The motion judge granted a stay. Although she found that Ontario courts had jurisdiction over the subject-matter of the dispute, she declined jurisdiction on the basis that Forbes had failed to demonstrate strong cause that the Clause should not be enforced: *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751 (S.C.C.) , at para. 29; *Novatrax International Inc. v. Hägele Landtechnik GmbH*, 2016 ONCA 771, 132 O.R. (3d) 481 (Ont. C.A.), at para. 5. Applying the strong cause test and the factors relevant to the *forum non conveniens* analysis, she held that England is the more appropriate forum than Ontario. The motion judge stayed the action. Forbes appeals.

 

5 On this appeal, the parties agree that the strong cause test only applies to forum selection clauses that by their terms grant exclusive jurisdiction to a foreign jurisdiction. Forbes submits that the motion judge made no finding that the Clause was an exclusive jurisdiction clause. The respondents counter that she did.

6 We are unable to read the reasons of the motion judge as containing any finding that the Clause amounted to an exclusive jurisdiction clause. In light of the jurisprudence referred to by the parties, we are not persuaded that the language used in the Clause amounts to an exclusive jurisdiction clause. That being the case, in light of the parties' consensus on the applicable legal principles, we conclude that the motion judge erred in using the strong cause test.

7 Given that conclusion, we accept Forbes' submission that this court should conduct a fresh *forum non conveniens* analysis in which the respondents must demonstrate that England clearly is the more appropriate forum: *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17, [2012] 1 S.C.R. 572 (S.C.C.) , at para. 108.

8 While the Clause remains a factor in the *forum non conveniens* analysis, it does not have determinative weight but must be considered together with all the other factors set out in para. 26 of *Young v. Tyco International of Canada Ltd.*, 2008 ONCA 709, 92 O.R. (3d) 161 (Ont. C.A.). Examining those factors:

(i) there was no evidence that the Term Sheet was signed in either England or Ontario;

(ii) we agree with the motion judge that: (a) there does not appear to be a strong connection between the subject matter of the Term Sheet and England; and (b) since the witnesses are scattered around the world, there is no one location that would be more convenient for all of the witnesses;

(iii) although the Term Sheet provides that the law of England is the governing law, it is a common occurrence for an Ontario court to apply foreign law: *A1 Pressure Sensitive Products Inc. v. Bostik Inc.*, 2009 ONCA 206 (Ont. C.A.) , at para. 4;

(iv) there is no suggestion of the loss of a legitimate juridical advantage; and

(v) on the record before us, there is nothing to suggest that the respondents contemplate bringing an action concerning the Term Sheet in England, thereby triggering Forbes' obligation under the Clause to attorn to the jurisdiction of the English courts.

9 Taken together, the evidence does not persuade us that the respondents have demonstrated that England is a clearly more appropriate forum in which to litigate the parties' dispute. Consequently, we are not prepared to decline the exercise of jurisdiction by the Ontario courts to hear the action.

10 For those reasons, we allow the appeal and set aside the stay granted by the motion judge. Forbes is entitled to its costs of the appeal fixed at $10,000, inclusive of disbursements and H.S.T. In accordance with the agreement of the parties, Forbes is also entitled to its costs of the motion below in the amount of $13,140.53, inclusive of disbursements and H.S.T.

*Appeal allowed.*

**End of Document**

# TAB 10

2009 ONCA 206
Ontario Court of Appeal

A1 Pressure Sensitive Products Inc. v. Bostik Inc.

2009 CarswellOnt 1190, 2009 ONCA 206, [2009] O.J. No. 916, 175 A.C.W.S. (3d) 1039

# A1 Pressure Sensitive Products Inc. (Plaintiff / Appellant) and Bostik, Inc. (Defendant / Respondent)

E.A. Cronk J.A., H.S. LaForme J.A., and S. Borins J.A.

Heard: February 17, 2009
Judgment: March 6, 2009
Docket: CA C49314

Proceedings: reversing *A1 Pressure Sensitive Products Inc. v. Bostik Inc.* (2008), 2008 CarswellOnt 8733 (Ont. S.C.J.)

Counsel: Kevin Sherkin, Anjali Mankotia for Appellant
J. Davis-Sydor for Respondent

Subject: International; Contracts; Civil Practice and Procedure; Torts

APPEAL by plaintiff from judgment reported at *A1 Pressure Sensitive Products Inc. v. Bostik Inc.* (2008), 2008 CarswellOnt 8733 (Ont. S.C.J.), dismissing action for lack of jurisdiction.

**Per Curiam:**

1 The motion judge found that Ontario did not have jurisdiction over the appellant's claim on the ground that there was no real or substantial connection between the defendant and Ontario. She, therefore, dismissed the plaintiff's claim which was for breach of contract and breach of warranty of fitness related to an adhesive product that the appellant had purchased from the respondent, an American company. The motion judge specifically found that there was no real and substantial connection between the subject matter of the action and Ontario notwithstanding that the appellant's business is in Ontario and that a substantial portion of the business relationship between the parties occurred in Ontario.

2 The motion judge's reasons essentially consist of a list of 27 reasons why she dismissed the plaintiff's claim. Virtually all of the reasons reference the respondent and its connection with the United States. As for the appellant, the motion judge said: "The only connection to Ontario is that the plaintiff operates in Ontario". This was not accurate. She said that in making her decision she relied on *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (Ont. C.A.). As a result of the decision she reached, she did not have to consider whether Ontario was the *forum conveniens* for the trial of the appellant's claim.

3 In *Muscutt* this court listed eight factors that the court should weigh in reaching its decision. It held that the real and substantial connection test is flexible and supports a broad approach in which the forum need meet only a minimum standard of suitability under which it must be fair for the case to be heard because the forum is a reasonable place for the action to take place. From the motion judge's brief reasons, it does not appear that she weighed the *Muscutt* factors. If she had, she may well have found a case favouring the assumption of jurisdiction against the out-of-province defendant. There was considerable evidence relating to facts occurring in Ontario. It is not possible to know whether she considered these facts, and if she considered them, why she discounted them.

4 The respondent's contract called for any dispute being resolved by the law of Wisconsin. This is a choice of law clause which, it appears, the motion judge read as a choice of jurisdiction clause. A choice of law clause is only one factor to consider. It is not determinative. If the case were to be tried in Ontario, the court could apply Wisconsin law. This is a common occurrence.

 

5 In the circumstances, we feel that the best course is to allow the appeal and order that the motion be re-argued before a different judge who will have the opportunity to weigh the *Muscutt* factors. He or she will decide whether Ontario should continue jurisdiction over the appellant's claim and, if so, whether there is a more convenient forum in which to try the case. We are not in a position to make these findings.

6 We would, therefore, allow the appeal, set aside the order of the motion judge and order that there be a re-hearing before a different judge. Costs of the appeal are reserved to the judge hearing the motion.

*Appeal allowed.*

**End of Document**

# TAB 11

2014 QCCS 3135, 2014 CarswellQue 6520, J.E. 2014-1270, EYB 2014-239196

2014 QCCS 3135
Cour supérieure du Québec

Homburg Invest Inc., Re

2014 CarswellQue 6520, 2014 QCCS 3135, J.E. 2014-1270, EYB 2014-239196

# In the Matter of the Plan of Compromise or Arrangement of : Homburg Invest Inc., Homburg Shareco Inc., Churchill Estates Development Ltd., Inverness Estates Development Ltd., CP Development Ltd. and North Calgary Land Ltd., Debtors-Petitioners, c. Homco Realty Fund (52) Limited Partnership, Homco Realty Fund (88) Limited Partnership, Homco Realty Fund (89) Limited Partnership, Homco Realty Fund (92) Limited Partnership, Homco Realty Fund (94) Limited Partnership, Homco Realty Fund (96) Limited Partnership, Homco Realty Fund (105) Limited Partnership, Homco Realty Fund (121) Limited Partnership, Homco Realty Fund (122) Limited Partnership, Homco Realty Fund (142) Limited Partnership, Homco Realty Fund (190) Limited Partnership, Homco Realty Fund (191) Limited Partnership and Homco Realty Fund (199) Limited Partnership, Mises en cause, et Stichting Homburg Bonds, Mise en cause, et Taberna Preferred Fundind VI, Ltd., Taberna Preferred Fundind VIII, Ltd., Taberna Europe CDO I P.L.C. and Taberna Europe CDO II P.L.C., Mises en cause, et Samson Bélair/Deloitte & Touche Inc., Monitor

Schrager J.C.S.

Audience: 10 juin 2014 - 12 juin 2014
Jugement: 30 juin 2014
Dossier: C.S. Qué. Montréal 500-11-041305-117

Avocat: *Me Martin Desrosiers*, for the Debtors / Petitioners
*Me Guy P. Martel, Me Danny Vu, Me Mathew De Angelis*, for Stichting Homburg Bonds
*Me Mason Poplaw, Me Jocelyn Perreault*, for Samson Bélair/Deloitte & Touche Inc.
*Me Sylvain Rigaud, Me Chrystal Ashby*, for mis-en-cause entities

Sujet: Insolvency; Civil Practice and Procedure; Corporate and Commercial; International

***Schrager J.C.S.*:**

1 The Debtors/Petitioners (« Debtors ») were subject to an initial stay order issued on September 9, 2011 pursuant to the *Companies' Creditors Arrangement Act* [1] (« CCAA ») by the Honourable Justice Louis Gouin. The latter has been charged with the management of the case but due to a conflict of interest with the attorneys the four (4) Taberna entities mises-en-cause in the instant proceedings (« Taberna »), the undersigned presided over the present matter.

2 After a number of extensions of the CCAA stay order, the Debtors filed an arrangement which was accepted by the statutory majority of creditors under the CCAA and subsequently sanctioned by the Court on June 5, 2013. Implementation of this plan, including payments thereunder, has begun.

3 The undersigned is called upon to adjudicate on the Debtor's Re-Amended Motion for Directions which was originally filed on January 25, 2013. The motion seeks resolution of issues regarding the rank *inter se* of, in essence, two series of debentures one held or administered by the mise-en-cause Stichting Homburg Bonds (« Stichting ») referred to above and the other by Taberna.

4 In May 2006, Homburg Invest Inc. (« HII »), one of the Co-Petitioners/ Debtors, entered into a trust indenture with Stichting as trustee providing, *inter alia*, for the issuance of bonds. In 2002, Homburg Shareco Inc. (« Shareco ») another Co-Petitioner

 

Debtor entered into an indenture also with Stichting providing for the issuance of additional bonds. The face-amount of the outstanding bonds as at the CCAA filing aggregated in excess of 400 Million Euros (or approximately 500 Million dollars) and constituted the largest single bloc of debt of the Debtor of approximately 1.8 Billion dollars.

5 In July 2006, HII entered into a « junior subordinate indenture » with Wells Fargo Bank, N.A. (« Wells Fargo ») providing for the issuance of 20 Million US dollar notes. A second indenture was signed at the same time providing for the issuance of 25 Million euro notes (hereinafter together, the 2006 Taberna Indentures).

6 Both of the 2006 Taberna Indentures contained the following clauses:

**SECTION 12.1. Securities Subordinate to Senior Debt.**

The Company covenants and agrees, and each Holder of a Security, by its acceptance thereof, likewise covenants and agrees, that, to the extent and in the manner hereinafter set forth in this Article XII, the payment of the principal of and any premium and interest (including any Additional Interest) on each and all of the Securities are hereby expressly made subordinate and subject in right of payment to the prior payment in full of all Senior Debt.

**SECTION 12.2. No Payment When Senior Debt in Default; Payment Over of ProceedsUpon Dissolution, Etc.**

(a) In the event and during the continuation of any default by the Company in the payment of any principal of or any premium or interest on any Senior Debt (following any grace period, if applicable) when the same becomes due and payable, whether at maturity or at a date fixed for prepayment or by declaration of acceleration or otherwise, then, upon written notice of such default to the Company by the holders of such Senior Debt or any trustee therefor, unless and until such default shall have been cured or waived or shall have ceased to exist, no direct or indirect payment (in cash, property, securities, by set-off or otherwise) shall be made or agreed to be made on account of the principal of or any premium or interest (including any Additional Interest) on any of the Securities, or in respect of any redemption, repayment, retirement, purchase or other acquisition of any of the Securities.

(b) In the event of a bankruptcy, insolvency or other proceeding described in clause (d) or (e) of the definition of Event of Default (each such event, if any, herein sometimes referred to as a "Proceeding"), all Senior Debt (including any interest thereon accruing after the commencement of any such proceedings) shall first be paid in full before any payment or distribution, whether in cash, securities or other property, shall be made to any Holder of any of the Securities on account thereof. Any payment or distribution, whether in cash, securities or other property (other than securities of the Company or any other entity provided for by a plan of reorganization or readjustment the payment of which is subordinate, at least to the extent provided in these subordination provisions with respect to the indebtedness evidenced by the Securities, to the payment of all Senior Debt at the time outstanding and to any securities issued in respect thereof under any such plan of reorganization or readjustment), which would otherwise (but for these subordination provisions) be payable or deliverable in respect of the Securities shall be paid or delivered directly to the holders of Senior Debt in accordance with the priorities then existing among such holders until all Senior Debt (including any interest thereon accruing after the commencement of any Proceeding) shall have been paid in full.

(c) In the event of any Proceeding, after payment in full of all sums owing with respect to Senior Debt, the Holders of the Securities, together with the holders of any obligations of the Company ranking on a parity with the Securities, shall be entitled to be paid from the remaining assets of the Company the amounts at the time due and owing on account of unpaid principal of and any premium and interest (including any Additional Interest) on the Securities and such other obligations before any payment or other distribution, whether in cash, property or otherwise, shall be made on account of any Equity Interests or any obligations of the Company ranking junior to the Securities and such other obligations. If, notwithstanding the foregoing, any payment or distribution of any character on any security, whether in cash, securities or other property (other than securities of the Company or any other entity provided for by a plan of reorganization or readjustment the payment of which is subordinate, at least to the extent provided in these subordination provisions with respect to the indebtedness evidenced by the Securities, to the payment of all Senior

  

> Debt at the time outstanding and to any securities issued in respect thereof under any such plan of reorganization or readjustment) shall be received by the Trustee or any Holder in contravention of any of the terms hereof and before all Senior Debt shall have been paid in full, such payment or distribution or security shall be received in trust the benefit of, and shall be paid over or delivered and transferred to, the relevant holders of the Senior Debt at the time outstanding in accordance with the priorities then existing among such holders for application to the payment of all Senior Debt remaining unpaid, to the extent necessary to pay all such Senior Debt (including any interest thereon accruing after the commencement of any Proceeding) in full. In the event of the failure of the Trustee or any Holder to endorse or assign any such payment, distribution or security, each holder of Senior Debt is hereby irrevocably authorized to endorse or assign the same.

(Underlined by the Court)

7 Senior Debt is broadly defined in the 2006 Taberna Indentures and it is not contested that it includes the debt existing under and pursuant to the Stichting bonds.

8 Thus, the 2006 Taberna notes were subordinate to the Stichting debt, in that once a payment of capital or interest on the Stichting debt was in default, no payment on account of the 2006 Taberna Indentures was permitted by HII.

9 The 2006 Taberna Indentures further provided that they are governed by the laws of the State of New York.

10 In 2011, HII was in default in virtue of certain financial covenants provided in the 2006 Taberna Indentures. Negotiations ensued between the business people followed by exchanges between the lawyers culminating in the signature of an Exchange Agreement on February 28, 2011 providing for the issuance of new indentures and new notes thereunder, to replace the 2006 Taberna Indentures and notes.

11 Accordingly, and also on February 28, 2011, two new indentures and notes were issued to replace the Dollar and Euro 2006 Taberna Indentures (the « 2011 Taberna Indentures »). These notes remain outstanding.

12 Sections 12.1 and 12.2 referred to above were altered in that the pertinent portions of the said Sections 12.1 and 12.2 now read as follows:

> **SECTION 12.1. Securities Subordinate to Senior Debt.**
>
> The Company covenants and agrees, and each Holder of a Security, by its acceptance thereof, likewise covenants and agrees, that, to the extent and in the manner hereinafter set forth in this Article XII, the payment of the principal of and any premium and interest (including any Additional Interest) on each and all of the Securities are hereby expressly made subordinate to the Senior Debt. Notwithstanding anything to the contrary contained herein, the securities issued pursuant to those certain Junior Subordinated Indentures, each dated as of the date hereof, between the Company and the Trustee shall not be Senior Debt or otherwise entitled to the subordination provisions of this Article XII and the Securities shall rank pari passu in right of payment to such securities.
>
> **SECTION 12.2. No Payment When Senior Debt in Default.**
>
> (a) In the event and during the continuation of any default by the Company in the payment of any principal of or any premium or interest on any Senior Debt (following any grace period, if applicable) when the same becomes due and payable, whether at maturity or at a date fixed for prepayment or by declaration of acceleration or otherwise, then, upon written notice of such default to the Company by the holders of such Senior Debt or any trustee therefore, unless and until such default shall have been cured or waived or shall have ceased to exist, no direct or indirect payment (in cash, property, securities, by set-off or otherwise) shall be made or agreed to be made on account of the principal of or any premium or interest (including any Additional Interest) on any of the Securities, or in respect of any redemption, repayment, retirement, purchase or other acquisition of any of the Securities. »
>
> (Underlined by the Court)

  

13 Of most significance and pertinent to these presents is the fact that Section 12(b) and (c) of the 2006 Taberna Indentures were deleted. Section 12.2(b) provided for full payment of the « Senior Debt » (in this case, Stichting) in priority to the Junior Debt (i.e. Taberna) in the event of a bankruptcy or insolvency of HII. Section 12.2(c) provided that in the event of payment received by Wells Fargo as trustee under the Taberna Indentures, in contravention of Section 12.2(b), then such proceeds would be remitted or turned over to Senior Debt holders. Such a clause is commonly referred to as a « turnover provision ».

14 The definition of « Senior Debt » and the New York choice of law have not been modified.

15 The effect of the foregoing modifications in the context of the CCAA arrangement of the Debtors is the gravaman of this litigation.

16 According to Taberna, the effect of the drafting changes taken with other factors to be discussed hereinbelow, is that the claim of Taberna notes is no longer subordinate to the Stichting claim and should be paid *pari passu* with Stichting under the plan of arrangement approved by the Court.

17 As stated above, the Debtors' plan of arrangement was sanctioned by the Court on June 5, 2013, in other words after the Motion for Directions was filed but before the present matter was set down for hearing.

18 Under the plan of arrangement, all ordinary creditors including holders of Stichting bonds and Taberna notes were grouped in one and the same class. The intention of the Debtors supported by the Monitor was to pay nothing on account of the Taberna claim given the provisions of the subordination clauses referred to above and the fact that Stichting would not, under the plan, be paid in full. This was and is not acceptable to Taberna. However, in order to allow the HII plan to be confirmed and allow HII to move forward with its reorganization, the following was provided in the plan:

> 9.6 b) Notwithstanding any other provision in the Plan, HII and the Monitor shall comply with the Taberna Order in making any distributions on account of the Taberna Claim under the Plan, using the reserves created under the HII/Shareco Plan, as applicable. To the extent that the Taberna Order directs that the distribution entitlement under the Plan in respect of the Taberna Claim shall be remitted to any Person or Persons other than the holders of the Taberna Claim, any Newco Common Shares Cash-Out Election made by any holders of the Taberna claim shall be null.
>
> **Taberna order** » means a Final Order of the Court addressing the distribution entitlement of the holders of the Taberna Claim under the Plan in respect of the Taberna Claim and authorizing and directing HII and the Monitor to rely on such Order in connection with the Plan;

19 The present judgment is the Taberna order.

20 By voting for the plan, the statutory majority agreed with HII that the issue of subordination between Stichting and Taberna would be resolved after the plan was sanctioned. Even though Taberna voted against the plan, it did not oppose this manner of proceeding or insist that HII's Motion for Directions be heard prior to the Court sanction of the plan.

21 For purposes of the proof and hearing herein, the parties relied on the affidavit in support of the Motion for Directions as well as the exhibits filed by consent and admissions filed in the Court record. Only the expert witnesses testifying on the content and effect of New York law were heard *viva voce*.

## SUMMARY OF THE PARTIES' POSITION

### *Position of Taberna*

22 Taberna submits that it should receive the same treatment as the Stichting bondholders under the plan of arrangement, or in other words be paid on a *pari passu* basis.

  

23 Taberna contends that the subordination contained in Section 12 of the 2011 Taberna Indentures no longer has effect because the bankruptcy language and the turnover provisions found in the 2006 Taberna Indentures were deleted so that in a bankruptcy or insolvency, Taberna debt is no longer subordinate and Taberna no longer has the obligation to turnover any entitlements to Stichting.

24 Taberna continues that the deletion of the language was a result of a negotiation between the business people followed by exchanges between the attorneys after HII's covenant default which led to the Exchange Agreement and the 2011 Taberna Indentures. It was part of the consideration for forbearing the covenant defaults. According to Taberna, the parties involved in the negotiation intended the result that Taberna no longer be subordinate in the event of a bankruptcy or insolvency.

25 Moreover, the fact that Taberna was placed in the same class for purposes of the plan of arrangement as Stichting (and indeed the same class as all of the unsecured creditors) dictates that Taberna should receive the same treatment as the other unsecured creditors, or in other words not be treated in a subordinate fashion.

***Position of the Debtor, Stichting and the Monitor***

26 The other parties contend that the drafting changes left the basic subordination language intact, so that the fundamental legal position of the Taberna debt remains unchanged - i.e. it is subordinate to Stichting and other HII creditors.

27 The wording of the 2011 Taberna Indentures is clear that Taberna is subordinate and the Court should not and indeed is not permitted by New York law, to look beyond the clear terms of the agreement between the parties. Under the parole evidence rule of New York law, evidence extrinsic to the document should not be considered unless there is an ambiguity on the face of the document. In such regard, no comparison should be made between the 2011 Taberna Indentures and the wording of the 2006 Taberna Indentures, to draw any inference (or ambiguity) from the deletion of the portions of Section 12.2. Equally the Exchange Agreement should not be considered in reading or interpreting the 2011 Taberna Indentures.

28 The parties other than Taberna add that there is no legal impediment under the CCAA to placing two (2) creditors in the same class for voting purposes though they may not under the plan of arrangement receive equal treatment on distribution or payment of dividends.

29 It is underlined that Stichting was a third-party beneficiary of the 2006 Taberna Indentures (as well as the 2011 Taberna Indentures), such that its rights could not be altered without its consent. Thus, the subordination from which it benefited under the 2006 Taberna Indentures could not be modified without its consent. Stichting was not a party to the Exchange Agreement nor to any of the negotiations leading up to the Exchange Agreement. Its consent was not obtained, nor even sought.

30 Moreover, Section 12.6 of the 2011 Taberna Indentures (section 12.7 in the 2006 Taberna Indentures) provides that a waiver of the subordination may not be presumed so that the fact that the Debtor may have placed Stichting in the same class as Taberna under the plan of arrangement (and Stichting not protesting) cannot be interpreted against Stichting as a waiver of the subordination from which it benefits under the 2011 Taberna Indentures.

**DISCUSSION**

31 In virtue of the choice of law clause in both the 2011 Taberna Indentures and the 2006 Taberna Indentures, the law of the State of New York applies. Though New York law applies to the interpretation and the validity of the contract, it is local law that applies to the insolvency estate established pursuant to the CCAA[2] so that issues of distribution in the insolvency or questions of priority of payment are decided by application of the *lex fori*[3]. In Québec private international law, insolvency laws are characterized as procedural, so that the conflict rule indicates that the law of the forum applies[4].

32 Since New York law is taken as a fact to be proved by expert testimony, each of Taberna, Stichting and the Monitor called expert witnesses who also, in accordance with Article 402.1 C.C.P., had filed reports.

  

33 Mr. Howard E. Levine, a practicing attorney and a former New York Court of Appeal Judge opined for Stichting that under New York law a clear and unambiguous contract is deemed « the definitive expression of the contracting parties' intent and must be enforced according to its terms, without reference to extrinsic evidence » (i.e. evidence other than the language used in the contract itself). Such extrinsic evidence may only be invoked where the language of the contract is ambiguous. Extrinsic evidence cannot be relied upon to create an ambiguity in the text of the contract. Since the subordination language used in the 2011 Taberna Indentures is clear and unambiguous, then, under New York law, extrinsic evidence would not be admitted. The lack of a turnover provision does not change the subordinated status of the Taberna notes. Mr. Levine was adamant that the New York courts strictly apply this parole evidence rule but he conceded that interrelated contracts executed contemporaneously may be read together.

34 Mr. Jeffrey D. Saferstein, a New York insolvency attorney, was called as an expert by the Monitor and echoed Mr. Levine's opinion on contract law and added an insolvency dimension.

35 Mr. Saferstein agreed that the subordination language in the 2011 Taberna Indentures was clear and unambiguous so that given the default, « Senior Debt » (i.e. the Stichting claims) must be paid in full before any monies can be received by Taberna noteholders. Turnover provisions are usually found in New York subordination agreements, but the absence of such a clause does not dilute the effect of the remaining subordination language. The turnover language reinforces the subordination, but its absence does not fundamentally alter the subordinated rights. In a New York insolvency, the US Bankruptcy Court would look at New York state law as the law of the contract and based on the parole evidence rule would exclude extrinsic evidence and give effect to the clear terms of the subordination of the 2011 Taberna Indentures, according to Mr. Saferstein.

36 Mr. Peter S. Partee, Taberna's expert, is also a New York insolvency lawyer. His quality as an expert was challenged since he is a partner in the law firm representing Taberna and it was argued that he did not have sufficient independence to be qualified as an expert. The undersigned dismissed the objection at the hearing, considering that the issue would go to probative value of the testimony rather than the qualification of Mr. Partee as an expert. This is particularly so because the principal concept of foreign law dealt with by the experts (i.e. the exclusion of extrinsic evidence when the terms of the parties' contract are clear and unambiguous) is not really that « foreign » at all. Québec law shares similar rules of evidence and interpretation.

37 Mr. Partee finds in the fact of the deletion of the turnover provisions from the 2006 Tarberna Indentures and in the extrinsic evidence, proof of the parties' intent that the subordination of the Taberna debt cease to have effect in an insolvency filing. The presence of a turnover provision is common and the fact of its deletion is significant and does not constitute parole evidence, so that the deletion would be considered by a New York court in the opinion of Mr. Partee. Absent the turnover, a court would not impose such an obligation on Tarberna - i.e. to turnover any entitlement to or funds received in an insolvency. Mr. Partee analyzed the turnover clause in the context of US bankruptcy proceedings where turnover provisions allow senior and subordinated debts to be classified together in a plan (for voting purposes) but not to receive the same financial treatment since the subordinated creditor will be obliged to turnover what it receives pursuant to its contractual obligations.

38 Mr. Partee also underlined in his testimony that the recitals of the 2011 Taberna Indentures refer explicitly to the concurrent Exchange Agreement which in turn refers to the 2006 Taberna Indentures. Thus, he argues, those documents are not extrinsic to the 2011 Taberna Indentures and may be considered in the interpretation exercise.

39 Counsel for Taberna went further, arguing that certain drafting inconsistencies brought about ambiguity so that the negotiations and email exchanges between the business people and counsel of the Debtors and Taberna leading up to the signing of the 2011 Taberna Indentures should be considered by this Court.

40 The undersigned does not believe that this Court must choose one expert's opinion over the other. The resolution of the differing expert's opinions does not change the outcome. The subordination clause clearly establishes the principal. The extrinsic evidence adduced by Taberna is not convincing of any intention to change the principal of subordination that existed under the 2006 Taberna Indentures. Canadian insolvency law (with Québec civil law as suppletive) provides that the effect of

  

that subordination in the insolvency of the Debtor is that the Taberna debt is to be treated as subordinate and not paid unless and until full payment has been made to the Senior Debt (including Stichting) .

41 The undersigned has considered the Exchange Agreement as a concurrent document and thus has considered it not to be extrinsic evidence. Since the Exchange Agreement specifically refers to the 2006 Taberna Indentures, the undersigned has considered the previous subordination drafting.

42 It is accepted in Canadian insolvency law that in proposals under the *Bankruptcy and Insolvency Act* [5] (« BIA"") to which CCAA arrangements are fundamentally similar, the rights of the debtor vis-à-vis its creditors is altered under the proposal but not the rights of the creditors *inter se* [6] .

43 Subordination clauses are fully enforceable in a bankruptcy or insolvency context [7] . Giving effect to a subordination clause as HII proposed does not make a plan unfair or unreasonable [8] as the fair and reasonable criterion for court sanction of a CCAA plan of arrangement does not require equal treatment of all creditors [9] .

44 Subordination clauses not containing express language addressing the effect of the subordination in a bankruptcy are given effect in a bankruptcy, nonetheless [10] .

45 Subordinate creditors have been ordered to turnover to senior creditors monies received in an insolvency based on general subordination language - i.e. absent a turnover clause [11] .

46 Significantly, in *Stelco* [12] , the Ontario Court of Appeal confirmed Farley, J. that a debtor may group subordinate with senior debt in classification. The creditors are classified according to their rights vis-à-vis the debtor [13] . Both Stichting and Taberna are unsecured note or debenture debt. It is their rights *inter se* which differ.

47 It is noteworthy that on the facts of the *Stelco* case, there was a turnover clause which was characterized as reinforcing the subordination [14] , which in turn reinforces Mr. Safestein's testimony before the undersigned that the general language is sufficient.

48 The Ontario Court of Appeal has stated that classification that would jeopardize plans of arrangement should not be favoured [15] . In *Stelco* as here, junior debt was grouped with senior debt since the junior debt was « out of the money » and accordingly would vote against the plan, as did Taberna in the present case. If placed in their own class, the Taberna noteholders could either defeat the plan, or not be bound by the plan so that the Debtor would be unable to arrange all of its debts. The debt of all the other creditors, senior to Taberna would be arranged but that of Taberna would not be arranged since they would not be bound by the plan.

49 Mr. Partee and Mr. Saferstein explained that in US bankruptcy law, the cram down provisions of the US Bankruptcy Code could allow the Court to sanction a plan and bind a creditor in a separate class who had voted against the plan. However, this possibility does not exist under the CCAA so that the « cram down » must exist at the voting level by grouping subordinate debt with senior debt. Otherwise, junior debt would have a veto or an option of not being bound which is what Farley, J. characterized as the « tyranny of the minority » [16] .

50 In the second round of *Stelco* litigation, the Ontario Court of Appeal again confirmed the trial judge (this time, Wilton-Siegel, J.) in giving effect to the subordination (*albeit* containing a turnover) but emphasizing the principle applicable here that a plan vote and implementation do not alter the rights of creditors *inter se.*

51 Accordingly, applying principles of Canadian insolvency law to the subordination in the present cause, Taberna remains subordinate in the insolvency and this absent the specific bankruptcy language and a turnover clause.

52 Unfortunately for Taberna, the extrinsic evidence adduced is not helpful to its case.

  

53 The testimony of Mr. Miles, the officer of HII involved in the business negotiation of the 2011 Taberna Indentures, at best, might support an argument that the new language was intended to eliminate subordination in the event that HII went into a bankruptcy liquidation [17]. However, the present regime is that of a plan of arrangement under the CCAA. There is no proof that there was a meeting of the minds that subordination ended within an insolvency filing.

54 The email exchanges of draft wording between the attorneys charged with preparing the 2011 Taberna Indentures are not proof of any meeting of the minds either. Initially, a draft was sent by Taberna's lawyer eliminating the whole subordination section from the 2006 Taberna Indentures. HII counsel replied with a request that the omitted subordination language be reinserted into the document. The end-result was the present wording. After HII consulted Dutch and Canadian counsel, the present wording was accepted. Taberna's counsel at trial invokes this exchange as part of its argument that it was agreed that there would be no turnover obligation in the event of an insolvency. However, the position of Canadian and Dutch counsel is equally consistent with the position of the Canadian case law summarized above that the general subordination language was sufficient to continue the status of Taberna debt as fully subordinated notwithstanding an insolvency filing and notwithstanding the absence of specific turnover language. Taberna counsel may have sought an advantage for Taberna in the drafting but no meeting of the minds to change the basic subordination concept has been demonstrated.

55 Taberna counsel's argument that the modification to the subordination was the consideration for Taberna forbearing the HII covenant default is not supported by the evidence. It is axiomatic that unsecured creditors generally benefit from their debtor continuing in business and avoiding forced liquidation. Particularly in this case, Taberna received letters of credit aggregating approximately $2 Million. Payment under the letters of credit was not subordinated. Taberna also received fee compensation in the six figures as additional consideration for entering into the Exchange Agreement and the 2011 Taberna Indentures. Payment to Taberna under the letters of credit is explicitly stated in the 2011 Taberna Indentures not to be subject to the subordination. Clearly, if the bargain had been that subordination would cease on bankruptcy or insolvency filing, then the parties could have easily so stated as they did for the payment under the letters of credit.

56 Most significantly, and in itself fatal to Taberna's position is the fact that Stichting was not a party to the negotiations leading up to the 2011 Taberna Indentures nor to the documents themselves.

57 Section 1.10 of both the 2006 and 2011 Taberna Indentures provides as follows:

> **SECTION 1.10** ***Benefits of Indenture***
>
> Nothing in this Indenture or in the Securities, express or implied, shall give to any Person, other than the parties hereto and their successors and assigns, the holders of Senior Debt and the Holders of the Securities any benefit or any legal or equitable right, remedy or claim under this Indenture.

58 Accordingly, and in virtue of Section 1.10, Stichting can rely on the terms of the Taberna Indentures and claim the benefit thereof.

59 Moreover, Section 12.7 of the 2006 Indentures (equivalent to Section 12.6 in the 2011 Taberna Indentures) provides as follows:

> **SECTION 12.7** ***No Waiver of Subordination Provisions***
>
> (a) No right of any present or future holder of any Senior Debt to enforce subordination as herein provided shall at any time in any way be prejudiced or impaired by any act or failure to act on the part of the Company or by any act or failure to act, in good faith, by any such holder, or by any noncompliance by the Company with the terms, provisions and covenants of this Indenture, regardless of any knowledge thereof that any such holder may have or be otherwise charged with.

 

> (b) Without in any way limiting the generality of paragraph (a) of this Section 12.7, the holders of Senior Debt may, at any time and from to time, without the consent of or notice to the Trustee or the Holders of the Securities, without incurring responsibility to such Holders of the Securities and without impairing or releasing the subordination provided in this Article XII or the obligations hereunder of such Holders of the Securities to the holders of Senior Debt, do any one or more of the following: (i) change the manner, place or terms of payment or extend the time of payment of, or renew or alter, Senior Debt, or otherwise amend or supplement in any manner Senior Debt or any instrument evidencing the same or any agreement under which Senior Debt is outstanding, (ii) sell, exchange, release or otherwise deal with any property pledged, mortgaged or otherwise securing Senior Debt, (iii) release any Person liable in any manner for the payment of Senior Debt and (iv) exercise or refrain from exercising any rights against the Company and any other Person.

60 Accordingly, Stichting senior rights existing at the time of the 2011 Taberna Indentures could not be waived or altered by HII dealing with Taberna alone, the whole in virute of the 2006 Taberna Indentures. Stichting's agreement was necessary.

61 This is clear on the basis of the afore-mentioned provisions and is underscored by the application of the principles of the Québec Civil Code dealing with the stipulation in favour of a third-party beneficiary to a contract (see Article 1444 and following of the Québec Civil Code).

62 There is no evidence of any revocation of the stipulation in favour of Senior Debt agreed to by Stichting. Indeed, the stipulations in their favour (Article 1.10) are reiterated in the 2011 Taberna Indentures.

63 In view of all of the foregoing, any debt under the 2011 Taberna Indentures is subordinate to the Stichting debt and based on the clear terms of the 2011 Taberna Indentures cannot receive payment unless and until Senior Debt including Stichting debt is paid in full.

64 Taberna's argument that the plan implementation changed the foregoing, is simply not correct. As stated above, the plan of arrangement does not alter the rights of creditors *inter se* [18] . Moreover, the process undertaken of seeking a judgment on the matter and writing into the plan that Taberna's claim would be dealt with on the basis of the Court order to be issued pursuant to such legal proceedings was not only a valid manner of dealing with the issue, but was a commercially practical manner of allowing the plan to move forward for the benefit of HII and all of the creditors and other stakeholders. Such an approach attains the policy objectives of the CCAA and was lauded by the Ontario Court of Appeal in *Stelco* [19] , in similar circumstance to this case.

65 Equally, neither Stichting nor the Monitor can validly argue that Taberna renounced its position or waived any right by not contesting the classification. The Motion for Directions was tabled prior to the plan. Everyone involved knew what the issue was. Taberna voted against the plan and awaited its day in court on the Motion to learn how its claim would ultimately be treated. It bought into the same commercially reasonable approach as the other parties in resolving the issue while allowing the plan to move forward. There was no waiver or renunciation by Taberna of its rights.

66 The Monitor aggressively supported Stichting's position. Mr. Saferstein, the expert produced by the Monitor, provided useful evidence since he brought a bankruptcy perspective into the evidence of US or New York law. There was however an inevitable overlap with Stichting's expert evidence made through Mr. Levine who did not deal with the the bankruptcy law effects of the subordination but solely the effect as between the parties. Accordingly, Stichting will be awarded costs including those of Mr. Levine fixed at US$76,413.00 according to the evidence filed at the hearing. Since no proof was made of the applicable exchange rate, this will be subject to taxation. The Monitor will be awarded one half of its expert's costs which will be subject to taxation since invoices were not filed at the hearing. Also, the Monitor did not testify nor file a report as is customary in order to bring the Court up to date on the state of the CCAA file. In view of the foregoing, no judicial costs of the Monitor will be awarded other than half of its expert fees.

67 Since HII's position was essentially represented by Stichting and the Monitor, no costs will be awarded to HII.

 

68 HII's counsel amended the conclusions of the Motion for Directions at the request of the undersigned to avoid reference to terms defined outside of the conclusions. The other parties did not contest the wording so that the conclusions in this judgment will follow such wording.

**FOR ALL OF THE FOREGOING REASONS, THE COURT:**

69 *GRANTS* the Petitioners' *Re-amended Motion for Directions* (the "Motion");

70 *DECLARES* that the payment of any and all amounts owing under and pursuant to:

> 70.1. Taberna Preferred Funding VI, Ltd.'s US $12 million interest pursuant to a Junior Subordinated Indenture dated as of July 26, 2006 (the "2006 USD Indenture") by and between Homburg Invest Inc. ("HII") and Wells Fargo Bank, N.A. ("Wells Fargo") for the issuance of US $20 million junior subordinated notes due 2036 (the "Original Taberna VI Note");
>
> 70.2. The note issued to Taberna Preferred Funding VIII, Ltd. ("Taberna VIII") pursuant to a Junior Subordinated Indenture dated as of February 28, 2011 (the "2011 Taberna VIII Indenture") by and between HII and Wells Fargo (the "2011 Taberna VIII Note"); and
>
> 70.3. The notes issued to Taberna Europe CDO I P.L.C. and Taberna Europe CDO II P.L.C. on February 28, 2011 witnessing their respective interest of €20 million and €5 million pursuant to a Junior Subordinated Indenture dated as of February 28, 2011 (collectively with the 2006 USD Indenture and the 2011 Taberna VIII Indenture, the "Taberna Indentures") by and between HII and Wells Fargo for the issuance of €25 million junior subordinated notes due 2036 (the "2011 Taberna Europe Notes");
>
> (the Original Taberna VI Note, the 2011 Taberna VIII Note and the 2011 Taberna Europe Notes are collectively referred to as the "Current Taberna Notes") is subordinated to the full and complete payment of any and all amounts owing in respect of the principal of and any premium and interest on all debt of HII (excluding trade accounts payable or liabilities arising in the ordinary course of business), whether incurred on or prior to the date of the Indentures or thereafter incurred, unless it is expressly provided in the instrument creating or evidencing the same that such obligations are not superior in right of payment to the Current Taberna Notes (the "Senior Debt"), including without limitation Stichting Homburg Bonds' claims against HII pursuant to a Trust Indenture dated as of December 15, 2002, and any related supplemental indentures thereto, and a Trust Indenture dated as of May 31, 2006 as guaranteed by HII pursuant to a Guarantee Agreement dated as of December 15, 2002 (the "Bonds"), unless and until the Senior Debt is fully satisfied;

71 *ORDERS* that for the purpose of any distribution to occur under the Fourth Joint Amended and Restated Plan of Compromise and Reorganization of HII and Homburg Shareco Inc. dated as of March 27, 2014 (the "Plan"), any distribution to the holders of the Current Taberna Notes by virtue of their status as unsecured creditors and holders of the Current Taberna Notes shall be remitted to the holders of the Senior Debt on a pro-rata basis, including without limitation the Bonds, unless and until the Senior Debt is fully satisfied;

72 *CONDEMNS* the mis-en-cause Taberna entities to judicial costs in favour of the mis-en-cause Stichting Homburg Bonds including experts' fees of US$76,413.00 subject to taxation but only for conversion to Canadian dollars, and to one half the expert costs of the Monitor regarding the report and testimony of Mr. Jeffrey Saferstein subject to taxation.

Notes de bas de page

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

2 DICEY AND MORRIS, The Conflict of Laws, 2000, par. 31-040).

 

3 *Todd Shipyards Corporation vs Ioannis Daskalelis, The*, [1974] S.C.R. 1248; DICEY, op.cit., par. 7-032.

4 C. EMANUELLI, Droit International Privé Québecois, 3e ed., 2011 para. 582; J. WALKER, CASTEL & WALKER, Canadian Conflict of Laws, 6th ed., pp. 6-7 and 29-7.

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

6 *Merisel Canada Inc. vs 2862565 Canada Inc.,* , 2002 R.J.Q. 671 (QCCA)..

7 Re *Maxwell Communications Corp,* [1994] 1 AII.E.R. 737 (Ch.D.) pp. 13-14, 21; *Bank of Montréal vs Dynex*; (1997) 145 D.L.R. 4th 499 (Alta Q.B.) confirmed on other grounds 182 D.L.R. 4th 640 (Alta C.A.) and [2002] 1 S.C.R. 146.

8 *Bank of Montréal vs. Dynex*, ibid.

9 *Air Canada*, (2004) 2 C.B.R. (5th) 4 at para 2. and 11 (Farley, J.).

10 *Air Canada*, ibid.

11 *Merisel Canada Inc. vs. 2862565 Canada Inc.,* op.cit.

12 *Re Stelco*, (2005) 15 C.B.R. (5th) 297 (Ont S.C.); affirmed (2005) 15 C.B.R. (5th) 307 (Ont. C.A.).

13 See s. 22 CCAA concerning criteria for classification.

14 Re *Stelco*, 2007 ONCA 483; , para.483; para. 41-45.

15 Re *Stelco*, (2005), C.A.,op.cit. para. 36.

16 Re *Stelco*, (2005), op.cit., para. 15.

17 Deposition of James Miles, February 21, 2013, pp. 29 to 30, and page 34.

18 Re *Stelco,* 2007, op.cit, para. 41-45.

19 Re *Stelco*, op.cit. no 2, para. 43

**Fin du document**

# TAB 12

2015 QCCA 62
Cour d'appel du Québec

Homburg Invest Inc. (Arrangement de)

2015 CarswellQue 203, 2015 QCCA 62, 250 A.C.W.S. (3d) 24, J.E. 2015-188, EYB 2015-246975

# Taberna Preferred Funding Vi, Ltd., Taberna Preferred Funding Viii, Ltd., Taberna Europe CDO I P.L.C. et Taberna Europe CDO II P.L.C., Appellants, v. Stichting Homburg Bonds, Samson Bélair/Deloitte & Touche inc. et 1810040 Alberta Ltd. (formerly known as Homburg Invest Inc. and Homburg Shareco Inc.) et al., Respondents, and Homco Realty Fund (52) Limited Partnership et al., Impleaded Party

Morissette J.C.A., Dutil J.C.A., Kasirer J.C.A.

Judgment: 16 january 2015
Docket: C.A. Qué. Montréal 500-09-024589-145

Counsel: *Me Sylvain Rigaud, Me Chrystal Ashby*, for Appellants
*Me Guy Paul Martel, Me Danny Duy Vu*, for Stichting Homburg Bonds
*Me Mason Poplaw, Me Nicolas Deslandres, Me Jocelyn Perreault*, for Samson Bélair/Deloitte & Touche inc.
*Me Martin Desrosiers*, for 1810040 Alberta Ltd.

Subject: Insolvency; Corporate and Commercial

***Morissette J.A., Dutil J.A., Kasirer J.A.*:**

1 With leave of a judge of this Court, the appellants have appealed a judgment of the Superior Court, District of Montreal (the Honourable Mark Schrager), rendered on June 30, 2014, which granted the respondents' re-amended motion for directions pursuant to the *Companies' Creditors Arrangement Act*. [1] The judge declared, *inter alia*, that the payment of amounts due to the appellants under certain indentures and notes collectively referred to by the judge as the 2011 Taberna Indentures be subordinated to the full and complete payment of the Senior Debt of Homburg Invest Inc. (HII), including claims by the respondent Stichting Homburg Bonds (Stichting). [2]

2 For the most part, the facts are not in dispute. All parties refer to the account given by the motion judge, in particular in paragraphs [1] to [20] of his reasons.

3 The key issue before the Superior Court was the meaning to be given to the 2011 Taberna Indentures, specifically to the sections of those agreements that provided that payment of the Taberna notes held by the appellants be subordinate to Senior Debt holders, including Stichting.

4 As the judge noted at para. [13] of his reasons, the 2011 Taberna Indentures replaced the 2006 Taberna Indentures following a period of negotiation. Significantly, sections 12.2(b) and 12.2(c) of the 2006 Taberna Indentures were deleted and do not appear in the 2011 Indentures. Section 12.2(b) had provided for full payment of the Senior Debt (including the Stichting bonds) in priority to the Junior Debt (including the Taberna notes) in the event of bankruptcy or insolvency of HII. Section 12.2(c) was a "turnover clause": it provided that, in the event of a payment received by the trustee under the 2006 Taberna Indentures in contravention with the terms of the Indentures, such proceeds would be remitted or turned over to the Senior bondholders.

5 According to Taberna, the effect of these deletions on the meaning to be given to the 2011 Taberna Indentures is that the claim of the Taberna noteholders is no longer subordinate to the claim of the Stichting bondholders in connection with the HII plan. This is the case, they say, notwithstanding the terms of Article XII of the 2011 Taberna Indentures which continue

 

to refer to the subordination of securities issued thereunder to Senior Debt. The Taberna noteholders asked the Superior Court to declare that under the 2011 Taberna Indentures, they should be paid *pari passu* with the Stichting bondholders pursuant to the CCAA plan of arrangement.

6 The judge disagreed. He decided that, notwithstanding the deletions and other evidence adduced as to the parties' intentions, the claim of the Taberna noteholders under the 2011 Taberna Indentures remained subordinate to the Senior Debt, including the Stichting debt. He agreed with the expert evidence that, under governing New York law, the terms of a contract should be enforced as the definitive expression of the parties' intent where they are clear and unambiguous. The subordination language in the 2011 Taberna Indentures was clear and unambiguous expression of the parties' intention that the Taberna notes be subordinate to the Stichting bonds. The deletion of the turnover provisions from the 2006 Indentures did not change the subordinated status of the Taberna notes. Moreover, held the judge, the rights of the creditors *inter se* were not altered by the approval and homologation of the CCAA plan of arrangement. The subordination clause was held to be this fully enforceable even if the Taberna noteholders and the Stichting bondholders are in the same class of creditors.

7 The appellants argue that the judge made three errors, each of which justifies setting aside the judgment *a quo*: he purportedly misinterpreted Article XII of the 2011 Taberna Indentures; he allegedly erred in his appreciation of the impact of the CCAA proceedings on the rights of the creditors *inter se* pursuant to the subordination provisions of the Indentures; and he is said to have been mistaken in his view of the enforceability of the Indentures against the Stichting bondholders as third parties.

8 The appellants are mistaken on the first two grounds of appeal. For the reasons that follow, we are of the view that the appellants have failed to show that the judge committed a reviewable error. It is not necessary to decide the third point. In the result, the appeal should be dismissed.

**I Alleged Error in the Interpretation of the 2011 Taberna Indentures**

9 Did the judge err in his interpretation of the subordination provisions of the 2011 Taberna Indentures leading him to conclude, mistakenly, that the claims held by the Taberna noteholders are still subordinated to the claims of the Stichting boldholders?

10 The appellants present three sub-arguments under this heading. They are treated here in turn.

11 *First*, the appellants argue that the judge wrongly resolved the subordination dispute on the basis of general insolvency law principles rather than on the contractual wording in the 2011 Taberna Indentures, including the choice of law clause designating New York law as applicable to the contract's interpretation. In support of this position, they point to language used in para. [51] of the judge's reasons where he stated the following : "[a]ccordingly, applying principles of Canadian insolvency law to the subordination in the present [case], Taberna remains subordinate in the insolvency and this absent the specific bankruptcy language and a turnover clause".

12 The appellants are mistaken on this point.

13 The motion judge correctly identified New York law as providing the rules of interpretation applicable to the 2011 Taberna Indentures and determined the content of these rules based on expert evidence presented before him: see paras. [14], [32] and [40] of his reasons. Once he decided that the determination of the substantive rights of the parties under the contract was governed by New York law, the judge also correctly held that the procedural treatment of such rights, for affected creditors under the plan of arrangement, was subject to Canadian insolvency law: paras [31], [32] and [40]. The judge's comment in para. [51], when read in the context of his analysis as a whole, is not inconsistent with this approach and evinces no reviewable error.

14 *Second*, the appellants submit that the judge erred "in law" when he concluded that the deletion of the existing turnover provision in the 2011 Taberna Indentures by HII and the Taberna noteholders did not constitute evidence that the parties no longer intended the Taberna notes to be subordinated to the Stichting bonds.

15 Writing on the terms of the 2011 Taberna Indentures at paragraph [40] of his reasons, the judge observed that "[t]he subordination clause clearly establishes the princip[le]. The extrinsic evidence adduced by Taberna is not convincing of any

  

intention to change the princip[le] of subordination that existed under the 2006 Taberna Indentures". After reviewing expert evidence on the rules for the interpretation of contracts in New York law, the judge decided that there was "no meeting of the minds" regarding the legal consequences of not reproducing the turnover provisions in the 2011 Taberna Indentures (para. [54]). On his view of the evidence, while the parties did delete the turnover provisions, they did not agree to change the basic subordination concept expressed in the 2006 agreements and carried forward by the clear and unambiguous wording of the 2011 Taberna Indentures. Even without the turnover clause, the subordination provisions are fully enforceable in a bankruptcy or insolvency context. The judge considered that the subordination language in Article XII of the 2011 Taberna Indentures was "sufficient" notwithstanding the deletion of the turnover provisions (para. [47]).

16 The interpretation of the intention of the parties as expressed in the 2011 Taberna Indentures is a finding of fact. Courts have been emphatic in deciding that whether or not a judge correctly interpreted a contract is a question of fact or, at best, a mixed question of fact and law. [3] The appellants bear the burden of showing that the judge committed a palpable and overriding error in order to have the judgment reversed. [4]

17 They have failed to meet that burden.

18 The judge found that, according to the clear meaning of the 2011 Taberna Indentures, the Taberna notes are subordinated to the Stichting bonds. In so doing, he applied the rule of interpretation in New York law that a clear and unambiguous wording is considered to be the definitive expression of the parties' intention.

19 The judge added that the evidence that Taberna brought did not convince him that the parties had agreed to set aside the subordination "principle" or "concept" by deleting the turnover provisions. In paragraphs [37] to [40], he specifically considered the appellants' argument, founded upon the testimony of their expert, that the deletion of the turnover provision was not parole evidence and that, instead, it was significant as an indication of the parties' intention to end subordination. The judge rejected that view of the evidence and preferred to discern the parties' intention from the clear terms of the contract.

20 Contrary to the appellants' submission, the judge did not decide that there was no meeting of minds on the basis of the "subjective" motivations of the parties but he relied, above all, on the clear terms of the 2011 agreements. The appellants have failed to show that this was a palpable and overriding error.

21 *Thirdly*, the appellants contend that the judge wrongly imposed an obligation to turnover payment upon the Taberna noteholders notwithstanding the fact that the turnover provisions had been deleted from the 2011 Indentures.

22 This argument is without merit.

23 Once again, the judge simply applied the clear terms of the 2011 Indentures, in particular, section 12.2(a) which provides that no payment shall be made to the Taberna noteholders so long as a payment default of the Senior Debt exists. Sections 12.2(b) and 12.5 impose on the Taberna noteholders and the trustee an obligation to take reasonable action to ensure the effectiveness of subordination. Section 5.6 of the 2011 Indentures provides that payment of all the Senior Debt shall be made in priority to amounts due under the Taberna notes. Moreover, contrary to the argument of the appellants, the judge did not order the Taberna noteholders to "turn over" the amounts recovered under the plan of arrangement to Stichting since, pursuant in particular to section 9.6b) of the Plan, those funds have been reserved pending the outcome of the subordination dispute. In this respect, having received no distribution under the plan, the noteholders have nothing to "turn over".

**II Impact of the CCAA Proceedings on the Subordination Provisions**

24 Did the motions judge err in concluding that the debtors' CCAA plan of arrangement did not alter the rights of the Stichting bondholders and the Taberna noteholders in relation to each other?

25 The appellants contend that by voting in favour of the plan of arrangement under the CCAA, Stichting waived its right to be considered senior to the Taberna noteholders pursuant to the subordination provisions.

  

26 The judge rejected this argument. He wrote, at para. [42] that "[ . . . ] the rights of the debtor vis-à-vis its creditors [are] altered under the proposal but not the rights of the creditors *inter se*". Later in his reasons, he explicitly relied on the judgment of the Court of Appeal for Ontario in *Re Stelco* [5] to reject the Taberna noteholders' submission that the implementation plan changed the substantive rights of the Stichting and Taberna creditors as between themselves.

27 The appellants have not convinced us that the judge erred in this regard.

28 The respondents have correctly noted, as the judge himself observed, that the motion for directions was filed before the plan of arrangement was adopted. All ordinary creditors, including holders of the Stichting bonds and the Taberna notes, were grouped in the same class. But the plan provided that nothing would be paid to the Taberna noteholders before the outcome of the "Taberna Order" - *i.e.* the motion for directions before Schrager, J. - dealing with the subordination provisions pursuant to section 9.6b) of the Plan, as noted above.

29 In para. [46] of his reasons, the judge correctly relied on *Re Stelco* [6] which held that junior and senior debt may be grouped within the same class. To this end, the judge also correctly relied on the judgment of this Court in *Mérisel* [7] .

30 In the circumstances, the appellants are wrong to suggest that the HII plan has an impact on this dispute between competing creditors as to their rank *inter se*. While it is true that the approval, sanction and implementation of a CCAA plan of arrangement can extinguish indebtedness of a creditor, it has no necessary impact on the rights between the creditors themselves.

**III Ultra petita**

31 The appellants argue that the judge ventured beyond the arguments made by the respondents in first instance by deciding that it is « in itself fatal to Taberna's position [ . . . ] that Stichting was not a party to the negotiations leading up to the 2011 Taberna Indentures nor to the documents themselves" (para. [56]). They say the judge was wrong to do so and that his finding on this point is insufficient to sustain the judgment.

32 It is not necessary to decide this point to dispose of the appeal.

33 As a practical matter, the reasons given by the judge concerning the fact that Stichting was not a party to the 2011 Taberna Indentures were not strictly speaking necessary to his conclusion. As the judge explained, the meaning to be given to the clear and unambiguous terms of the 2011 Taberna Indentures, despite the absence of a turnover clause, was the basis in law for his decision to rank the Taberna notes subordinate to the Stichting bonds. The judge's discussion of Stichting's rights under the law on stipulation for the benefit of a third party was not decisive for the outcome of the case in first instance.

34 All parties before this Court agree that this was a subsidiary argument made by the respondents in first instance. Given our conclusion that the judge made no reviewable error in his interpretation of the 2011 Indentures, the Court refrains from deciding the point.

35 In dismissing the appeal, the Court will not disturb the order for costs made by the motion judge in first instance.

36 *FOR THE AFOREMENTIONED REASONS*, the Court:

37 *DISMISSES* the appeal, with costs.

Footnotes

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

2 2014 QCCS 3135. The terms used to describe the various bonds, notes and indentures herein are defined in the reasons of the motions judge and, as the parties have done, we shall refer to those defined terms for ease of reference.

  

3 *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, paras. 42 to 55. See also *René Corriveau & Fils inc.* v. *9201-0958 Québec inc.*, 2014 QCCA 1765, para. 10 and *Compagnie de chemin de fer du littoral nord de Québec et du Labrador inc. v. Sodexho Québec ltée*, 2010 QCCA 2408, para. 211.

4 *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.

5 2007 ONCA 483, confirming [2006] CanLII 27117 (Sup. Ct J.).

6 (2005) 15 C.B.R. (5th) 307 (Ont. C.A.), confirming 2005 CanLII 41379 (Sup. Ct J.).

7 *2862565 Canada Inc*. v. *Mérisel Canada Inc.*, [2002] R.J.Q. 671 (QC CA).

# TAB 13

2016 ONSC 595
Ontario Superior Court of Justice [Commercial List]

Essar Steel Algoma Inc., Re

2016 CarswellOnt 1040, 2016 ONSC 595, 263 A.C.W.S. (3d) 301, 33 C.B.R. (6th) 313

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

In the Matter of a Plan of Compromise or Arrangement of Essar Steel Algoma Inc., Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company, and Essar Steel Algoma Inc. USA

Newbould J.

Heard: January 14, 2016
Judgment: January 25, 2016
Docket: 15-CV-0011169-00CL

Counsel: Eliot Kolers, Maria Konyukhova, Yannick Katirai, for Applicants
Andrew Kent, Markus Koehnen, Jeffery Levine, for Moving Parties, Cleveland-Cliffs Iron Company, Cliffs Mining Company and Northshore Mining Company ("Cliffs")
Derrick Tay, Clifton Prophet, Nicholas Kluge, for Monitor
L. Joseph Latham, Bradley Whiffen, for Ad Hoc Committee of Noteholders
Natalie E. Levine, for Ad Hoc Committee of senior and junior secured Noteholders
Sarah-Anne Van Allen, for Wilmington Trust, National Association
Evan Cobb, for Directors of the applicants
Andrea Lockhart, for Deutsche Bank
Ronald Carr, for Her Majesty the Queen in right of Ontario

Subject: Civil Practice and Procedure; Contracts; Insolvency; International

MOTION by mining companies for dismissal or stay of steel company's motion on basis of lack of jurisdiction or forum non conveniens.

***Newbould J.*:**

1 The Cleveland-Cliffs Iron Company, Cliffs Mining Company and Northshore Mining Company (collectively "Cliffs") move to object to the jurisdiction of this Court to hear a motion brought by the applicants (together "Essar Algoma") for relief in connection with a supply contract under which Cliffs supplied Essar Algoma for a number of years with all of its iron ore pellets until Cliffs purported to terminate the contract on October 5, 2015, shortly before this CCAA proceeding was commenced. Cliffs submits in the alternative that Ontario is not the convenient forum in which to determine the dispute between Cliffs and Essar Algoma, and in the further alternative a ruling that a summary procedure for the determination of the dispute is inappropriate.

2 For the reasons that follow, I have concluded that this Court does have jurisdiction over the claim of Essar Algoma against Cliffs and that Cliffs has not established that Ontario is not the convenient forum for the dispute. What the procedure will be to determine the dispute has not yet been settled.

**Relevant history**

3 In 2001 Algoma Steel Inc. ("Old Algoma") began proceedings under the CCAA and eventually put forward and had approved a plan of compromise and arrangement. As part of its restructuring, Old Algoma divested itself of certain non-core assets, including its interest in a mine in Michigan (the "Tilden Mine") from which Old Algoma sourced its iron ore pellets. In

 

January 2002 Old Algoma sold its interest in the Tilden Mine to Cliffs in consideration for an assumption by Cliffs of certain Old Algoma liabilities and future obligations in respect of the Tilden Mine and Old Algoma and Cliffs entering into a long-term supply agreement effective January 31, 2002 (the "Cliffs Contract"). The Cliffs Contract has been amended a number of times. Essar Algoma succeeded to Old Algoma's rights and obligations under the Cliffs Contract in 2007. The Cliffs Contract is governed by Ohio law.

4 The Cliffs Contract provides that Essar Algoma will source its long-term needs for iron ore pellets exclusively from Cliffs to 2016. As last amended by term sheet in 2013, the Cliffs Contract obliged Essar Algoma to purchase iron ore pellets exclusively from Cliffs until and including 2016. From 2017 to 2024 it obliged Essar Algoma to purchase a portion of its pellets each year from Cliffs. The Cliffs Contract provides that Essar Algoma is obliged in November of each year to provide to Cliffs its good faith estimate of its iron ore requirements (or nomination) for the next year. After Essar Algoma has set its nomination, it has certain rights to modify its nomination to increase or decrease its nomination within a specified range of percentages if it provides written notice to Cliffs by certain deadlines.

5 The Cliffs Contract specifies: (a) a formula for calculating the price of iron ore pellets for the 2013 calendar year; (b) a price for the purchase and sale of iron ore pellets for the 2014 calendar year; (c) a formula for fixing the price of iron ore pellets in 2015 and 2016; and (d) a separate pricing formula for calendar years 2017 to 2024.

6 Cliffs mines the iron ore in Michigan at its mines at the Tilden site and then processes and delivers iron ore pellets by rail to a dock in Michigan known as the Marquette dock or a railway yard in Michigan known as the Partridge rail yard, from which points Essar Algoma takes delivery. Essar Algoma then arranges delivery to Sault Ste. Marie by ship or train.

7 There have been several disputes between Cliffs and Essar Algoma under the Cliffs Contract. The most recent and relevant of such disputes relates to the timing and volume of shipments of iron ore pellets from Cliffs to Essar Algoma beginning in late 2013. At the end of 2013, Essar Algoma advised Cliffs of its nomination for the 2014 calendar year. However, it soon became apparent that the 2013/2014 winter season was one of the coldest and longest in recent history. As a result, the Great Lakes thawed later than usual and the 2014 shipping season was accordingly shortened and Essar Algoma determined that it would not be able to take and use all of the iron ore pellets that it had nominated for 2014. It met with Cliffs to discuss the situation.

8 Whether an agreement was reached to reduce the 2014 shipments became contested, Cliffs saying there was no agreement and Essar Algoma saying there was. The number of tons to be taken by Essar Algoma in 2014 remained a question of debate when Essar Algoma nominated in October 2014 what it would take in 2015 and when it reduced its nomination in July 2015. Cliffs took the position that Essar Algoma had to take the entire tonnage that it had nominated in 2014. Essar Algoma took the position that there was an agreement to reduce the tonnage for 2014.

9 On January 12, 2015, Cliffs filed a complaint in the United States District Court for the Northern District of Ohio (Eastern Division) (the "Ohio Court"). On August 31, 2015, Cliffs amended its complaint. In its Amended Complaint, Cliffs claimed, among other things, damages plus interest and costs for alleged breaches of the Cliffs Contract, including Essar Algoma's alleged failure to take timely delivery of iron ore pellets in the requisite amounts, and a declaratory judgment that Essar Algoma had materially breached the Cliffs Contract by failing to take delivery of or pay for the full amount of ore that it nominated it would require in 2013, 2014 and 2015 by the end of each calendar. Cliffs did not claim any order or direction permitting it to terminate the Cliffs Contract.

10 In response to the Amended Complaint, Essar Algoma filed an Answer to Plaintiffs' Amended Complaint and Counterclaim on September 14, 2015, wherein it denied Cliffs' allegations and counterclaimed against Cliffs, seeking damages, including a claim for a long-term contract renewal credit payment payable to Essar Algoma pursuant to the Cliffs Contract and a claim for damages for alleged underreporting of moisture levels in pellets delivered by Cliffs.

11 On July 31, 2015, Cliffs filed a motion for partial summary judgment, seeking judgment on its claim that Essar Algoma breached a contractual duty to take its 2014 nomination and to dismiss Essar Algoma's claim for damages related to Cliffs' underreporting of moisture levels to Algoma since 2010. The Cliffs motion was scheduled to be heard on October 6, 2015.

 

12 On October 5, 2015 Cliffs purported to terminate the Cliffs Contract by letter which stated that as a result of multiple and material breaches and repudiation of the Cliffs Contract by Essar Algoma, Cliffs was treating the Cliffs Contract as terminated effective immediately. The termination came with no advance notice and within days of the next adjustment in price and at a time of year that Essar Algoma has historically begun building up inventory before the winter freeze.

13 On October 7, 2015, Cliffs offered to resume supplying Essar Algoma on a "just in time basis" at a materially higher price than provided for in the Cliffs Contract. The next day Essar Algoma notified Cliffs that the proposed price was commercially unfeasible for it. On October 14, 2015 Cliffs proposed a slightly lower price to Essar Algoma that was still materially higher than the price Essar Algoma had been paying.

14 The Cliffs summary judgment motion in the Ohio Court was heard on October 6, 2015. On the following day, Judge Nugent released his reasons. He granted Cliffs motion in part and denied it in part. He held that there had been no agreement reached in an exchange of emails in April 2014 regarding Essar Algoma's request to decrease its 2014 nomination and that Essar Algoma had thus failed to meet its annual requirements by a margin of at least 500,000 tons. He held however that there were issues as to whether Essar Algoma had given effective notice to reduce a further amount of tons for 2014, whether a force majeure clause gave Essar Algoma a defence to any liability for damages stemming from its alleged failure to meet its annual requirements nomination amounts for 2014, and whether any outstanding damages remained following any allowable off-sets for alleged over-billing caused by Cliffs' use of the 2014 pricing structure in its 2015 sales. In the result he dismissed Cliffs' motion for summary judgment for breach of contract relating to Essar Algoma's 2014 nomination. He also granted Cliffs' motion to dismiss the counterclaim of Essar Algoma with respect to moisture content.

15 On October 6, 2015, one day after Cliffs purported to terminate the Cliffs Contract, Essar Algoma moved in the Ohio Court for a temporary restraining order and a preliminary injunction requiring Cliffs to supply Essar Algoma with iron ore pellets. On October 15, 2015 Essar Algoma filed a notice of withdrawal of its motion. In the notice, Essar Algoma stated that it had obtained supply from another supplier that would provide it with supply for the next several weeks and that this supply removed the need for immediate injunctive relief.

16 A trial for all of the issues in the Ohio litigation was scheduled for December 7, 2015. On October 30, 2015 Essar Algoma filed a motion to adjourn the trial, essentially on the grounds that too much work, particularly documentary production, the conducting of depositions and the production of expert reports, was required for the parties to be ready to start the trial as scheduled.

17 This CCAA proceeding commenced on November 9, 2015 when the Initial Order was made. On November 10, 2015, Essar Algoma commenced ancillary insolvency proceedings under chapter 15 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware. On that day the foreign representative of Essar Algoma sought and obtained, among other things, orders recognizing and enforcing in the United States the orders granted in the CCAA proceeding which was recognized as a foreign main proceeding. The foreign representative of Essar Algoma also filed a complaint for a declaratory judgment against Cliffs and a motion for entry of an order compelling Cliffs to resume supplying iron ore pellets under the Cliffs Contract. Judge Shannon who heard the motions in Delaware was advised by counsel for the foreign representative that this motion was filed as a "placeholder" in the event that the Canadian Court declined to assume jurisdiction to hear Essar Algoma's motion for injunctive relief against Cliffs.

18 On November 11, 2015 Essar Algoma filed with the Ohio Court a notice pursuant to 11 U.S.C. Section 362 that the Ohio action was automatically stayed as to the defendant Essar Algoma. On December 3, 2015 Judge Nugent of the Ohio Court on his own without argument dismissed the case without prejudice. The order stated that upon application, the action may be reinstated, if necessary, when the bankruptcy proceedings have concluded.

19 On December 4, 2015 Cliffs moved in the Ohio Court for an order vacating the without prejudice dismissal of the action and instead placing the case on the suspense docket until the claim is resolved by the bankruptcy court. No decision on that motion has been rendered by Judge Nugent.

 

**Relevant motions in the CCAA proceeding**

20 In mid-November 2015 Essar Algoma served a motion seeking a critical supplier order against Cliffs under section 11.4 of the CCAA. The motion was adjourned to December 3, 2015 and then ultimately not proceeded with. The explanation given by Essar Algoma is that following the filing of the motion, it was able to find alternative suppliers for the shorter term. It now has supply of pellets to the end of March. What is at issue on its motion is the right of Essar Algoma under Cliffs Contract to the end of 2024.

21 On December 8, 2015 the applicants served a motion for an order (i) declaring that the CCAA proceedings are the correct forum for the determination of issues relating to the Cliffs Contract; (ii) declaring that the purported termination of the Cliffs Contract was not effective and that it remains in full force and effect and that Cliffs must supply iron ore pellets to Essar Algoma at the price payable under the Cliffs Contract; (iii) directing Cliffs to comply with its obligations under the Cliffs Contract, and (iv) directing Cliffs to pay damages resulting from its purported termination of the Cliffs Contract.

22 On December 23, 2015 Cliffs delivered a notice of motion for an order (i) dismissing or staying the applicants' motion on the grounds that this Court does not have jurisdiction to grant the relief sought by Essar Algoma; (ii) in the alternative, an order staying the applicants' motion on the grounds that Ontario is not a convenient forum for the hearing of the applicants' motion and (iii) in the further alternative, an order dismissing the applicants' motion without prejudice to the applicants to seek the same relief in the form of an action. It is this motion that was heard on January 14, 2016.

**Analysis**

23 Cliffs raises a number of issues, including (i) the lack of power to deal with this matter under the CCAA, (ii) a lack of jurisdiction to deal with the claim against Cliffs in Ontario, (iii) Ontario is *forum non conveniens* and (iv) the relief sought is inappropriate for a summary CCAA proceeding.

**Jurisdiction under the CCAA**

24 Cliffs takes the position that there is no jurisdiction in the CCAA to grant the relief sought by Essar Algoma declaring the termination of the Cliffs Contract to be ineffective and requiring Cliffs to deliver iron ore pellets as required by that contract. It says that the Cliffs Contract was terminated before the CCAA proceedings were commenced and thus the powers of the Court given under the CCAA cannot be used in this case. It relies on *SNV Group Ltd., Re*, 2001 BCSC 1644 (B.C. S.C.) in which Justice Pitfield refused to make an order under the CCAA ordering the repayment of money paid before the CCAA proceeding was brought that was said to have been in breach of an agreement that the debtor had with a third party. In that case, Pitfield J. stated:

> The capacity to stay, whether pursuant to section 11 or by virtue of the Court's inherent jurisdiction, applies to prospective proceedings. By its very nature, a proceeding that has been carried to completion cannot be stayed. An order to repay an amount obtained in contravention of a stay granted by the Court would be appropriate, but it is my opinion that the Court cannot rely on the CCAA or its inherent jurisdiction to compel repayment of an amount alleged to have been obtained in reliance upon a contract in a manner that would amount to adjudication of a claim. The CCAA is not intended to give the Court the capacity to undo transactions completed before the effective date of the initial or subsequent orders.

25 Essar Algoma takes the position that Cliffs has misconstrued what Essar Algoma seeks. Rather, it says that it is requesting the Court to invoke its broad and inherent jurisdiction in exercising its territorial jurisdiction, retaining its territorial jurisdiction under the principles of *forum non conveniens*, and determining the appropriate procedures for the determination of the substantive issues in dispute between the parties. It is the consequent modification of Cliffs' procedural rights that Essar Algoma seeks under the CCAA which it says is routinely granted.

26 I do not see the *SNV Group* case as being apposite. Essar Algoma is not asking the Court on its motion to declare the Cliffs Contract as operative because of some provision of the CCAA, which is what the situation was in *SNV Group*.

 

27 The CCAA is skeletal in nature and does not contain a comprehensive code that lays out all that is permitted or barred. A court under the CCAA has both statutory authority granted under the CCAA and an inherent and equitable jurisdiction when supervising a reorganization. The most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the CCAA text before turning to inherent or equitable jurisdiction to anchor measures taken in a CCAA proceeding. See *Ted Leroy Trucking Ltd., Re*, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter Century Services] at paras. 57, 64 and 65.

28 The CCAA provides in section 11 that a court has jurisdiction to make any order "that it considers appropriate in the circumstances" [1] . A CCAA court clearly has the power as per *Century Services* to make the procedural orders of the kind sought by Essar Algoma in this case. See also *Smoky River Coal Ltd., Re* (1999), 12 C.B.R. (4th) 94 (Alta. C.A.) at paras. 60 and 67 per Hunt J.A. in which he held that a judge has the discretion under the CCAA to permit issues to be decided in another forum (in that case arbitration) but is under no obligation to do so.

29 The "single control" model also favours a CCAA court to deal with the issues between Essar Algoma and Cliffs. In *Eagle River International Ltd., Re*, [2001] 3 S.C.R. 978 (S.C.C.) ["*Sam Lévy*"] Binnie J. referred to and adopted a "single control" model that favours litigation involving an insolvent company to be dealt with in one jurisdiction. He stated:

> **26** The trustees will often (and perhaps increasingly) have to deal with debtors and creditors residing in different parts of the country. They cannot do that efficiently, to borrow the phrase of Idington J. in *Stewart v. LePage* (1916), 53 S.C.R. 337, at p. 345, "if everyone is to be at liberty to interfere and pursue his own notions of his rights of litigation"...
>
> **27** Stewart was, as stated, a winding-up case, but the legislative policy in favour of "single control" applies as well to bankruptcy. There is the same public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse...

30 *Sam Lévy*, involved a BIA proceeding. In it, Binnie J. referred to *Stewart v. LePage* [1916 CarswellPEI 1 (S.C.C.)], a winding-up application. I see no reason why the principles in *Sam Lévy*, should not be applicable in a CCAA proceeding. In *Century Services* it was noted that the harmonization of insolvency law common to the BIA and CCAA is desirable to the extent possible. The central nature of insolvency and the resolution of issues caused by insolvency are common to both BIA and CCAA proceedings and so too should the underlying principles. See my comments in *Nortel Networks Corp., Re* (2015), 23 C.B.R. (6th) 264 (Ont. S.C.J. [Commercial List]) at para. 24.

31 In this case Cliffs has sued in Ohio for damages claiming material breaches of the Cliffs Contract. It is thus a party that has claimed to be a creditor of Essar Algoma [2] . The single control model requires that its claim against Essar Algoma be dealt with in this CCAA proceeding. Essar Algoma claims in this Court a declaration that the Cliffs Contract has not been legally terminated. Cliffs says that the material breaches by Essar Algoma that it claimed in the Ohio litigation to have occurred permit it to terminate the Cliffs Contract. These issues are completely interwoven and it would make no sense to require Essar Algoma to litigate its claim against Cliffs in the United States [3] when Cliffs' claim against Essar Algoma must be dealt with in this Court in Ontario. The claim of Essar Algoma against Cliffs is an asset of the applicants to be dealt with in this Court.

32 In *Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re*, 2013 QCCS 5194 (C.S. Que.), a CCAA proceeding arising out of the Lac-Mégantic rail disaster, it was held that a claim by the debtor against its American insurer under a policy governed by Maine law with a forum selection clause in favour of Maine was an asset of the debtor and should be dealt with in Quebec. Dumas J.C.S. referred to the single control model for insolvencies and stated:

> In the present case, we deal with the contrary. It concerns a bankrupt's claim (via the trustee) against its insurance company. Without a shadow of a doubt, this is an asset of the debtor over which the Bankruptcy Court has jurisdiction. [4]

33 For the single control model to apply, the third-party, in this case Cliffs, must not be a stranger to the insolvency proceedings. Cliffs has raised significant damage claims against Essar Algoma and seeks to have those claims remain alive and

  

dealt with in Ohio. Its purported termination of the Cliffs Contract was an important factor that led to Essar Algoma filing for protection under the CCAA. Cliffs is not a stranger to these proceedings.

***Jurisdiction simpliciter***

34 Jurisdiction must be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum. See *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17 (S.C.C.) at para. 82 per LeBel J. See also para. 79 in which LeBel J. referred to the link between the subject matter of the litigation and the defendant to the forum.

35 To establish jurisdiction *simpliciter*, a plaintiff need only establish that there is a good arguable case for assuming jurisdiction. See *Ontario v. Rothmans Inc.*, 2013 ONCA 353 (Ont. C.A.) at para. 54, 110, 118-19. The phrase a "good arguable case" is not a high threshold and means no more than a "serious question to be tried" or a "genuine issue" or that the case has "some chance of success". See *Tucows.Com Co. v. Lojas Renner S.A.*, 2011 ONCA 548 (Ont. C.A.) at para. 36.

36 It is for the plaintiff to establish that there is a presumptive connecting factor to the forum. If the plaintiff establishes that, the defendant has the burden of rebuttal and must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them. See *Van Breda* at paras. 95 and 100.

37 Apart from this test of the connection between the subject matter of the litigation and the forum, traditional tests for basing jurisdiction continue to exist. See *Van Breda* at para. 79 in which LeBel J. stated:

> However, jurisdiction may also be based on traditional grounds, like the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction, if they are established. The real and substantial connection test does not oust the traditional private international law bases for court jurisdiction.

38 The subject matter of the dispute is whether the Cliffs Contract has been breached and by whom. Cliffs claims Essar Algoma has materially breached provisions of the contract, which if proven, would be grounds to terminate it under Ohio law. Essar Algoma claims that Cliffs had no basis to terminate the contract. Counsel for Cliffs in argument contended that the subject matter of the dispute is a request for specific performance of the contract in Ohio where the ore is mined and delivered to Essar Algoma. I do not agree with that contention. The subject matter of the dispute is the Cliffs Contract and who breached it. While the relief sought by Essar Algoma includes mandatory injunctive relief, that does not make that prayer for relief the subject matter of the dispute. LeBel J. in *Van Breda* stated that it was the legal situation or the subject matter of the litigation that must be connected to the forum. The legal situation is the contention that the Cliffs Contract has been breached and by whom.

39 Rule 17.02 provides a guide to what may be a presumptive factor. LeBel J. stated:

> **83** At this stage, I will briefly discuss certain connections that the courts could use as presumptive connecting factors. Like the Court of Appeal, I will begin with a number of factors drawn from rule 17.02 of the Ontario Rules of Civil Procedure. These factors relate to situations in which service *ex juris* is allowed, and they were not adopted as conflicts rules. Nevertheless, they represent an expression of wisdom and experience drawn from the life of the law. Several of them are based on objective facts that may also indicate when courts can properly assume jurisdiction...Thus they offer guidance for the development of this area of private international law.

40 Rule 17.02 refers to the following in dealing with contract claims:

> **17.02** A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,
>
> (f) in respect of a contract where,
>
> (i) the contract was made in Ontario,...

  

41 Essar Algoma takes the position that the Cliffs Contract was made in Ontario.

42 The genesis of the Cliffs Contract was the 2001 CCAA proceeding of Old Algoma. As part of that restructuring, Old Algoma sold Cliffs its interest in the Tilden Mine and concurrently entered into the Cliffs Contract. Old Algoma's restructuring, including the Cliffs Contract, required the approval of the CCAA court which was given by order of Chief Justice LeSage of this Court in 2002.

43 There are traditional rules governing where a contract is made. The general rule of contract law is that a contract is made in the location where the offeror receives notification of the offeree's acceptance. See *Eastern Power Ltd. v. Azienda Comunale Energia & Ambiente* (1999), 50 B.L.R. (2d) 33 (Ont. C.A.) at para. 22 per MacPherson J.A. When acceptance of a contract is transmitted electronically and instantaneously, the contract is usually considered to be made in the jurisdiction where the acceptance is received. See *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2014 ONCA 497 (Ont. C.A.) at para. 66 per Lauwers J.A. There is an exception to this rule which is the postal acceptance rule that when contracts are to be concluded by post the place of mailing the acceptance is to be treated as the place where the contract was made. See *Eastern Power Ltd.* at para. 22.

44 There is no provision in the Cliffs Contract or any of its amendments that would give rise to the postal acceptance rule. Thus the traditional rule that a contract is made in the location where the offeror receives notification of the offeree's acceptance would apply. The evidence as to how the original Cliffs Contract or its amendments was concluded is somewhat unclear but unlikely to get better. Mr. Mee of Cliffs in his affidavit stated:

> I no longer have a specific recollection of where the Agreement and each of its amendments was negotiated or signed. My general recollection is that Essar would sign amendments first and that Cliffs would sign them in Cleveland, Ohio after they had been signed by Essar. I have looked back in my calendar for face to face meetings with Essar in which I participated since 2002. I found a total of 50 meetings 20 of which were in Canada and 30 of which were in the United States.

45 Neither the original Cliffs Contract nor the amendments provide that the contract or amendments becomes binding when signed without delivery. The original Cliffs Contract states in the first recital that "concurrently with the execution *and delivery* of this Agreement [the parties] are entering into that Purchase and Sale Agreement in which [Cliffs is acquiring the interest of Algoma in the Tilden Mine Company]" (Underlining added). This language would indicate that the parties expected delivery of the contract to the other to be required for it to be binding.

46 Therefore if the evidence of Mr. Mee of Cliffs is accepted, it would mean that Essar Algoma generally signed the contract and amendments first, then sent them to Cliffs in Cleveland who then signed them and then sent them back to Essar Algoma. That would mean that the contract was formed when Essar Algoma received notice from Cliffs in Ontario of the acceptance of its offer.

47 There is no date of execution on the original Cliffs Contract effective January 31, 2002 or many of the amendments. There are exceptions. The second amendment was signed and dated by Algoma three days after it was signed by Cliffs. The third amendment was signed and dated by Algoma one day before it was signed by Cliffs. Some were signed the same day. The final amendment that extended the term to 2014 that was produced by Cliffs has an execution date by Essar Algoma of June 7, 2013 and no execution by Cliffs.

48 Based on the evidence led by Cliffs, I find that based on the traditional rules governing where a contract is made, Essar Algoma has at least an arguable case, and likely a stronger case than that, that the Cliffs Contract and its amendments generally were contracts made in Ontario.

49 Beyond this, the fact that the original Cliffs Contract became effective only when approved in Ontario by Justice LeSage under the CCAA is a strong indicator that there is a strong and substantial connection of the Cliffs Contract to Ontario. In *Trillium* Lauwers J.A. referred to Professor Waddams and consideration whether the traditional rules in determining the place of contract are appropriate for jurisdictional cases. He stated:

 

> **70** Should the traditional rules for determining the place of the contract be determinative in applying the fourth PCF [presumptive connecting factor]? This is perhaps an issue for another case, but I agree with the observation of Professor Waddams, at paras. 108-109, that the arbitrary common law rules for determining the place of a contract may not always be apposite in jurisdictional cases. The traditional contract placement rules respond to concerns that are different from those engaged by a jurisdictional analysis. A broader, more contextual analysis is required, which would inevitably engage the same considerations as the real and substantial connection test itself.

50 One may ask why a technical rule as to where an e-mail or fax was sent or received should determine the local of an international piece of litigation. The fact that the Cliffs Contract had its genesis in an Ontario CCAA process and required the approval of the CCAA court in Ontario appears to me to be at least as much a factor in holding that the contract is an Ontario contract as the factor of who sent or received confirmation of the terms of the contract. Often, and in this case, contract terms or amendments are discussed and agreed orally over the phone or in meetings and then papered afterwards.

51 I conclude and find that Essar Algoma has established a presumptive connecting factor to Ontario for its claim under the Cliffs Contract to Ontario on the basis that the contract was made in Ontario.

52 Essar Algoma also says that Cliffs has operated its business in Ontario and on that basis Ontario has jurisdiction to hear the Essar Algoma request for relief against Cliffs. As stated in para. 79 of *Van Breda*, a defendant's presence in the jurisdiction is a traditional basis for a court having jurisdiction. LeBel J. also stated that carrying on business in a jurisdiction could be an appropriate connecting factor. He stated:

> **87** Carrying on business in the jurisdiction may also be considered an appropriate connecting factor. But considering it to be one may raise more difficult issues. Resolving those issues may require some caution in order to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity. Active advertising in the jurisdiction or, for example, the fact that a Web site can be accessed from the jurisdiction would not suffice to establish that the defendant is carrying on business there. The notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction. But the Court has not been asked in this appeal to decide whether and, if so, when e-trade in the jurisdiction would amount to a presence in the jurisdiction. With these reservations, "carrying on business" within the meaning of rule 17.02(p) may be an appropriate connecting factor. (Underlining added)

53 Rule 17.02(p) provides:

> 17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,
>
> (p) against a person ordinarily resident or carrying on business in Ontario;

54 The three Cliffs corporations that are a party to the Cliffs Contract are The Cleveland-Cliffs Iron Company, an Ohio corporation with its principal place of business in Cleveland, Cliffs Mining Company, a Delaware corporation with its principal place of business in Cleveland and Northshore Mining Company, a Delaware corporation with its principal palce of business in Silver Bay, Minnesota. They are each wholly-owned subsidiaries of Cliffs Natural Resources Inc. which is an international mining and natural resources company and publicly traded in the United States and until 2014 owned a mining project in the "Ring of Fire" region of Ontario.

55 Under the Cliffs Contract, Cliffs mined the iron ore in Michigan, refined the ore into iron ore concentrate in Michigan, processed the iron ore concentrate into iron ore pellets in Michigan and delivered the iron ore pellets to Essar in Michigan. Cliffs asserts that it has not carried on any business in Canada and has no presence here. However, the fact that all of the mining and delivery took place in Michigan does not by itself mean that it did not carry on business in Canada.

 

56 Essar Algoma relies on the fact that during the course of the Cliffs Contract representatives of Cliffs have continuously dealt with Essar Algoma or its predecessor Old Algoma in Sault Ste. Marie in Ontario. Mr. Mee of Cliffs stated that he himself had visited Canada 20 times in connection with the Cliffs Contract. Essar Algoma and its predecessor Old Algoma has been a significant customer of Cliffs. Mr. Marwah of Essar Algoma stated in his affidavit that representatives of Cliffs visit Sault Ste. Marie and representatives of Essar Algoma visit Cleveland in alternating years, during which visits they discuss the status of the Cliffs Contract and ongoing issues relating to their business relationship. Representatives of Cliffs review Essar Algoma's operations and stockpiles of iron ore pellets when they visit Sault Ste. Marie. The most recent visit by Cliffs' personnel was on September 18, 2015 shortly before Cliffs purported to terminate the Cliffs Contract. Prior to that, representatives of Cliffs, including sales, operational, safety and quality personnel visited Essar Algoma in Sault Ste. Marie in October 2014 and August 2013. All of these visits fall within LeBel J.'s statement in *Van Breda* that "regularly visiting the jurisdiction" can constitute carrying on business in the jurisdiction.

57 Cliffs has previously appeared in the Ontario Superior Court of Justice in connection with the Cliffs Contract. In 2010 after Cliffs purported to terminate the Cliffs Contract after a pricing dispute, Essar Algoma applied for and obtained interim injunctive relief. Cliffs appeared on the application and did not oppose the jurisdiction of the Court to hear the relief. Rather it opposed the injunction on the merits. Cliffs complied with the terms of the injunction.

58 I conclude and find that Essar Algoma has established a presumptive connecting factor to Ontario for its claim under the Cliffs Contract to Ontario on the basis that Cliffs has carried on business in Ontario.

59 Cliffs has the burden of rebuttal and must establish facts which demonstrate that the presumptive connecting factors in this case do not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them. I do not think Cliffs has met that burden. The relationship between the Cliffs Contract and Ontario is not weak and the visits and meetings by Cliffs personnel in Sault Ste. Marie were not for trivial purposes. They were regular visits to meet with an important customer.

60 Accordingly I find that this Court has jurisdiction over the claim of Essar Algoma against Cliffs.

***Forum non conveniens***

61 The party raising *forum non conveniens* has the burden of showing that the alternative forum is clearly more appropriate. The use of the word "clearly" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. See *Van Breda* at paras. 108 and 109.

62 The factors to be considered are numerous and variable. See *Black v. Breeden*, [2012] 1 S.C.R. 666 (S.C.C.) at para. 23. In *Van Breda*, at para. 5 LeBel J. provided a non-exhaustive list of factors that could play a role. Cliffs relies on a number of these factors as supporting Ohio as the more convenient forum.

63 Before going through these factors, there is an issue as to whether Ohio is the alternative jurisdiction. Essar Algoma says the alternative jurisdiction is Delaware in which the chapter 15 proceedings are taking place. I hesitate to get into that issue and will assume that the alternative forum is the Ohio District Court. That is certainly the view of the expert witness Allan L. Gropper relied on by Cliffs.

*(i) The cost of transferring the case or of declining the stay*

64 Cliffs says it will result in substantial additional cost and delay to litigate the issues in Ontario. It says that both parties have teams of lawyers in Ohio who are intimately familiar with the case, the relevant documents, witnesses and issues. Cliffs

 

had spent approximately U.S. $1 million on the Ohio litigation before it was dismissed. Essar Algoma has stated that it has a team of 12 attorneys who have spent more than 5,000 hours reviewing documents in the Ohio litigation and that its attorneys have reviewed more than 43,000 documents that Cliffs has produced.

65 Cliffs is concerned that if the matter is litigated in Ontario, both sides will have to educate Ontario lawyers about all of this. At one time, that would have been a major concern. However it is now possible and becoming commonplace in cross-border litigation for American lawyers to appear in an Ontario court, and *vice versa*. The recent Nortel trial was a perfect example of that in which on many days there were 10 to 20 U.S. lawyers in Toronto attending the trial.

66 Cliffs also says that as the Cliffs Contract is governed by Ohio law, there would be the added expense of proving Ohio law. That appears to me to be a minor expense. Essar Algoma has already provided an affidavit of an expert on Ohio law, which Cliffs accepted at least on one point during argument. An affidavit on Ohio contract law could not be relatively expensive in comparison to what has already been expended. Cliffs has also provided a copy of Ohio jury instructions for a civil breach of contract case. The concepts seem virtually identical to Ontario concepts.

67 This factor is essentially a neutral one.

*(ii) The impact of a transfer on the conduct of the litigation or on related parallel proceedings*

68 Cliffs says having an Ontario court hear the dispute would deprive it of an Ohio judge who is familiar with the issues. Judge Nugent is certainly far more familiar with the issues than an Ontario judge would be. However an Ontario judge, like any other judge hearing a trial or proceeding, is used to coming in cold and picking it up quickly.

69 Judge Nugent has not ruled on whether the Cliffs Contract can be terminated or on whether there were breaches of the contract by Essar Algoma that could be considered material breaches. He merely found on the summary judgment motion, that he dismissed, that there was no legally enforceable agreement between the parties to reduce the 2014 annual nomination to 3.3 million tons and that Essar Algoma therefore failed to meet its annual requirements by a margin of at least 500,000 tons. He did not deal with other defences that Essar Algoma was asserting and stated that he could not conclude that there was a breach entitling Cliffs to damages. Cliffs did not claim any declaration that it had a right to terminate the Cliffs Contract. Cliffs says that if it can prove that there were material breaches, it would have the right to terminate the Cliffs Contract. These are issues yet to be dealt with.

70 So far as the timing of any trial or other proceeding is concerned, there is no evidence that the Ohio District Court would be in a better position to hear the case sooner than in this Court. Cliffs says it is ready to proceed to trial. Essar Algoma has said it needs more discovery. Both Cliffs and Essar Algoma say they want the matter determined as quickly as possible.

71 Whatever the situation, this Court can accommodate the parties quickly. The situation for Essar Algoma is critical, and the Monitor has stated in its sixth report that in developing and carrying out the SISP, which has tight timelines, Algoma needs certainty concerning the status of the Cliffs Contract and an expedited determination of the rights of the parties is linked to the development of the SISP. Whether those rights can be determined that quickly may be a question mark, but this Court is in at least as good a position as the Ohio court to deal with the issues quickly.

72 I see this factor as neutral or at best perhaps slightly favouring Cliffs.

*(iii) The possibility of conflicting judgments*

73 I do not see this as an issue. In argument, Essar Algoma acknowledged that it is bound by the finding made by Judge Nugent, to which I have already referred. It could hardly say otherwise, given the principle of *res judicata*. All other issues remain open.

*(iv) Location of evidence*

  

74 Cliffs says it will have to call evidence of witnesses in the U.S. regarding its advance planning and why Essar Algoma's actions were a problem to Cliffs. These witnesses would come from Cleveland.

75 However, Essar Algoma's witnesses are from Sault Ste. Marie. There is no evidence how many from each side will need to be called. It is a shorter trip from Cleveland to Toronto than from Sault Ste. Marie to Toronto, whether by air or car. In this day of international contracts, particularly between parties near the Canadian border, I do not see this factor as compelling. It is a neutral factor.

*(v) Applicable law*

76 Ohio law governs the Cliffs Contract. Cliffs says there is a risk an Ontario court will apply Ohio law incorrectly. I suppose it can be said that an Ohio judge would also apply it incorrectly. This might be a material factor if the law in question was markedly different from Ontario law with concepts unknown to Ontario law. It is clear from the record however that this is not the case. It was acknowledged in argument that Ohio law is not substantially different from Ontario law regarding material breach.

77 Cliffs cites the standard jury instructions in Ohio which defines material breach as follows:

> "Material breach" by plaintiff means a breach that violates a term essential to the purpose of the contract. Mere nominal, trifling, slight or technical departures from the contract terms are not material breaches so long as they occur in good faith.

78 The jury instructions go on to say that some Ohio courts have utilized the following five factors listed in the Restatement of the Law, (2d) Contracts (1981) in deciding whether a breach is material:

> (i) The extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (ii) The extent to which the injured party can be adequately compensated for the part of the benefit of which he will be deprived;
>
> (iii) The extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (iv) The likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (v) The extent to which the behaviour of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.
>
> (vi) The extent to which the behaviour of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

79 Cliffs argues that the determination of whether a party failed to comport with standards of good faith and fair dealing is an inherently local reflection of local commercial mores and that the nature of an Ontario court's determination of standards of good faith and fair dealing would inevitably reflect Ontario values and standards rather than Ohio values and standards. I find this argument a stretch. There is no suggestion in the evidence that the values in Cleveland on such an issue would be different from the values in Sault Ste. Marie. In any event, there is nothing in the Ohio law that says that in a case involving parties undertaking a contract in Cleveland and Sault Ste. Marie, it is the Cleveland values rather than the Sault Ste. Marie values that are to be considered.

80 Ontario courts can and do often apply foreign law. In this case I do not consider the fact that the law to be applied is Ohio law much of a factor, if any.

*(vi) Recognition and enforcement of an Ontario judgment*

  

81 Cliffs takes the position that there is no jurisdiction in this Court to deal with the Essar Algoma claim against Cliffs because an injunction should not be ordered against a U.S. resident such as Cliffs that could not be enforced.

82 This argument assumes that Cliffs would ignore a decision of an Ontario court. Whether that is so is a question. Cliffs complied with an injunction ordered in Ontario in 2010 after it purported to terminate the Cliffs Contract. Cliffs has requested alternative relief if this Court assumes jurisdiction requiring a statement of claim to be delivered by Essar Algoma, which is some indication that it intends to appear and deal with the issue if it is to be dealt with in Ontario. If it does there could be no issue of Ontario having jurisdiction that would not be recognized by a U.S. Court as Cliffs would have attorned to the jurisdiction.

83 Cliffs relies on a passage from Sharpe, *Injunctions and Specific Performance*, (loose-leaf ed. November 2015 Toronto: Canada Law Book), ¶1.1220 that refers to a reluctance of courts to make an order that cannot be enforced, as follows:

> Claims for injunctions against foreign parties present jurisdictional constraints which are not encountered in the case of claims for money judgments. In the case of a money claim, the courts need not limit assumed jurisdiction to cases where enforceability is ensured. Equity, however, acts *in personam* and the effectiveness of an equitable decree depends upon the control which may be exercised over the person of the defendant. If the defendant is physically present, it will be possible to require him or her to do, or permit, acts outside the jurisdiction. The courts have, however, conscientiously avoided making orders which cannot be enforced. The result is that the courts are reluctant to grant injunctions against parties not within the jurisdiction and the practical import of rules permitting service *ex juris* in respect of injunction claims is necessarily limited. Rules of court are typically limited to cases where it is sought to restrain the defendant from doing anything within the jurisdiction. As a practical matter the defendant "who is doing anything within the jurisdiction" will usually be physically present within the jurisdiction to allow ordinary service.

84 I have not been provided with any case however involving cross-border insolvencies in which orders in proceedings under the CCAA cannot be enforced in the United States in chapter 15 proceedings under the U.S. Bankruptcy Code or that deal with evidence as in this case regarding the enforceability of a non-monetary judgment in the United States.

85 Cliffs relies on an opinion of Allan L. Gropper, a highly regarded federal bankruptcy judge for the Southern District of New York from 2000 to 2015. In that opinion, Mr. Gropper stated that United States courts have the greatest respect for the orders and judgments of courts of other nations, particularly those of Canada and judgments for money are ordinarily enforced. He stated that while non-monetary judgments are less regularly enforced, in appropriate circumstances they may be enforced under the common law principle of comity. However, in order for a foreign order or judgment to be enforced, the foreign court must have personal jurisdiction over the defendant. [5]

86 I could hardly quarrel with an opinion on these matters by someone as eminent as Mr. Gropper. However, Mr. Gropper was instructed to assume that Cliffs does not carry on business in Canada, and that assumption is critical to his analysis. That assumption cannot stand in light of the findings that I have made regarding Cliffs carrying on business in Ontario. While Mr. Gropper opines that a U.S. court must scrutinize the basis on which a foreign court asserts jurisdiction over a defendant, and in light of international concepts of jurisdiction to adjudicate, there is no discussion of this issue if the foreign court such as this Court has found that the defendant has carried on business in Ontario under a contract made in Ontario.

87 Essar Algoma relies on an opinion of Ronald A. Brand, a professor of law at the University of Pittsburgh and highly qualified in the area of the recognition of foreign judgments. Professor Brand's opinion is that the fact that a Canadian judgment provides relief in the form of (a) a declaratory order concerning the rights and obligations of parties under and the status of a contract, and/or (b) specific performance of contractual obligations, would not prevent the recognition and enforcement of that judgment in a court in the United States. Recognition is based on the principle of comity and derives from a U.S. case of *Hilton v. Guyot*, 159 U.S. 113 (U.S. N.Y. Sup. 1895). Professor Brand says that the principles of comity discussed in that case have made the U.S. one of the most liberal countries in the world in recognizing foreign judgments.

  

88 Cliffs relies on an opinion of Richard B. McQuade Jr., as U.S. District Court judge from 1986 to 1989 and before that an Ohio Common Pleas Court judge from 1978. Since 1998 he has served as a judge by assignment in both federal and Ohio states courts. His opinion is that an Ohio, Minnesota or Michigan court would not enforce an order of an Ontario court in the nature of specific performance. I must say that I prefer the opinion of Professor Brand for the reasons given by Professor Brand and his impressive credentials on the subject, credentials that I believe to be superior to those of Mr. McQuade.

89 Mr. McQuade states in his opinion that recognition of foreign judgments is based upon general principles of comity. He then goes on to state that the Uniform Foreign-Money Judgments Recognition Act that has been adopted in many states, including Ohio, Michigan and Minnesota, restricts the enforcement of foreign judgments to the recovery of money only. This, however, is not the whole picture. As Professor Brand points out, those state statutes are limited in scope to the recognition of foreign money judgments, but they all include a "savings clause" which specifically acknowledges that judgments other than money judgments may be recognized by applying traditional concepts of comity.

90 Mr. McQuade in his opinion stated that courts that adopted the Uniform Act have consistently denied enforcement to non-monetary judgments, and he cited one case *Sea Search Armada v. Republic of Colombia*, 821 F.Supp.2d 268 (U.S. Dist. Ct. 2011) as authority for that proposition. However, as explained by Professor Brand, that decision dealt with a version of the Uniform Foreign Money-Judgments Recognition Act that was in effect in Washington D.C. in 2011 that did not contain the savings clause that other states including Ohio, Michigan and Minnesota had adopted. A Washington D.C. statute was later passed in 2011 after the decision to expressly preserve the D.C. courts' discretion to recognize foreign non-money judgments under principles of comity or otherwise. Curiously, Mr. McQuade in a footnote to his opinion stated that a U.S. court may provide injunctive relief to enforce a foreign judgment it has recognized and that a U.S. court in doing so may take into account a number of factors typically taken into account in ordering injunctive relief. That footnote was contrary to his opinion stated in the body of his affidavit. [6]

91 There is also the issue as to what a U.S. court would consider in recognizing an injunctive order from this Court. In a recent article in 2014 by Judge Martin Glenn of the United States Bankruptcy Court for the Southern District of New York, Judge Glenn commented on the practice of comity between the U.S. and Canada. He stated:

> In *Hilton v. Guyot*, the Supreme Court held that if the foreign forum provides "a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting," the judgment should be enforced and not "tried afresh." *Hilton*, 159 U.S. at 202-03. "[W]hen the foreign proceeding is in a sister common law jurisdiction with procedures akin to our own, comity should be extended with less hesitation, there being fewer concerns over the procedural safeguards employed in those foreign proceedings." *In re Bd. of Dirs. of Hopewell Int'l. Ins. Ltd., Inc.*, 238 B.R. 25, 66 (Bankr. S.D.N.Y. 1999), *aff'd*, 238 B.R. 699 (S.D.N.Y. 2002) (internal quotation marks and citations omitted). For example, the U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford creditors a full and fair opportunity to be heard in a manner consistent with standards of U.S. due process. U.S. federal courts have repeatedly granted comity to Canadian proceedings.

92 Judge Glenn also referred to a reluctance to second guess a decision of a foreign court in taking jurisdiction if the defendant appeared in the foreign court to challenge its jurisdiction and failed to prevail. He stated:

> In deciding whether to enforce a foreign judgment, a court in the United States may scrutinize the basis for the assertion of jurisdiction by the foreign court. *See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 482 cmt. c. ("*Lack of jurisdiction over defendant.* The most common ground for refusal to recognize or enforce a foreign judgment is lack of jurisdiction to adjudicate in respect of the judgment debtor. If the rendering court did not have jurisdiction over the defendant under the laws of its own state, the judgment is void and will not be recognized or enforced in any other state. Even if the rendering court had jurisdiction under the laws of its own state, a court in the United States asked to recognize a

  

foreign judgment should scrutinize the basis for asserting jurisdiction in the light of international concepts of jurisdiction to adjudicate."). Whether jurisdiction was challenged in the foreign court is relevant but not necessarily decisive in deciding whether to enforce a foreign judgment, although a renewed challenge to jurisdiction is generally precluded. *Id.* ("If the defendant appeared in the foreign court to challenge the jurisdiction of the court and failed to prevail, it is not clear whether such determination will be considered *res judicata* by a court in the United States asked to recognize the resulting judgment."); *Id.* at § 482 rn.3 ("[i]f the defendant challenged the jurisdiction of the rendering court in the first action and the challenge was unsuccessful or was not carried to conclusion ... a renewed challenge to jurisdiction of the rendering court is generally precluded").

93 I recognize the reluctance expressed by Justice Sharpe in his text that our courts avoid making orders that cannot be enforced. However on the basis of the evidence before me, Cliffs has not established that an order made in this Court requiring Cliffs to perform the Cliffs Contract would not be enforced in those states where Cliffs has assets. I accept that there may be some risk as opinions are only opinions, but the risk on the basis of the evidence before me does not rise to the level that would render Ontario a *forum non conveniens* in this case.

*(vii) Conclusion on forum non conveniens*

94 Cliffs has not met its burden of showing that the alternative forum, in this case Ohio, is clearly more appropriate.

**Is the relief inappropriate for a summary proceeding?**

95 Cliffs takes the position that the relief Essar Algoma seeks is inappropriate for a summary proceeding and that there is no basis for Essar Algoma claiming urgency. This is not raised as a *forum non conveniens* point. It requests an order that Essar Algoma must deliver a statement of claim.

96 So far as the urgency is concerned, the Monitor has made clear that the issue needs to be quickly decided. I cannot find that Essar Algoma has purposely delayed the issue. In any event, Cliffs in argument took the position that it wanted the issue decided quickly.

97 Regarding the kind of hearing required to deal with the dispute, there is nothing in the record before me to say that Essar Algoma is demanding some summary procedure that would impair Cliffs' procedural rights in any material way. In argument, counsel for Essar Algoma said that what procedure will be adopted is for this Court on another day and that the parties will have to work together to come up with an appropriate procedure. It could be a full trial or less.

98 I would not at this stage order that Essar Algoma deliver a statement of claim. What the form of the process will take is yet to be decided. I agree with Cliffs that the procedural rights of the parties should be protected as much as possible as the circumstances will permit. Those circumstances, of course, include the fact that Essar Algoma filed under the CCAA shortly after Cliffs purported to terminate the Cliffs Contract and that the issue needs to be dealt with quickly for the sake of both parties. As well, the principles laid out in *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) and the need to be mindful of the most proportionate procedure for a case will need to be considered.

**Conclusion**

99 The motion of Cliffs is dismissed.

*Motion dismissed.*

Footnotes

1 The power in section 11 is "subject to the restrictions set out in this Act." Cliffs argued that an inference should be drawn that because Essar Algoma withdrew its critical supplier motion, an inference should be drawn that it did so because it could not comply with the critical supplier tests in section 11(4). Thus the failure to be able to comply with section 11(4) should be read as a restriction in the Act preventing the use of section 11 by the applicants. I decline to make such an inference and in any event do not think a failure to

  

fall into the language of section 11(4) which provides that a court *may* make an order can be read to be a restriction under section 11. It is commonplace in CCAA proceedings to make orders requiring supply without invoking section 11(4).

2 At the request of Cliffs, the claims procedure order signed on January 14, 2016 in this CCAA proceeding by agreement did not cover Cliffs' claims and the procedure to govern those claims is to await the determination of this motion.

3 It would be up to the Delaware Bankruptcy Court to determine if the claim should proceed in that Court or in the Ohio District Court.

4 Although Justice Dumas referred to a trustee and the Bankruptcy Court, the case was a CCAA case and the MME was not a bankrupt.

5 Mr. Gropper went on in his opinion to give his view ("it is submitted...") that a U.S. Court would not find that Cliffs has submitted to the jurisdiction of the Canadian courts. I have serious doubts as to whether an expert in foreign law should go beyond stating what the foreign law is and give an opinion on what the foreign court would do in a particular case. See my comments in *Nortel Networks Corp., Re* (2014), 20 C.B.R. (6th) 171 (Ont. S.C.J. [Commercial List]) at paras. 103-104. In any event, his opinion was based on the assumption that Cliffs did not carry on business in Canada.

6 Mr. Gropper also referred, in a footnote to his statement that in appropriate circumstances a non-monetary may be enforced under the common law principle of comity, to the *Sea Search* case as authority that where the Uniform Act has been adopted, courts have consistently denied enforcement to non-monetary judgments. However Professor Brand's analysis is a complete answer to that case. I would note that while Mr. Gropper has extremely impressive credentials as a bankruptcy expert, his *curriculum vitae* does not list experience in dealing with state courts or the enforcement of foreign judgments under state legislation.

**End of Document**

# TAB 14

2012 SCC 17
Supreme Court of Canada

Van Breda v. Village Resorts Ltd.

2012 CarswellOnt 4268, 2012 CarswellOnt 4269, 2012 SCC 17, [2012] 1 S.C.R. 572, [2012] A.C.S. No. 17, [2012] S.C.J. No. 17, 10 R.F.L. (7th) 1, 114 O.R. (3d) 79 (note), 17 C.P.C. (7th) 223, 212 A.C.W.S. (3d) 712, 291 O.A.C. 201, 343 D.L.R. (4th) 577, 429 N.R. 217, 91 C.C.L.T. (3d) 1, J.E. 2012-788

# Club Resorts Ltd. (Appellant) and Morgan Van Breda, Viktor Berg, Joan Van Breda, Tony Van Breda, Adam Van Breda and Tonnille Van Breda (Respondents) and Tourism Industry Association of Ontario, Amnesty International, Canadian Centre for International Justice, Canadian Lawyers for International Human Rights and Ontario Trial Lawyers Association (Interveners)

Club Resorts Ltd. (Appellant) and Anna Charron, Estate Trustee of the Estate of Claude Charron, deceased, the said Anna Charron, personally, Jennifer Candace Charron, Stephanie Michelle Charron, Christopher Michael Charron, Bel Air Travel Group Ltd. and Hola Sun Holidays Limited (Respondents) and Tourism Industry Association of Ontario, Amnesty International, Canadian Centre for International Justice, Canadian Lawyers for International Human Rights and Ontario Trial Lawyers Association (Interveners)

McLachlin C.J.C., Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell JJ. [*]

Heard: March 21, 2011
Judgment: April 18, 2012 [**]
Docket: 33692, 33606

Proceedings: affirming *Van Breda v. Village Resorts Ltd.* (2010), 98 O.R. (3d) 721, 71 C.C.L.T. (3d) 161, 81 C.P.C. (6th) 219, 316 D.L.R. (4th) 201, 77 R.F.L. (6th) 1, 2010 CarswellOnt 549, 2010 ONCA 84, 264 O.A.C. 1 (Ont. C.A.); additional reasons at *Van Breda v. Village Resorts Ltd.* (2010), 81 C.P.C. (6th) 269, 77 R.F.L. (6th) 51, 72 C.C.L.T. (3d) 225, 2010 ONCA 232, 2010 CarswellOnt 1751 (Ont. C.A.); affirming *Van Breda v. Village Resorts Ltd.* (2008), 60 C.P.C. (6th) 186, 2008 CarswellOnt 3867 (Ont. S.C.J.); additional reasons at *Van Breda v. Village Resorts Ltd.* (2008), 2008 CarswellOnt 4738 (Ont. S.C.J.); and affirming *Charron v. Bel Air Travel Group Ltd.* (2008), (sub nom. *Charron Estate v. Bel Air Travel Group Ltd.)* 92 O.R. (3d) 608, 2008 CarswellOnt 6165 (Ont. S.C.J.); additional reasons at *Charron v. Bel Air Travel Group Ltd.* (2008), 2008 CarswellOnt 7770 (Ont. S.C.J.)

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François Larocque, Michael Sobkin, Mark C. Power, Lauren J. Wihak, for Interveners, Amnesty International, Canadian Centre, for International Justice and Canadian Lawyers, for International Human Rights (33606 and 33692)
Allan Rouben, for Intervener, Ontario Trial Lawyers Association (33606 and 33692)

Subject: International; Torts; Civil Practice and Procedure; Contracts; Family

 

APPEALS by defendant from judgment reported at *Van Breda v. Village Resorts Ltd.* (2010), 98 O.R. (3d) 721, 71 C.C.L.T. (3d) 161, 81 C.P.C. (6th) 219, 316 D.L.R. (4th) 201, 77 R.F.L. (6th) 1, 2010 CarswellOnt 549, 2010 ONCA 84, 264 O.A.C. 1 (Ont. C.A.).

POURVOIS formés par les défendeurs à l'encontre d'un jugement publié à *Van Breda v. Village Resorts Ltd.* (2010), 98 O.R. (3d) 721, 71 C.C.L.T. (3d) 161, 81 C.P.C. (6th) 219, 316 D.L.R. (4th) 201, 77 R.F.L. (6th) 1, 2010 CarswellOnt 549, 2010 ONCA 84, 264 O.A.C. 1 (Ont. C.A.).

***LeBel J.*:**

**I. Introduction**

1 Tourism has grown into one of the most personal forms of globalization in the modern world. Canadians look elsewhere for the sun, or to see new sights or seek new experiences. Trips are planned and taken with great expectations. But personal tragedies do happen. Happiness gives way to grief, as in the situations that resulted in these appeals. A young woman, Morgan Van Breda, suffered catastrophic injuries on a beach in Cuba. A family doctor and father, Dr. Claude Charron, died while scuba diving, also in Cuba. Actions were brought in Ontario against a number of parties, including the appellant Club Resorts Ltd. ("Club Resorts"), a company incorporated in the Cayman Islands that managed the two hotels where the accidents occurred. Club Resorts sought to block those proceedings, arguing that the Ontario courts lacked jurisdiction and, in the alternative, that a Cuban court would be a more appropriate forum on the basis of the doctrine of *forum non conveniens*. The same issues have now been raised in this Court. I will begin by summarizing the events that led to the litigation, the conduct of the litigation and the judgments of the courts below. I will then consider the principles that should apply to the assumption of jurisdiction and the doctrine of *forum non conveniens* under the common law conflicts rules of Canadian private international law. Finally, I will apply those principles to determine whether the Ontario courts have jurisdiction and, if so, whether they should decline to exercise it.

**II. Background and Facts**

***A. Van Breda***

2 In June 2003, the respondent Viktor Berg and his spouse, Ms. Van Breda, went on a trip to Cuba, where they stayed at the SuperClub's Breezes Jibacoa resort managed by Club Resorts. Mr. Berg, a professional squash player, had made arrangements for a one-week stay for two people at this hotel through René Denis, an Ottawa-based travel agent operating a business known as Sport au Soleil.

3 Mr. Denis's business involved arranging for racquet sport professionals for, among others, Club Resorts, in exchange for undisclosed compensation. Mr. Denis also received a fee from each professional. Once the arrangements for Mr. Berg were finalized, Mr. Denis sent him a letter on letterhead bearing the words "SuperClubs Cuba — Tennis", which confirmed the details of the agreement with Club Resorts: Mr. Berg was to provide two hours of tennis lessons a day in exchange for bed and board and other services for two people at the hotel.

4 The accident happened on the first day of their stay. Ms. Van Breda tried to do some exercises on a metal structure on the beach, but the structure collapsed. She suffered catastrophic injuries and, as a result, became paraplegic. After spending a few days in a hospital in Cuba, she returned to Canada, going to Calgary where her family lived. She is now living in British Columbia with Mr. Berg. They never returned to Ontario, which they had planned to do after their holiday.

5 In May 2006, Ms. Van Breda, her relatives and Mr. Berg sued several defendants, including Mr. Denis, Club Resorts, and some companies associated with Club Resorts in the SuperClubs group, in the Ontario Superior Court of Justice. Their claim was framed in contract and in tort. They sought damages for personal injury, damages for loss of support, care, guidance and companionship pursuant to the *Family Law Act*, R.S.O. 1990, c. F.3, and punitive damages.

  

6 Some of the parties, including those who were served outside Ontario under rule 17.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, moved to dismiss the action for want of jurisdiction. In the alternative, they asked the Superior Court of Justice to decline jurisdiction on the basis of *forum non conveniens*.

***B. Charron***

7 In January 2002, Dr. Charron and his wife booked a vacation package through a travel agent, Bel Air Travel Group Ltd. ("Bel Air"). This package was offered by Hola Sun Holidays Ltd. ("Hola Sun"), which sold packages offered by, among others, SuperClubs. It was an all-inclusive package — at the Breezes Costa Verde hotel in Cuba — that featured scuba diving. The hotel was owned by Gaviota SA (Ltd.) ("Gaviota"), a Cuban corporation, but was managed by the appellant, Club Resorts. Dr. and Mrs. Charron reached the Breezes Costa Verde on February 8, 2002. Four days later, Dr. Charron drowned during his second scuba dive.

8 Mrs. Charron and her children sued for breach of contract and negligence. Dr. Charron's estate sought damages for loss of future income, and the individual plaintiffs also sought damages for loss of love, care, guidance and companionship pursuant to the *Family Law Act*. The statement of claim was served on the Ontario defendants, Bel Air and Hola Sun. It was also served outside Ontario on several foreign defendants, including Club Resorts, under rule 17.02. The parties served outside Ontario included the diving instructor and the captain of the boat. Club Resorts and an associated company, Village Resorts International Ltd., which owned the SuperClubs trademark, moved to dismiss the action on the ground that the Ontario courts lacked jurisdiction or, in the alternative, to stay the action on the grounds that Ontario was not the most appropriate forum.

***C. Judicial History***

*(1) Van Breda — Ontario Superior Court of Justice, (2008), 60 C.P.C. (6th) 186 (Ont. S.C.J.)*

9 In *Van Breda*, Pattillo J. held that Club Resorts' motion turned on whether there was a real and substantial connection in accordance with the test laid out by the Ontario Court of Appeal in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (Ont. C.A.). He found that there was a connection between Ontario and Club Resorts by virtue of the activities the company engaged in in Ontario through Mr. Denis. He also found on a *prima facie* basis that the agreement between Mr. Berg and Club Resorts had actually been concluded in Ontario. After reviewing the other factors from *Muscutt v. Courcelles*, including unfairness to the defendants in assuming jurisdiction, unfairness to the plaintiffs in not doing so and the involvement of other parties to the suit, he held that there was a sufficient connection between Ontario and the subject matter of the litigation. Pattillo J. then considered the issue of *forum non conveniens*. Although he accepted that Cuba also had jurisdiction, he concluded that it had not been established that a Cuban court would clearly be a more appropriate forum. For these reasons, he held that the Ontario Superior Court of Justice should entertain the action as against Club Resorts.

*(2) Charron — Ontario Superior Court of Justice, (2008), 92 O.R. (3d) 608 (Ont. S.C.J.)*

10 In *Charron*, Mulligan J. held against Club Resorts. In his opinion, a contract had been entered into between Dr. Charron and Bel Air. The travel agency had booked an all-inclusive package at the Cuban hotel through Hola Sun, which had an agreement with Club Resorts. These facts weighed in favour of assuming jurisdiction. Mulligan J. also found that there was a connection between Ontario and the defendants. In his view, the resort relied heavily on international travellers to ensure its profitability. Club Resorts marketed the resort in Ontario by way of an agreement with Hola Sun. I note that the record indicated that Club Resorts or one of its associated companies had an office in Richmond Hill, Ontario. After reviewing the other factors from *Muscutt v. Courcelles*, Mulligan J. held that the Ontario courts had jurisdiction with respect to Club Resorts. In considering *forum non conveniens*, Mulligan J. weighed several factors. He took into account the fact that more parties and witnesses were located in Ontario than in Cuba, that the damage had been sustained in Ontario and that a liability insurance policy was available to the foreign defendants in Ontario. In addition, Mrs. Charron and her children would lose the benefit of statutory family law remedies if the case were to proceed in Cuba. For these reasons, Mulligan J. held that the Ontario court was clearly a more appropriate forum than a Cuban court.

 

*(3) Ontario Court of Appeal, 2010 ONCA 84, 98 O.R. (3d) 721 (Ont. C.A.)*

11 The two cases were heard together in the Court of Appeal. After ordering a rehearing, the Court of Appeal, in reasons written by Sharpe J.A., took the opportunity to review and reframe the *Muscutt* test. I will discuss this new framework below in reviewing the evolution of the common law policy relating to conflicts of jurisdiction and conflicts of laws.

12 Suffice it to say at this stage that, after recasting the *Muscutt* test, the Court of Appeal unanimously held, in both cases, that the Ontario courts had jurisdiction over the claims and the parties. It then decided that the Ontario courts should not decline jurisdiction on the basis of *forum non conveniens* principles, because a Cuban court would not clearly be a more appropriate forum.

13 The appeals in *Van Breda* and *Charron* were also heard together in this Court. They were heard during the same session as two other appeals involving the issues of jurisdiction and *forum non conveniens*, which concerned actions in damages for defamation (*Black v. Breeden*, 2012 SCC 19 (S.C.C.), and *Banro Corp. v. Éditions Écosociété Inc.*, 2012 SCC 18 (S.C.C.)).

**III. Analysis**

***Issues***

*(1) Nature and Scope of Private International Law*

14 These appeals raise broad issues about the fundamental principles of the conflict of laws as this branch of the law has traditionally been known in the common law, or "private international law" as it is often called now (A. Briggs, *The Conflict of Laws* (2nd ed. 2008), at pp. 2-3; Manitoba Law Reform Commission, *Private International Law*, Report No. 119 (2009), at p. 2; J.-G. Castel, "The Uncertainty Factor in Canadian Private International Law" (2007) 52 *McGill L.J.* 555).

15 Although both appeals raise issues concerning both the determination of whether a court has jurisdiction (the test of jurisdiction *simpliciter*) and the principles governing a court's decision to decline to exercise its jurisdiction (the doctrine of *forum non conveniens*), those issues may have an impact on the development of other areas of private international law. Private international law is in essence domestic law, and it is designed to resolve conflicts between different jurisdictions, the legal systems or rules of different jurisdictions and decisions of courts of different jurisdictions. It consists of legal principles that apply in situations in which more than one court might claim jurisdiction, to which the law of more than one jurisdiction might apply or in which a court must determine whether it will recognize and enforce a foreign judgment or, in Canada, a judgment from another province (S. G. A. Pitel and N. S. Rafferty, *Conflict of Laws* (2010), at p. 1).

16 Three categories of issues — jurisdiction, *forum non conveniens* and the recognition of foreign judgments — are intertwined in this branch of the law. Thus, the framework established for the purpose of determining whether a court has jurisdiction may have an impact on the choice of law and on the recognition of judgments, and vice versa. Judicial decisions on choice of law and the recognition of judgments have played a central role in the evolution of the rules related to jurisdiction. None of the divisions of private international law can be safely analysed and applied in isolation from the others. This said, the central focus of these appeals is on jurisdiction and the appropriate forum.

*(2) Issues Related to Jurisdiction: Assumption and Exercise of Jurisdiction*

17 Two issues arise in these appeals. First, were the Ontario courts right to assume jurisdiction over the claims of the respondents Van Breda and Charron and over the appellant, Club Resorts? Second, were they right to exercise that jurisdiction and dismiss an application for a stay based on *forum non conveniens*?

18 To be able to resolve these issues, I must first discuss the evolution of the rules of jurisdiction *simpliciter* in Canadian private international law. It will be necessary to review the approach the Ontario Court of Appeal adopted in respect of the questions of assumption of jurisdiction and *forum non conveniens* in its judgments in the cases at bar and, in particular, its reconsideration of the principles that it had previously set out in *Muscutt*.

 

19 I will then propose an analytical framework and legal principles for assuming jurisdiction (jurisdiction *simpliciter*) and for deciding whether to decline to exercise it (*forum non conveniens*). On that basis, I will review the facts of the cases at bar to determine whether the Ontario courts made any reviewable errors when they decided to retain jurisdiction over them.

20 Before turning to these issues, however, it is important to consider the constitutional underpinnings of private international law in Canada. This part of the analysis is necessary in order to explain the origins of the "real and substantial connection test" as it is now known, its nature, and its impact on the development of the principles of private international law.

*(3) Constitutional Underpinnings of Private International Law*

21 Conflicts rules must fit within Canada's constitutional structure. Given the nature of private international law, its application inevitably raises constitutional issues. This branch of the law is concerned with the jurisdiction of courts of the Canadian provinces, with whether that jurisdiction should be exercised, with what law should apply to a dispute, and with whether a court should recognize and enforce a judgment rendered by a court of another province or country. The rules of private international law can be found, in the common law provinces, in the common law and in statute law and, in Quebec, in the *Civil Code of Québec*, S.Q. 1991, c. 64, which contains a well-developed set of rules and principles in this area (see *Civil Code of Québec*, Book Ten, arts. 3076 to 3168). The interplay between provincial jurisdiction and external legal situations takes place within a constitutional framework which limits the external reach of provincial laws and of a province's courts. The Constitution assigns powers to the provinces. But these powers are subject to the restriction that they be exercised within the province in question (see P. W. Hogg, *Constitutional Law of Canada* (5th ed. 2007), vol. 1, at pp. 364-65 and 376-77; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (5th ed. 2008), at p. 569; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 (S.C.C.), at paras. 26-28, *per* Major J.), and they must be exercised in a manner consistent with the territorial restrictions created by the Constitution (see *Castillo v. Castillo*, 2005 SCC 83, [2005] 3 S.C.R. 870 (S.C.C.), at para. 5, *per* Major J.; *Unifund Assurance Co. of Canada v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63 (S.C.C.), at para. 51, *per* Binnie J.).

*(4) Origins of the Real and Substantial Connection Test*

22 The real and substantial connection test arose out of decisions of this Court that were aimed at establishing broad and flexible principles to govern the exercise of provincial powers and the actions of a province's courts. It was focussed on two issues: (1) the risk of jurisdictional overreach by provinces and (2) the recognition of decisions rendered in other jurisdictions within the Canadian federation and in other countries. In developing the real and substantial connection test, the Court crafted a constitutional principle rather than a simple conflicts rule (see G. Goldstein and E. Groffier, *Droit international privé*, vol. I (1998), at p. 47). However, the test was born as a general organizing principle of the conflict of laws. Its constitutional dimension appeared only later. Courts have used the expression "real and substantial connection" to describe the test in both senses, and often in the same judgment. This has produced confusion about both the nature of the test and the constitutional status of the rules and principles of private international law. A clearer distinction needs to be drawn between the private international law and constitutional dimensions of this test.

23 From a constitutional standpoint, the Court has, by developing tests such as the real and substantial connection test, sought to limit the reach of provincial conflicts rules or the assumption of jurisdiction by a province's courts. However, this test does not dictate the content of conflicts rules, which may vary from province to province. Nor does it transform the whole field of private international law into an area of constitutional law. In its constitutional sense, it places limits on the reach of the jurisdiction of a province's courts and on the application of provincial laws to interprovincial or international situations. It also requires that all Canadian courts recognize and enforce decisions rendered by courts of the other Canadian provinces on the basis of a proper assumption of jurisdiction. But it does not establish the actual content of rules and principles of private international law, nor does it require that those rules and principles be uniform.

24 The first mention of a "real and substantial connection test" in the Court's modern jurisprudence can be found in the reasons of Dickson J. in *Moran v. Pyle National (Canada) Ltd.* (1973), [1975] 1 S.C.R. 393 (S.C.C.). That case concerned a

  

tort action with respect to manufacturer's liability. The main issue was whether the courts of Saskatchewan had jurisdiction over the claim and, if so, what substantive law governed it. Dickson J. suggested that the English courts seemed to be moving towards some form of "real and substantial connection test" (pp. 407-8) to resolve issues related to the assumption of jurisdiction by a province's courts and the appropriate choice of the law applicable to a tort. The test was formally adopted in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.). As had been the case in *Moran*, the Court's intention in *Morguard* was to develop an organizing principle of Canadian private international law, albeit with constitutional overtones. The test's constitutional role in the Canadian federation was confirmed a few years later in *Hunt v. T & N plc*, [1993] 4 S.C.R. 289 (S.C.C.). Its Janus-like nature — with a private international law face on the one hand and a constitutional face on the other — crystallized in *Hunt* and remained a permanent feature of the subsequent jurisprudence.

25 In retrospect, it can be seen that in *Morguard*, the Court initiated a major shift in the framework governing the conflict of laws in Canada by accepting the validity of the real and substantial connection test as a principle governing the rules applicable to conflicts. In view of its importance, the case merits closer consideration. At issue in *Morguard* was an application to enforce, in British Columbia, a judgment rendered in Alberta against a resident of British Columbia. The claim related to a debt secured by a mortgage on property in Alberta. The parties were resident in Alberta at the time the loan was made. La Forest J., writing for a unanimous Court, called for a re-evaluation of relationships between the courts of the provinces within the Canadian federation. The creation of the Canadian federation established an internal space within which exchanges should occur more freely than between independent states. The principle of comity and the principles of fairness and order applicable within a federal space required that the rules of private international law be adjusted (*Morguard*, at pp. 1095-96).

26 In *Morguard*, the Court held that the courts of a province must recognize and enforce a judgment of a court of another province if a real and substantial connection exists between that court and the subject matter of the litigation. Another purpose of the test was to prevent improper assumptions of jurisdiction by the courts of a province. Thus, the test was designed to ensure that claims are not prosecuted in a jurisdiction that has little or no connection with either the transactions or the parties, and it requires that a judgment rendered by a court which has properly assumed jurisdiction in a given case be recognized and enforced. La Forest J. did not seek to determine the precise content of this real and substantial connection test (*Morguard*, at p. 1108), nor did he elaborate on the strength of the connection. Rather, he held that the connections between the matters or the parties, on the one hand, and the court, on the other, must be of some significance in order to promote order and fairness. They must not be "tenuous" (p. 1110). La Forest J. added that the requirement of a real and substantial connection was consistent with the constitutional imperative that provincial power be exercised "in the province" (p. 1109). Because the appeal had not been argued on constitutional grounds, however, he refrained from determining whether the real and substantial connection test should be considered a constitutional test.

27 The Court's subsequent judgment in *Hunt* confirmed the constitutional nature of the real and substantial connection test. That case concerned the application of a "blocking" statute enacted by the Quebec legislature that prohibited the transfer to other jurisdictions of certain documents kept by corporations in Quebec, even in the context of court litigation. The Court found that the statute was not applicable to litigation conducted in British Columbia. It held that assumptions of jurisdiction by a province and its courts must be grounded in the principles of order and fairness in the judicial system. The real and substantial connection test from *Morguard* reflected the need for limits on assumptions of jurisdiction by a province's courts (*Hunt*, at p. 325). Any improper assumption of jurisdiction would be negated by the requirement that there be a "real and substantial connection" (p. 328; see C. Emanuelli, *Droit international privé québécois* (3rd ed. 2011), at p. 38).

28 Since *Hunt*, the real and substantial connection test has been recognized as a constitutional imperative in the application of the conflicts rules. It reflects the limits of provincial legislative and judicial powers and has thus become more than a conflicts rule. Its application was extended to the recognition and enforcement of foreign judgments in *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416 (S.C.C.).

29 But, in the common law, the nature of the conflicts rules that would accord with the constitutional imperative has remained largely undeveloped in this Court's jurisprudence. Although the real and substantial connection test has been consistently applied both as a constitutional test and as a principle of private international law, since *Hunt*, the Court has generally declined to articulate the content of the private international law rules that would satisfy the test's constitutional requirements or to develop

  

a framework for them. The Court has continued to affirm the relevance and importance of the test and has even extended it to foreign judgments, but without attempting to elaborate upon the rules it requires (see *Beals*, at paras. 23 and 28, *per* Major J.).

30 So the test does exist. But what does it mean? What rules would satisfy its status as a constitutional imperative? Two approaches are possible. One approach is to view the test not only as a constitutional principle, but also as a conflicts rule in itself. If it is viewed as a conflicts rule, its content would fall to be determined on a case-by-case basis by the courts in decisions in which they would attempt to implement the objectives of order and fairness in the legal system. The other approach is to accept that the test imposes constitutional limits on provincial powers, but to seek to develop a system of connecting factors and principles designed to make the resolution of conflict of laws issues more predictable in order to reduce the scope of judicial discretion exercised in the context of each case. Some academic commentators view the second approach as critical in order to maintain order, efficiency and predictability in this area of the law. Indeed, the real and substantial connection test itself has been criticized as being much too loose and unpredictable to facilitate an orderly resolution of conflicts issues (see Castel; J. Blom and E. Edinger, "The Chimera of the Real and Substantial Connection Test" (2005), 38 *U.B.C. L. Rev.* 373).

31 Thus, in the course of this review, we should remain mindful of the distinction between the real and substantial connection test as a constitutional principle and the same test as the organizing principle of the law of conflicts. With respect to the constitutional principle, the territorial limits on provincial legislative competence and on the authority of the courts of the provinces derive from the text of s. 92 of the *Constitution Act, 1867*. These limits are, in essence, concerned with the legitimate exercise of state power, be it legislative or adjudicative. The legitimate exercise of power rests, *inter alia*, upon the existence of an appropriate relationship or connection between the state and the persons who are brought under its authority. The purpose of constitutionally imposed territorial limits is to ensure the existence of the relationship or connection needed to confer legitimacy.

32 As can be observed from the jurisprudence, in Canadian constitutional law, the real and substantial connection test has given expression to the constitutionally imposed territorial limits that underlie the requirement of legitimacy in the exercise of the state's power of adjudication. This test suggests that the connection between a state and a dispute cannot be weak or hypothetical. A weak or hypothetical connection would cast doubt upon the legitimacy of the exercise of state power over the persons affected by the dispute.

33 The constitutionally imposed territorial limits on adjudicative jurisdiction are related to, but distinct from, the real and substantial connection test as expressed in conflicts rules. Conflicts rules include the rules that have been chosen for deciding when jurisdiction can be assumed over a given dispute, what law will govern a dispute or how an adjudicative decision from another jurisdiction will be recognized and enforced. The constitutional territorial limits, on the other hand, are concerned with setting the outer boundaries within which a variety of appropriate conflicts rules can be elaborated and applied. The purpose of the constitutional principle is to ensure that specific conflicts rules remain within these boundaries and, as a result, that they authorize the assumption of jurisdiction only in circumstances representing a legitimate exercise of the state's power of adjudication.

34 This case concerns the elaboration of the "real and substantial connection" test as an appropriate common law conflicts rule for the assumption of jurisdiction. I leave further elaboration of the content of the constitutional test for adjudicative jurisdiction for a case in which a conflicts rule is challenged on the basis of inconsistency with constitutionally imposed territorial limits. To be clear, however, the existence of a constitutional test aimed at maintaining the constitutional limits on the powers of a province's legislature and courts does not mean that the rules of private international law must be uniform across Canada. Legislatures and courts may adopt various solutions to meet the constitutional requirements and the objectives of efficiency and fairness that underlie our private international law system. Nor does this test's existence mean that the connections with the province must be the strongest ones possible or that they must all point in the same direction.

35 Turning to the search for appropriate conflicts rules, the trend is towards retaining or establishing a system of connecting factors informed by principles for applying them, as opposed to relying on almost pure judicial discretion to achieve order and fairness. This trend is apparent in the laws passed by certain provincial legislatures and is reflected in a number of judicial decisions. These decisions include the important jurisprudential current that the Ontario Court of Appeal has been developing since *Muscutt*, which is in issue in the cases at bar. The real and substantial connection test should be viewed not in isolation,

  

but rather in the context of its historical roots, contemporary legislative developments, the academic literature and initiatives aimed at developing and modernizing Canada's conflicts rules. The test was not born *ex nihilo*, without any awareness of the methods and techniques that evolved in the field of private international law. In this respect, both the common law and the civil law have relied largely on the selection and use of a number of specific objective factual connections.

36 In *Hunt*, La Forest J. cautioned against casting aside all the traditional connections. In commenting on the difficulties of framing an appropriate test for a reasonable assumption of jurisdiction and on the development of the real and substantial connection test, he wrote:

> The exact limits of what constitutes a reasonable assumption of jurisdiction were not defined, and I add that no test can perhaps ever be rigidly applied; no court has ever been able to anticipate all of these. However, though some of these may well require reconsideration in light of *Morguard*, the connections relied on under the traditional rules are a good place to start. [p. 325]

37 Not long after *Hunt*, the Court rendered its judgment in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 (S.C.C.), a case concerned mainly with determining what law should apply to a tort. In it, too, the Court's concern was to assure predictability in the application of the law of conflicts to tort claims. The Court established a new conflicts rule in respect of torts, abandoning the rule it had adopted in *McLean v. Pettigrew* (1944), [1945] S.C.R. 62 (S.C.C.), that favoured the law of the forum (*lex fori*) and holding that, in principle, the law governing the tort should be that of the place where the tort occurred (*lex loci delicti*). The *situs* of the tort would also justify the assumption of jurisdiction by the courts of a province. The Court did not at that time rely solely on the real and substantial connection test as a conflicts rule. In a sense, it held that in this context, the objectives of fairness and efficiency in the conflicts system would be better served by relying on factual connections with the place where the tort occurred.

38 In La Forest J.'s opinion, *Morguard* prevented courts from overreaching by entering into matters in which they had little or no interest (*Tolofson*, at p. 1049). But he also cautioned against building a system of private international law based solely on the expectations of the parties and concerns of fairness in a specific case, as such a system could hardly be considered rational. A degree of predictability or reliability must be assured:

> The truth is that a system of law built on what a particular court considers to be the expectations of the parties or what it thinks is fair, without engaging in further probing about what it means by this, does not bear the hallmarks of a rational system of law. Indeed in the present context it wholly obscures the nature of the problem. In dealing with legal issues having an impact in more than one legal jurisdiction, we are not really engaged in that kind of interest balancing. We are engaged in a structural problem.
>
> (*Tolofson*, at pp. 1046-47)

To La Forest J. in *Tolofson*, order was needed in the conflicts system, and was even a precondition to justice (p. 1058). Certainty was one of the key purposes being pursued in framing a conflicts rule (p. 1061). With this in mind, the Court crafted what it hoped would be a clear conflicts rule for torts that would bring a degree of certainty to this part of tort law and private international law (pp. 1062-64). Subject to the constitutional requirement established in *Morguard*, this rule would make it possible to identify some connecting factors linking the court or the law to the matter and to the parties. The presence of such factors would not necessarily resolve everything. Specific torts might raise particular difficulties that could require crafting carefully defined exceptions (p. 1050). Such difficulties indeed arise in the companion cases of *Breeden* and *Éditions Écosociété Inc.* Nevertheless, a conflicts rule based on specific connections seemed likely to introduce greater certainty into the interpretation and application of private international law principles in Canada.

39 Legislative action since *Morguard* and *Hunt* points in the same direction. Without entering into the details of the complex, often flexible and nuanced, system of conflicts rules that became part of the *Civil Code of Québec* in 1994, it is worth mentioning that the *Civil Code* sets out a number of specific conflicts rules that identify connecting factors to be applied in various international or interprovincial situations. This Court has discussed the *Civil Code*'s scheme on a number of occasions. In particular, in *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205 (S.C.C.), it reviewed

  

the scheme applicable to the assumption by Quebec courts of jurisdiction over situations involving delictual or quasi-delictual liability in an international or interprovincial context.

40 Across Canada, various initiatives have been undertaken to flesh out the real and substantial connection test. For example, the Uniform Law Conference of Canada proposed a uniform Act to govern issues related to jurisdiction and to the doctrine of *forum non conveniens* (see *Uniform Court Jurisdiction and Proceedings Transfer Act* ("*CJPTA*") (online).

41 The *CJPTA* focusses mainly on issues related to the assumption of jurisdiction. Section 3(e) provides that a court may assume jurisdiction if "there is a real and substantial connection between [enacting province or territory] and the facts on which the proceeding against that person is based" (text in brackets in original). Section 10 enumerates a variety of circumstances in which such a connection would be presumed to exist. For example, it lists a number of factors that might apply where the purpose of the proceeding is the determination of property rights or rights related to a contract. In the case of tort claims, s. 10(g) provides that the commission of a tort in a province would be a proper basis for the assumption of jurisdiction by that province's courts. Section 10 states that the list of connecting factors would not be closed and that other circumstances might be proven in order to establish a real and substantial connection. The *CJPTA* also includes specific provisions regarding forum of necessity (s. 6) and *forum non conveniens* (s. 11). A number of subsequent provincial statutes are clearly based on the *CJPTA* (see, e.g., *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28; *The Court Jurisdiction and Proceedings Transfer Act*, S.S. 1997, c. C-41.1; *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003, c. 2; *Court Jurisdiction and Proceedings Transfer Act*, S.Y. 2000, c. 7).

42 In these statutes, the legislative scheme proposed in the *CJPTA* has been adopted, with some differences in wording, as they include non-exhaustive lists of prescriptive connecting factors which are presumed to establish a real and substantial connection. Unlike with Book Ten of the *Civil Code of Québec*, the legislatures that enacted them did not attempt to codify the entire field of private international law, but attached particular importance to issues related to the assumption and exercise of jurisdiction.

43 Unlike in these other provinces, the Ontario legislature has not enacted a statute based on the *CJPTA*. However, the province has established its own set of connecting factors for the purposes of service outside Ontario, which are set out in the Ontario *Rules of Civil Procedure*. These factors, which are found in rule 17.02, are similar, in part, to those of the *CJPTA* and of the statutes based on the *CJPTA*. It has been observed, though, that rule 17.02 is purely procedural in nature and does not by itself establish jurisdiction in a case (P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (2010), at p. 121).

*(5) Understanding the Real and Substantial Connection Test — The Ontario Court of Appeal in Muscutt*

44 Given the absence of statutory rules, the Ontario Court of Appeal endeavoured to establish a common law framework for the application of the real and substantial connection test in its important judgment in *Muscutt*. At issue in that case was a claim in tort. An Ontario resident had been injured in a car crash in Alberta. The four defendants lived in Alberta at the time. One of them moved to Ontario after the accident. The plaintiff returned to Ontario and sued all the defendants in Ontario. Two of the Alberta defendants moved to stay the action for want of jurisdiction and, in the alternative, on the basis of *forum non conveniens*. They argued that the action should be stayed for want of jurisdiction. They also challenged the constitutional validity of the provisions of the Ontario rules on service outside the province. In their opinion, those provisions were *ultra vires* the province of Ontario because they had an extraterritorial effect. The Ontario Superior Court of Justice dismissed the constitutional challenge and assumed jurisdiction. The matter was then appealed to the Court of Appeal, which took the opportunity to consider the constitutional issues, although the main focus of its decision was on the content and the application of the real and substantial connection test.

45 The Court of Appeal quickly disposed of the argument that rule 17.02(h) was unconstitutional. It acknowledged that the real and substantial connection test imposed constitutional limits on the assumption of jurisdiction by a province's courts. But in its opinion, rule 17.02(h) was purely procedural and did not by itself determine the issue of the jurisdiction of the Ontario courts. The rule applied within the limits of the real and substantial connection test and did not resolve the issue of the assumption of jurisdiction (*Muscutt*, at paras. 50-52).

  

46 The Court of Appeal then turned to the central issue in the case: whether it was open to the Superior Court of Justice to assume jurisdiction. Sharpe J.A. first sought to draw a clear distinction between the assumption of jurisdiction itself and *forum non conveniens*, which concerns the court's discretion to decline to exercise its jurisdiction. He cautioned against conflating what he viewed as different analytical stages in a situation in which the assumption of jurisdiction is in issue. A court must determine whether it has jurisdiction by applying the appropriate principles governing the assumption of jurisdiction. If it does have jurisdiction, it might then have to consider whether it should decline to exercise that jurisdiction in favour of a more appropriate forum (*Muscutt*, at paras. 40-42). The critical step in this process consists in determining when a court can properly assume jurisdiction in light of the constitutional limits imposed by the real and substantial connection test.

47 Sharpe J.A. emphasized the importance of this Court's decisions — from *Morguard* to *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 (S.C.C.) — in the re-crafting of the traditional approaches to the resolution of conflicts in private international law. The adoption of the real and substantial connection test mandated a flexible approach to the assumption of jurisdiction informed by the underlying requirements of order and fairness. This approach required a concrete analysis of a number of factors that would allow a court to decide whether a sufficient connection existed between the forum and the subject matter of the litigation rather than with the parties. The court was to look not for the strongest possible connection with the forum, but for a minimum connection sufficient to meet the constitutional requirement that the matter be linked to the forum (para. 44). The Court of Appeal held that a court should consider a variety of factors to determine whether it has jurisdiction. Sharpe J.A. recommended taking a broad approach to jurisdiction. The defendant's relationship with the forum might be an "important" connecting factor, but not a "necessary" one (para. 74) (emphasis deleted).

48 Although the Court of Appeal acknowledged the importance of flexibility, it stressed that clarity and certainty are also necessary characteristics of the conflicts system. It accordingly developed a list of eight factors to be considered when deciding whether an assumption of jurisdiction is justified:

> (1) the connection between the forum and the plaintiff's claim;
>
> (2) the connection between the forum and the defendant;
>
> (3) unfairness to the defendant in assuming jurisdiction;
>
> (4) unfairness to the plaintiff in not assuming jurisdiction;
>
> (5) the involvement of other parties to the suit;
>
> (6) the court's willingness to recognize and enforce an extraprovincial judgment rendered on the same jurisdictional basis;
>
> (7) whether the case is interprovincial or international in nature; and
>
> (8) comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

49 In the Court of Appeal's opinion, no single factor should be determinative. In Sharpe J.A.'s words, "all relevant factors should be considered and weighed together" (*Muscutt*, at para. 76). The Court of Appeal held that the Superior Court of Justice could assume jurisdiction in the case before it. It turned briefly to the issue of *forum non conveniens*, but found that an Alberta court would not be a more appropriate forum (para. 115).

50 At the same time as its decision in *Muscutt*, the Court of Appeal applied this new template to four other cases in which the assumption of jurisdiction and *forum non conveniens* were in issue. In those appeals, it held that the Ontario courts should not assume jurisdiction, because the connections with Ontario were too insignificant to satisfy the real and substantial connection test. All four cases involved Ontario residents who had suffered injuries in accidents outside Canada and filed suits in Ontario courts (*Lemmex v. Bernard* (2002), 60 O.R. (3d) 54 (Ont. C.A.); *Gajraj v. DeBernardo* (2002), 60 O.R. (3d) 68 (Ont. C.A.); *Sinclair v. Cracker Barrel Old Country Store Inc.* (2002), 60 O.R. (3d) 76 (Ont. C.A.); *Leufkens v. Alba Tours International*

  

*Inc.* (2002), 60 O.R. (3d) 84 (Ont. C.A.)). All the actions were dismissed in respect of the foreign defendants. The Court of Appeal found that the facts that the plaintiffs resided in Ontario and had sustained damage in the province did not create a real and substantial connection between the litigation and the Ontario courts. Since the courts lacked jurisdiction, there was no need for the Court of Appeal to consider the *forum non conveniens* arguments.

*(6) Reconsideration of Muscutt by the Ontario Court of Appeal*

51 A few years after *Muscutt*, the Court of Appeal decided that, in the cases now before this Court, a review of the existing framework for the assumption of jurisdiction by Ontario courts and of issues related to *forum non conveniens* had become necessary. Since *Muscutt*, Ontario courts had consistently been applying the framework adopted in that case. Outside Ontario, *Muscutt* was considered an influential authority, and its framework was often accepted as an appropriate one for resolving issues related to the assumption of jurisdiction. But as I mentioned above, a number of common law provinces preferred to adopt the framework proposed in the *CJPTA*. On occasion, courts outside Ontario expressed reservations about certain aspects of the *Muscutt* framework (*Coutu v. Gauthier (Succession de)*, 2006 NBCA 16, 296 N.B.R. (2d) 35 (N.B. C.A.), at paras. 67-68; *Fewer v. Ellis*, 2011 NLCA 17, 305 Nfld. & P.E.I.R. 39 (N.L. C.A.)). It was suggested that the *Muscutt* test gave judges too much latitude in exercising their discretion on a case-by-case basis and was thus incompatible with the objectives of order and predictability in the assumption of jurisdiction. The wide parameters of this broad jurisdiction might also lead a court to conflate the jurisdictional analysis and the application of the doctrine of *forum non conveniens* in a search for the better or more appropriate forum in any given case. The analysis under the *Muscutt* test could also generate an instinctive bias in favour of the forum chosen by the plaintiff.

*(7) The New Van Breda-Charron Approach of the Ontario Court of Appeal*

52 As the Court of Appeal noted, it had heard a variety of opinions and conflicting suggestions regarding the need to reframe the *Muscutt* test and how this should be done. Some of the litigants wanted to retain *Muscutt* as it was; others proposed the adoption of a test based on a list of presumptive connecting factors similar to that of the *CJPTA* (*Van Breda-Charron*, paras. 56-57). The Court of Appeal declined to craft a common law rule that would in substance reproduce the content of the *CJPTA*. Sharpe J.A. expressed the view that the unpredictability of the *Muscutt* test had been exaggerated, as had the degree of certainty and predictability that would result if the *CJPTA* scheme were adopted (para. 68). He proposed what he saw as a middle way. The Court of Appeal would retain the *Muscutt* test, but would modify it by simplifying it and bringing it closer to the *CJPTA* model. Sharpe J.A. stated: "In refining the *Muscutt* test, we can look to *CJPTA* as a worthy attempt to restate and update the Canadian law of jurisdiction ... and, in so doing, bring Ontario law into line with the emerging national consensus on appropriate jurisdictional standards" (para. 69).

53 On that basis, the Court of Appeal reframed the *Muscutt* test in part. The first change, as Sharpe J.A. stated, moved the existing framework closer to that of the *CJPTA*. It was the creation of a category-based presumption of jurisdiction modelled on s. 10 of the *CJPTA*. In the absence of statutory connecting factors, the court decided to rely for this purpose on the factors governing service outside Ontario set out in rule 17.02 of the Ontario *Rules of Civil Procedure* (para. 71). Sharpe J.A. asserted that most of the connecting factors enumerated in rule 17.02, such as the fact that a contract was made in Ontario (rule 17.02(f)) or a tort was committed in the province (rule 17.02(g)), would presumptively confirm the jurisdiction of the Ontario court (para. 72). In other words, whenever one of these factors was established, a real and substantial connection justifying the assumption of jurisdiction by an Ontario court would be presumed to exist.

54 Sharpe J.A. added that where the presumption applied, it would be rebuttable. It would be open to a party to argue that, even though a presumptive connection existed, the real and substantial connection test had not been met (para. 72). Sharpe J.A. stated that these changes would be consistent with the incremental approach to the development of common law rules. In addition, almost all the post-*Muscutt* cases that he had reviewed seemed to have been resolved by one or another of the factors listed in rule 17.02 (paras. 74-75).

55 According to this view, the appropriate factors generally operate as reliable markers of jurisdiction at common law. The adoption of these markers would mitigate the complexity and unpredictability of the *Muscutt* test. Sharpe J.A. noted that the

  

jurisprudence on service *ex juris* provides support for the use of these factors as indicators of a real and substantial connection. For example, in *Hunt*, La Forest J. had observed that, even if some of the traditional rules of jurisdiction might have to be recast in light of *Morguard*, the established factors could nevertheless be viewed as "a good place to start" (p. 325; see also *Spar Aerospace*, at paras. 55-56, on the provisions of the *Civil Code of Québec* applicable to the assumption by Quebec courts of jurisdiction over situations involving delictual and quasi-delictual liability). But Sharpe J.A. declined to give presumptive effect to the factors set out in rules 17.02(h) (damage sustained in Ontario) and 17.02(o) (necessary or proper party). Neither of these factors is included in the *CJPTA*. Nor have they gained broad acceptance as reliable indicators of jurisdiction. Indeed, the Court of Appeal found in *Muscutt* and its companion cases that the factor of "damage sustained in Ontario" was often not reliable and significant enough to justify an assumption of jurisdiction by an Ontario court.

56 Sharpe J.A. reaffirmed the need to draw a clear distinction between assuming jurisdiction and deciding whether to decline to exercise it on the basis of the *forum non conveniens* doctrine. He cautioned against confusing these two different steps in the resolution of a conflicts issue and emphasized that the factors that would justify a stay in the *forum non conveniens* analysis should not be worked into the jurisdiction *simpliciter* analysis (paras. 81-82 and 101). The conflation of the two analyses may have been the result of an unduly broad interpretation of the fairness factors of the *Muscutt* analysis (para. 81).

57 Building on this first principle that recognized the list of presumptive connecting factors, Sharpe J.A. re-crafted the *Muscutt* test. He retained part of the *Muscutt* analysis, merged some of its factors and reviewed the roles of other principles governing the assumption of jurisdiction. The defendants' connection with the court seized of the action continued to be a valid and important consideration. However, the connection between the plaintiffs' claim and the forum was maintained as a core element of the real and substantial connection test (paras. 87-88). A test based solely on the defendant's contacts with the jurisdiction would be "unduly restrictive" (para. 86).

58 The Court of Appeal merged the two factors related to fairness to the parties of assuming or declining jurisdiction into a single one. At the same time, it recommended that judges avoid treating the consideration of fairness as a separate inquiry distinct from the core of the test, since fairness cannot compensate for weak connections. Sharpe J.A. understood, however, the need to retain fairness to the plaintiff and to the defendant as an analytical tool in assessing the relevance, quality and strength of the connections with the forum in order to determine whether assuming jurisdiction would accord with the principles of order and fairness (paras. 93, 95-96 and 98).

59 Sharpe J.A. went on to observe that considerations of fairness would support the view that the forum of necessity doctrine is an exceptional basis for assuming jurisdiction (para. 100). I add that the forum of necessity issue is not before this Court in these appeals, and I will not need to address it here.

60 According to Sharpe J.A., the involvement of other parties would remain a relevant factor, but its importance would be downgraded. It should not be routinely considered but would become relevant only if a party raised it as a connecting factor (para. 102).

61 He accepted that acts or conduct short of residence that take place in the jurisdiction will often support a finding that a real and substantial connection has been established (para. 92).

62 In the future, Sharpe J.A. stated, whether the courts would be willing to recognize and enforce a foreign judgment should not be treated as a separate factor to be weighed against the other connecting factors in determining jurisdiction. Rather, it is a general and overarching principle that constrains, or "disciplines", as he wrote, the assumption of jurisdiction against extraprovincial defendants. A court should not assume jurisdiction if it would not be prepared to recognize and enforce a foreign judgment rendered on the same jurisdictional basis (para. 103). Whether the case is international or interprovincial was also removed from the list of factors. This would be treated as a question of law liable to be considered in the real and substantial connection analysis (para. 106). The court adopted the same approach in respect of comity and the standards of jurisdiction and of recognition and enforcement of judgments prevailing elsewhere. These considerations, while remaining relevant to the real and substantial connection analysis, would no longer serve as specific factors (paras. 107-8).

  

63 Finally, the Court of Appeal held that considerations related to foreign law remain relevant to the issue of the assumption of jurisdiction. In Sharpe J.A.'s view, evidence on how foreign courts would treat such cases might be helpful (para. 107). I note in passing, however, that undue emphasis on juridical disadvantage as a factor in the jurisdictional analysis appears to be hardly consonant with the principle of comity that should govern legal relationships between modern democratic states, as this Court held in *Beals*. In particular, such an emphasis would seem hard to reconcile with the principle of comity that should govern relationships between the courts of different provinces within the same federal state, as this Court held in *Morguard* and *Hunt*.

64 In summary, the *Van Breda-Charron* approach offers a simplified test in which the roles of a number of the factors of the *Muscutt* test have been modified. In short, when one of the presumptive connecting factors applies, the court will assume jurisdiction unless the defendant can demonstrate the absence of a real and substantial connection. If, on the other hand, none of the presumptive connecting factors are found to apply to the claim, the onus rests on the plaintiff to prove that a sufficient relationship exists between the litigation and the forum. In addition to the list of presumptive and non-presumptive factors, parties can rely on other connecting factors informed by the principles that govern the analysis.

65 I will now turn to the issue of whether the Court of Appeal was right to hold that it was open to the Ontario courts to assume jurisdiction in the two cases now before us. If I conclude that it was open to them to do so, I will then discuss whether they should have declined to exercise their jurisdiction under the principles of *forum non conveniens*.

*(8) Framework for the Assumption of Jurisdiction*

66 In this Court, as in the Court of Appeal, the parties and the interveners have expressed sharply different views about whether and how the law of conflicts should be changed in respect of the assumption of jurisdiction. As might be expected, the disagreements extend to the impact of possible changes on the outcome of these appeals. The conflicting approaches articulated in this Court reflect the tension between a search for flexibility, which is closely connected with concerns about fairness to individuals engaged in litigation, and a desire to ensure greater predictability and consistency in the institutional process for the resolution of conflict of laws issues related to the assumption and exercise of jurisdiction. Indeed, striking a proper balance between flexibility and predictability, or between fairness and order, has been a constant theme in the Canadian jurisprudence and academic literature since this Court's judgments in *Morguard*, *Hunt*, *Amchem* and *Tolofson*.

67 The real and substantial connection test is now well established. However, it is clear that dissatisfaction with it and uncertainty about its meaning and conditions of application have been growing, and that there is now a perceived need for greater direction on how it applies. I adverted above to the need to draw a distinction between the constitutional test and the rules of private international law — two aspects of the law of conflicts that have sometimes been conflated in previous cases. At this point, it is necessary to clarify the rules of the conflict of laws in a way that is consistent with the constitutional constraints on the provinces' courts but does not turn every private international law issue into a constitutional one.

68 The legislatures of several provinces, as well as the Ontario Court of Appeal in *Muscutt* and *Van Breda-Charron*, have responded to these concerns and attempted to provide guidance for the application of the real and substantial connection test. We can build upon these legislative developments and judgments. Indeed, Sharpe J.A. referred in *Van Breda-Charron* to what he described, perhaps with some optimism, as an emerging consensus in Canadian law on how to resolve these issues. On the basis of this perhaps fragile consensus and these developments and judgments, this Court must craft more precisely the rules and principles governing the assumption of jurisdiction by the courts of a province over tort cases in which claimants sue in Ontario, but at least some of the events that gave rise to the claims occurred outside Canada or outside the province. I will also consider how jurisdiction should be exercised or declined under the doctrine of *forum non conveniens*. This said, I remain mindful that the Court is not of course tasked with drafting a complete code of private international law. Principles will be developed as problems arise before the courts. Moreover, all my comments about the development of the common law principles of the law of conflicts are subject to provisions of specific statutes and rules of procedure.

69 When a court considers issues related to jurisdiction, its analysis must deal first with those concerning the assumption of jurisdiction itself. That analysis must be grounded in a proper understanding of the real and substantial connection test, which

  

has evolved into an important constitutional test or principle that imposes limits on the reach of a province's laws and courts. As I mentioned above, this constitutional test reflects the limited territorial scope of provincial authority under the *Constitution Act, 1867*. At the same time, the Constitution acknowledges that international or interprovincial situations may have effects within a province. Provinces may address such effects in order to resolve issues related to conflicts with their own internal legal systems without overstepping the limits of their constitutional authority (see *Castillo*).

70 The real and substantial connection test does not mean that problems of assumption of jurisdiction or other matters, such as the choice of the proper law applicable to a situation or the recognition of extraprovincial judgments, must be dealt with on a case-by-case basis by discretionary decisions of courts, which would determine, on the facts of each case, whether a sufficient connection with the forum has been established. Judicial discretion has an honourable history, and the proper operation of our legal system often depends on its being exercised wisely. Nevertheless, to rely completely on it to flesh out the real and substantial connection test in such a way that the test itself becomes a conflicts rule would be incompatible with certain key objectives of a private international law system.

71 The development of an appropriate framework for the assumption of jurisdiction requires a clear understanding of the general objectives of private international law. But the existence of these objectives does not mean that the framework for achieving them must be uniform across Canada. Because the provinces have been assigned constitutional jurisdiction over such matters, they are free to develop different solutions and approaches, provided that they abide by the territorial limits of the authority of their legislatures and their courts.

72 What would be an appropriate framework? How should it be developed in the case of the assumption and exercise of jurisdiction by a court? A particular challenge in this respect lies in the fact that court decisions dealing with the assumption and the exercise of jurisdiction are usually interlocutory decisions made at the preliminary stages of litigation. These issues are typically raised before the trial begins. As a result, even though such decisions can often be of critical importance to the parties and to the further conduct of the litigation, they must be made on the basis of the pleadings, the affidavits of the parties and the documents in the record before the judge, which might include expert reports or opinions about the state of foreign law and the organization of and procedure in foreign courts. Issues of fact relevant to jurisdiction must be settled in this context, often on a *prima facie* basis. These constraints underline the delicate role of the motion judges who must consider these issues.

73 Given the nature of the relationships governed by private international law, the framework for the assumption of jurisdiction cannot be an unstable, *ad hoc* system made up "on the fly" on a case-by-case basis — however laudable the objective of individual fairness may be. As La Forest J. wrote in *Morguard*, there must be order in the system, and it must permit the development of a just and fair approach to resolving conflicts. Justice and fairness are undoubtedly essential purposes of a sound system of private international law. But they cannot be attained without a system of principles and rules that ensures security and predictability in the law governing the assumption of jurisdiction by a court. Parties must be able to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect. The need for certainty and predictability may conflict with the objective of fairness. An unfair set of rules could hardly be considered an efficient and just legal regime. The challenge is to reconcile fairness with the need for security, stability and efficiency in the design and implementation of a conflict of laws system.

74 The goal of the modern conflicts system is to facilitate exchanges and communications between people in different jurisdictions that have different legal systems. In this sense, it rests on the principle of comity. But comity itself is a very flexible concept. It cannot be understood as a set of well-defined rules, but rather as an attitude of respect for and deference to other states and, in the Canadian context, respect for and deference to other provinces and their courts (*Morguard*, at p. 1095; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 (S.C.C.), at para. 47). Comity cannot subsist in private international law without order, which requires a degree of stability and predictability in the development and application of the rules governing international or interprovincial relationships. Fairness and justice are necessary characteristics of a legal system, but they cannot be divorced from the requirements of predictability and stability which assure order in the conflicts system. In the words of La Forest J. in *Morguard*, "what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice" (p. 1097; see also H. E. Yntema, "The Objectives of Private International Law" (1957), 35 *Can. Bar Rev.* 721, at p. 741.

  

75 The development and evolution of the approaches to the assumption of jurisdiction reviewed above suggest that stability and predictability in this branch of the law of conflicts should turn primarily on the identification of objective factors that might link a legal situation or the subject matter of litigation to the court that is seized of it. At the same time, the need for fairness and justice to all parties engaged in litigation must be borne in mind in selecting these presumptive connecting factors. But in recent years, the preferred approach in Canada has been to rely on a set of specific factors, which are given presumptive effect, as opposed to a regime based on an exercise of almost pure and individualized judicial discretion.

76 For example, the statutes based on the *CJPTA*, and Book Ten of the *Civil Code of Québec* rely on specific facts linking the subject matter of the litigation to the jurisdiction. These factors are considered in order to determine whether a real and substantial connection exists for the purposes of the conflicts rules.

77 In the *CJPTA*, in the case of tort claims, s. 10(g) refers to the *situs* of a tort as a specific factor connecting the act with the jurisdiction. The identification of the *situs* of a tort may well lead to further questions, to which the *CJPTA* does not offer immediate answers, such as: Where did the acts that gave rise to the injury occur? Did they happen in more than one place? Where was the damage suffered or where did it become apparent? Other connecting factors might also become relevant, such as the existence of a contractual relationship (s. 10(e)) or a business carried on in the province (s. 10(h)). Jurisdiction can also be presence-based, when the defendant resides in the province (s. 3(d)). Likewise, the *Civil Code of Québec* contains a list of factors that must be considered in order to determine whether a Quebec authority has jurisdiction over a delictual or quasi-delictual action (art. 3148).

78 Some authors take the view that the true core of the revised *Van Breda-Charron* test consists of a set of objective factual connections. Likewise, the Court of Appeal stated in *Van Breda-Charron* that the issue was essentially about connections: "The core of the real and substantial connection test is the connection that the plaintiff's claim has to the forum and the connection of the defendant to the forum respectively" (para. 84; T. Monestier, "A 'Real and Substantial' Improvement? Van Breda Reformulates the Law of Jurisdiction in Ontario", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation, 2010*, (2010) 185, at pp. 204-7). In my view, identifying a set of relevant presumptive connecting factors and determining their legal nature and effect will bring greater clarity and predictability to the analysis of the problems of assumption of jurisdiction, while at the same time ensuring consistency with the objectives of fairness and efficiency that underlie this branch of the law.

79 From this perspective, a clear distinction must be maintained between, on the one hand, the factors or factual situations that link the subject matter of the litigation and the defendant to the forum and, on the other hand, the principles and analytical tools, such as the values of fairness and efficiency or the principle of comity. These principles and analytical tools will inform their assessment in order to determine whether the real and substantial connection test is met. However, jurisdiction may also be based on traditional grounds, like the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction, if they are established. The real and substantial connection test does not oust the traditional private international law bases for court jurisdiction.

80 Before I go on to consider of a list of presumptive connecting factors for tort cases, I must define the legal nature of the list. It will not be exhaustive. Rather, it will, first of all, be illustrative of the factual situations in which it will typically be open to a court to assume jurisdiction over a matter. These factors therefore warrant presumptive effect, as the Court of Appeal held in *Van Breda-Charron* (para. 109). The plaintiff must establish that one or more of the listed factors exists. If the plaintiff succeeds in establishing this, the court might presume, absent indications to the contrary, that the claim is properly before it under the conflicts rules and that it is acting within the limits of its constitutional jurisdiction (J. Walker, "Reforming the Law of Crossborder Litigation: Judicial Jurisdiction", consultation paper for the Law Commission of Ontario (March 2009), at pp. 19-20). Although the factors set out in the list are considered presumptive, this does not mean that the list of recognized factors is complete, as it may be reviewed over time and updated by adding new presumptive connecting factors.

81 The presumption with respect to a factor will not be irrebuttable, however. The defendant might argue that a given connection is inappropriate in the circumstances of the case. In such a case, the defendant will bear the burden of negating

 

the presumptive effect of the listed or new factor and convincing the court that the proposed assumption of jurisdiction would be inappropriate. If no presumptive connecting factor, either listed or new, applies in the circumstances of a case or if the presumption of jurisdiction resulting from such a factor is properly rebutted, the court will lack jurisdiction on the basis of the common law real and substantial connection test. I will elaborate on each of these points below.

**(a) List of Presumptive Connecting Factors**

82 Jurisdiction must — irrespective of the question of forum of necessity, which I will not discuss here — be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum. The Court of Appeal was moving in this direction in the cases at bar. This means that the courts must rely on a basic list of factors that is drawn at first from past experience in the conflict of laws system and is then updated as the needs of the system evolve. Abstract concerns for order, efficiency or fairness in the system are no substitute for connecting factors that give rise to a "real and substantial" connection for the purposes of the law of conflicts.

83 At this stage, I will briefly discuss certain connections that the courts could use as presumptive connecting factors. Like the Court of Appeal, I will begin with a number of factors drawn from rule 17.02 of the Ontario *Rules of Civil Procedure*. These factors relate to situations in which service *ex juris* is allowed, and they were not adopted as conflicts rules. Nevertheless, they represent an expression of wisdom and experience drawn from the life of the law. Several of them are based on objective facts that may also indicate when courts can properly assume jurisdiction. They are generally consistent with the approach taken in the *CJPTA* and with the recommendations of the Law Commission of Ontario, although some of them are more detailed. They thus offer guidance for the development of this area of private international law.

84 I would not include general principles or objectives of the conflicts system, such as fairness, efficiency or comity, in this list of presumptive connecting factors. These systemic values may influence the selection of factors or the application of the method of resolution of conflicts. Concerns for the objectives of the conflicts system might rule out reliance on some particular facts as connecting factors. But they should not themselves be confused with the factual connections that will govern the assumption of jurisdiction.

85 The list of presumptive connecting factors proposed here relates to claims in tort and issues associated with such claims. It does not purport to be an inventory of connecting factors covering the conditions for the assumption of jurisdiction over all claims known to the law.

86 The presence of the plaintiff in the jurisdiction is not, on its own, a sufficient connecting factor. (I will not discuss its relevance or importance in the context of the forum of necessity doctrine, which is not at issue in these appeals.) Absent other considerations, the presence of the plaintiff in the jurisdiction will not create a presumptive relationship between the forum and either the subject matter of the litigation or the defendant. On the other hand, a defendant may always be sued in a court of the jurisdiction in which he or she is domiciled or resident (in the case of a legal person, the location of its head office).

87 Carrying on business in the jurisdiction may also be considered an appropriate connecting factor. But considering it to be one may raise more difficult issues. Resolving those issues may require some caution in order to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity. Active advertising in the jurisdiction or, for example, the fact that a Web site can be accessed from the jurisdiction would not suffice to establish that the defendant is carrying on business there. The notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction. But the Court has not been asked in this appeal to decide whether and, if so, when e-trade in the jurisdiction would amount to a presence in the jurisdiction. With these reservations, "carrying on business" within the meaning of rule 17.02(p) may be an appropriate connecting factor.

88 The *situs* of the tort is clearly an appropriate connecting factor, as can be seen from rule 17.02(g), and from the *CJPTA*, the *Civil Code of Québec* and the jurisprudence of this Court since *Tolofson*. The difficulty lies in locating the *situs*, not in

  

acknowledging the validity of this factor once the *situs* has been identified. Claims related to contracts made in Ontario would also be properly brought in the Ontario courts (rule 17.02(f)(i)).

89 The use of damage sustained as a connecting factor may raise difficult issues. For torts like defamation, sustaining damage completes the commission of the tort and often tends to locate the tort in the jurisdiction where the damage is sustained. In other cases, the situation is less clear. The problem with accepting unreservedly that if damage is sustained at a particular place, the claim presumptively falls within the jurisdiction of the courts of the place, is that this risks sweeping into that jurisdiction claims that have only a limited relationship with the forum. An injury may happen in one place, but the pain and inconvenience resulting from it might be felt in another country and later in a third one. As a result, presumptive effect cannot be accorded to this connecting factor.

90 To recap, in a case concerning a tort, the following factors are presumptive connecting factors that, *prima facie*, entitle a court to assume jurisdiction over a dispute:

(a) the defendant is domiciled or resident in the province;

(b) the defendant carries on business in the province;

(c) the tort was committed in the province; and

(d) a contract connected with the dispute was made in the province.

**(b) Identifying New Presumptive Connecting Factors**

91 As I mentioned above, the list of presumptive connecting factors is not closed. Over time, courts may identify new factors which also presumptively entitle a court to assume jurisdiction. In identifying new presumptive factors, a court should look to connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the listed factors. Relevant considerations include:

(a) Similarity of the connecting factor with the recognized presumptive connecting factors;

(b) Treatment of the connecting factor in the case law;

(c) Treatment of the connecting factor in statute law; and

(d) Treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.

92 When a court considers whether a new connecting factor should be given presumptive effect, the values of order, fairness and comity can serve as useful analytical tools for assessing the strength of the relationship with a forum to which the factor in question points. These values underlie all presumptive connecting factors, whether listed or new. All presumptive connecting factors generally point to a relationship between the subject matter of the litigation and the forum such that it would be reasonable to expect that the defendant would be called to answer legal proceedings in that forum. Where such a relationship exists, one would generally expect Canadian courts to recognize and enforce a foreign judgment on the basis of the presumptive connecting factor in question, and foreign courts could be expected to do the same with respect to Canadian judgments. The assumption of jurisdiction would thus appear to be consistent with the principles of comity, order and fairness.

93 If, however, no recognized presumptive connecting factor — whether listed or new — applies, the effect of the common law real and substantial connection test is that the court should not assume jurisdiction. In particular, a court should not assume jurisdiction on the basis of the combined effect of a number of nonpresumptive connecting factors. That would open the door to assumptions of jurisdiction based largely on the case-by-case exercise of discretion and would undermine the objectives of order, certainty and predictability that lie at the heart of a fair and principled private international law system.

 

94 Where, on the other hand, a recognized presumptive connecting factor does apply, the court should assume that it is properly seized of the subject matter of the litigation and that the defendant has been properly brought before it. In such circumstances, the court need not exercise its discretion in order to assume jurisdiction. It will have jurisdiction unless the party challenging the assumption of jurisdiction rebuts the presumption resulting from the connecting factor. I will now turn to this issue.

**(c) Rebutting the Presumption of Jurisdiction**

95 The presumption of jurisdiction that arises where a recognized connecting factor — whether listed or new — applies is not irrebuttable. The burden of rebutting the presumption of jurisdiction rests, of course, on the party challenging the assumption of jurisdiction. That party must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them.

96 Some examples drawn from the list of presumptive connecting factors applicable in tort matters can assist in illustrating how the presumption of jurisdiction can be rebutted. For instance, where the presumptive connecting factor is a contract made in the province, the presumption can be rebutted by showing that the contract has little or nothing to do with the subject matter of the litigation. And where the presumptive connecting factor is the fact that the defendant is carrying on business in the province, the presumption can be rebutted by showing that the subject matter of the litigation is unrelated to the defendant's business activities in the province. On the other hand, where the presumptive connecting factor is the commission of a tort in the province, rebutting the presumption of jurisdiction would appear to be difficult, although it may be possible to do so in a case involving a multi-jurisdictional tort where only a relatively minor element of the tort has occurred in the province.

97 In each of the above examples, it is arguable that the presumptive connecting factor points to a weak relationship between the forum and the subject matter of the litigation and that it would accordingly not be reasonable to expect that the defendant would be called to answer proceedings in that jurisdiction. In such circumstances, the real and substantial connection test would not be satisfied and the court would lack jurisdiction to hear the dispute.

98 However, where the party resisting jurisdiction has failed to rebut the presumption that results from a presumptive connecting factor — listed or new — the court must acknowledge that it has jurisdiction and hold that the action is properly before it. At this point, it does not exercise its discretion to determine whether it has jurisdiction, but only to decide whether to decline to exercise its jurisdiction should *forum non conveniens* be raised by one of the parties.

99 I should add that it is possible for a case to sound both in contract and in tort or to invoke more than one tort. Would a court be limited to hearing the specific part of the case that can be directly connected with the jurisdiction? Such a rule would breach the principles of fairness and efficiency on which the assumption of jurisdiction is based. The purpose of the conflicts rules is to establish whether a real and substantial connection exists between the forum, the subject matter of the litigation and the defendant. If such a connection exists in respect of a factual and legal situation, the court must assume jurisdiction over all aspects of the case. The plaintiff should not be obliged to litigate a tort claim in Manitoba and a related claim for restitution in Nova Scotia. That would be incompatible with any notion of fairness and efficiency.

100 To recap, to meet the common law real and substantial connection test, the party arguing that the court should assume jurisdiction has the burden of identifying a presumptive connecting factor that links the subject matter of the litigation to the forum. In these reasons, I have listed some presumptive connecting factors for tort claims. This list is not exhaustive, however, and courts may, over time, identify additional presumptive factors. The presumption of jurisdiction that arises where a recognized presumptive connecting factor — whether listed or new — exists is not irrebuttable. The burden of rebutting it rests on the party challenging the assumption of jurisdiction. If the court concludes that it lacks jurisdiction because none of the presumptive connecting factors exist or because the presumption of jurisdiction that flows from one of those factors has been rebutted, it must dismiss or stay the action, subject to the possible application of the forum of necessity doctrine, which I need not address in these reasons. If jurisdiction is established, the claim may proceed, subject to the court's discretion to stay the proceedings on the basis of the doctrine of *forum non conveniens*. I will now turn to that issue.

*(9) Doctrine of Forum Non Conveniens and the Exercise of Jurisdiction*

  

101 As I mentioned above, a clear distinction must be drawn between the existence and the exercise of jurisdiction. This distinction is central both to the resolution of issues related to jurisdiction over the claim and to the proper application of the doctrine of *forum non conveniens*. *Forum non conveniens* comes into play when jurisdiction is established. It has no relevance to the jurisdictional analysis itself.

102 Once jurisdiction is established, if the defendant does not raise further objections, the litigation proceeds before the court of the forum. The court cannot decline to exercise its jurisdiction unless the defendant invokes *forum non conveniens*. The decision to raise this doctrine rests with the parties, not with the court seized of the claim.

103 If a defendant raises an issue of *forum non conveniens*, the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The defendant must identify another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action. The defendant must show, using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum, what connections this alternative forum has with the subject matter of the litigation. Finally, the party asking for a stay on the basis of *forum non conveniens* must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate.

104 This Court reviewed and structured the method of application of the doctrine of *forum non conveniens* in *Amchem*. It built on the existing jurisprudence, and in particular on the judgment of the House of Lords in *Spiliada Maritime Corp. v. Cansulex Ltd.* (1986), [1987] A.C. 460 (U.K. H.L.). The doctrine tempers the consequences of a strict application of the rules governing the assumption of jurisdiction. As those rules are, at their core, based on establishing the existence of objective factual connections, their use by the courts might give rise to concerns about their potential rigidity and lack of consideration for the actual circumstances of the parties. When it is invoked, the doctrine of *forum non conveniens* requires a court to go beyond a strict application of the test governing the recognition and assumption of jurisdiction. It is based on a recognition that a common law court retains a residual power to decline to exercise its jurisdiction in appropriate, but limited, circumstances in order to assure fairness to the parties and the efficient resolution of the dispute. The court can stay proceedings brought before it on the basis of the doctrine.

105 A party applying for a stay on the basis of *forum non conveniens* may raise diverse facts, considerations and concerns. Despite some legislative attempts to draw up exhaustive lists, I doubt that it will ever be possible to do so. In essence, the doctrine focusses on the contexts of individual cases, and its purpose is to ensure that both parties are treated fairly and that the process for resolving their litigation is efficient. For example, s. 11(1) of the *CJPTA* provides that a court may decline to exercise its jurisdiction if, "after considering the interests of the parties to a proceeding and the ends of justice", it finds that a court of another state is a more appropriate forum to hear the case. Section 11(2) then provides that the court must consider the "circumstances relevant to the proceeding". To illustrate those circumstances, it contains a non-exhaustive list of factors:

> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
>
> (b) the law to be applied to issues in the proceeding;
>
> (c) the desirability of avoiding multiplicity of legal proceedings;
>
> (d) the desirability of avoiding conflicting decisions in different courts;
>
> (e) the enforcement of an eventual judgment; and
>
> (f) the fair and efficient working of the Canadian legal system as a whole. [s. 11(2)]

106 British Columbia's *Court Jurisdiction and Proceedings Transfer Act*, which is based on the *CJPTA*, contains an identical provision — s. 11 — on *forum non conveniens*. In *Lloyd's Underwriters v. Cominco Ltd.*, 2009 SCC 11, [2009] 1 S.C.R. 321 (S.C.C.), at para. 22, this Court stated that s. 11 of the British Columbia statute was intended to "codify" *forum non conveniens*.

  

Article 3135 of the *Civil Code of Québec* provides that *forum non conveniens* forms part of the private international law of Quebec, but it does not contain a description of the factors that are to govern the application of the doctrine in Quebec law. The courts are left with the tasks of developing an approach to applying it and of identifying the relevant considerations.

107 Quebec's courts have adopted an approach that, although basically identical to that of the common law courts, is subject to the indication in art. 3135 that *forum non conveniens* is an exceptional recourse. A good example of this can be found in the judgment of the Quebec Court of Appeal in *Lexus Maritime inc. c. Oppenheim Forfait Gmbh*, 1998 CanLII 13001 [1998 CarswellQue 638 (Que. C.A.)], in which an action brought in Quebec was stayed in favour of a German court on the basis of *forum non conveniens*. Pidgeon J.A. emphasized the wide-ranging and contextual nature of a *forum non conveniens* analysis. The judge might consider such factors as the domicile of the parties, the locations of witnesses and of pieces of evidence, parallel proceedings, juridical advantage, the interests of both parties and the interests of justice (pp. 7-8; see also *Spar Aerospace*, at para. 71; J. A. Talpis, *"If I am from Grand-Mère, Why Am I Being Sued in Texas?"*, *Responding with the collaboration of S. L. Kath, to Inappropriate Foreign Jurisdiction in Quebec-United States Crossborder Litigation* (2001), at pp. 44-45).

108 Regarding the burden imposed on a party asking for a stay on the basis of *forum non conveniens*, the courts have held that the party must show that the alternative forum is clearly more appropriate. The expression "clearly more appropriate" is well established. It was used in *Spiliada* and *Amchem*. On the other hand, it has not always been used consistently and does not appear in the *CJPTA* or any of the statutes based on the *CJPTA*, which simply require that the party moving for a stay establish that there is a "more appropriate forum" elsewhere. Nor is this expression found in art. 3135 of the *Civil Code of Québec*, which refers instead to the exceptional nature of the power conferred on a Quebec authority to decline jurisdiction: "... it may exceptionally and on an application by a party, decline jurisdiction ...".

109 The use of the words "clearly" and "exceptionally" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. But the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules. *Forum non conveniens* may play an important role in identifying a forum that is clearly more appropriate for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute.

110 As I mentioned above, the factors that a court may consider in deciding whether to apply *forum non conveniens* may vary depending on the context and might include the locations of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the two parties.

111 Loss of juridical advantage is a difficulty that could arise should the action be stayed in favour of a court of another province or country. This difficulty is aggravated by the possible conflation of two different issues: the impact of the procedural rules governing the conduct of the trial, and the proper substantive law for the legal situation, that is, in the context of these two appeals, the proper law of the tort. In considering the question of juridical advantage, a court may be too quick to assume that the proper law naturally flows from the assumption of jurisdiction. However, the governing law of the tort is not necessarily the domestic law of the forum. This may be so in many cases, but not always. In any event, if parties plead the foreign law, the court may well need to consider the issue and determine whether it should apply that law once it is proved. Even if the jurisdictional analysis leads to the conclusion that courts in different states might properly entertain an action, the same substantive law may apply, at least in theory, wherever the case is heard.

 

112 A further issue that does not arise in these appeals is whether it is legitimate to use this factor of loss of juridical advantage within the Canadian federation. To use it too extensively in the *forum non conveniens* analysis might be inconsistent with the spirit and intent of *Morguard* and *Hunt*, as the Court sought in those cases to establish comity and a strong attitude of respect in relations between the different provinces, courts and legal systems of Canada. Differences should not be viewed instinctively as signs of disadvantage or inferiority. This factor obviously becomes more relevant where foreign countries are involved, but even then, comity and an attitude of respect for the courts and legal systems of other countries, many of which have the same basic values as us, may be in order. In the end, the court must engage in a contextual analysis, but refrain from leaning too instinctively in favour of its own jurisdiction. At this point, the decision falls within the reasoned discretion of the trial court. The exercise of discretion will be entitled to deference from higher courts, absent an error of law or a clear and serious error in the determination of relevant facts, which, as I emphasized above, takes place at an interlocutory or preliminary stage. I will now consider whether the Ontario courts properly assumed jurisdiction in these cases and, if so, whether they should have declined to exercise it on the basis of *forum non conveniens*.

*(10) Application*

113 Before discussing the outcomes in the two appeals, I must note that the evidence was not the same in *Van Breda* and *Charron*, although they did raise similar legal issues and their factual matrices were the same in important aspects. The Court of Appeal rightly observed that the evidence about Club Resorts' activities in Ontario was not identical in the two cases. In particular, the plaintiffs in *Charron*, unlike the plaintiffs in *Van Breda*, asserted that the SuperClubs group of companies, to which the appellant Club Resorts belonged, maintained an office near Toronto and that Club Resorts had availed itself of that office's services. They also relied on the fact that representatives of Club Resorts had travelled to Ontario to promote their business. Moreover, it is important to note that in considering the decisions of the courts below, this Court must show deference to the findings of fact of the judge of the Superior Court of Justice.

**(a) Van Breda**

114 In *Van Breda*, there is little evidence about the existence of sufficient factual connections. Ms. Van Breda's accident and physical injuries happened in Cuba. Mr. Berg and Ms. Van Breda were living in Ontario at the time of their trip. After the accident, however, they did not return to Ontario, as they moved first to Calgary and later to British Columbia, where they were living when they brought their action. Ms. Van Breda's damage, pain and suffering have happened mostly in British Columbia, like most of the treatments she has received. In addition, the evidence is essentially silent about Club Resorts' activities in Ontario, except on one point which I will address below. Moreover, I do not accept that evidence of advertising in Ontario would be enough to establish a connection. Advertising is often international, if not global. It is ubiquitous, crossing borders with ease. It does not, on its own, establish a connection between the claim and the forum. If advertising sufficed to create a connection with a forum, commercial organizations of a certain size could be sued in courts everywhere and anywhere in the world. The courts of a victim's place of residence would possess an almost universal jurisdiction over diverse and vast classes of consumer claims.

115 The motion judge and the Court of Appeal concluded, however, that a sufficient connection between the claim and the province arose out of the contractual relationship created between Mr. Berg and Club Resorts through the defendant Denis. Mr. Denis, who operated a specialized travel agency known as Sport au Soleil, had an agreement with Club Resorts under which he found tennis and squash professionals and sent them to Club Resorts hotels. In exchange for bed and board at a resort, each professional would give a few hours of instruction to guests of the hotel during his or her stay. It appears that Mr. Denis received some form of compensation from Club Resorts.

116 I find no reviewable error in the findings that Mr. Denis had the authority to represent Club Resorts and that a contract existed under which Mr. Berg was to provide services to Club Resorts. The benefit of this contract, accommodation at the resort, was extended to Ms. Van Breda, who was injured while there in the context of Mr. Berg's performance of his contractual obligation. Deference is owed to the motion judge's findings. No palpable and overriding error has been established. A contract

  

was entered into in Ontario and a relationship was thus created in Ontario between Mr. Berg, Club Resorts and Ms. Van Breda, who was brought within the scope of this relationship by the terms of the contract.

117 The existence of a contract made in Ontario that is connected with the litigation is a presumptive connecting factor that, on its face, entitles the courts of Ontario to assume jurisdiction in this case. The events that gave rise to the claim flowed from the relationship created by the contract. Club Resorts has failed to rebut the presumption of jurisdiction that arises where this factor applies. On this basis, I would uphold the Court of Appeal's conclusion that there was a sufficient connection between the Ontario court and the subject matter of the litigation.

118 Whether the Superior Court of Justice should have declined jurisdiction on the basis of the doctrine of *forum non conveniens* remains to be determined. Club Resorts had the burden of showing that a Cuban court would clearly be a more appropriate forum. I recognize that a sufficient connection exists between Cuba and the subject matter of the litigation to support an action there. The accident happened on a Cuban beach, at a hotel managed by Club Resorts. The initial injury was suffered there. Some of the potential defendants reside in Cuba. However, other issues related to fairness to the parties and to the efficient disposition of the claim must be considered. A trial held in Cuba would present serious challenges to the parties. There may be problems with witnesses, concerns about the application of local procedures, and expenses linked to litigating there. All things considered, the burden on the plaintiffs clearly would be far heavier if they were required to bring their action in Cuba. They would face substantial additional expenses and would be at a clear disadvantage relative to the defendants. They might also suffer a loss of juridical advantage. But on this point the evidence is far from clear and satisfactory. In the end, the appellant has not shown that a Cuban court would clearly be a more appropriate forum. I agree that the motion judge made no reviewable error in deciding not to decline to exercise his jurisdiction, and I would affirm the Court of Appeal's judgment dismissing the appeal from that decision.

**(b) Charron**

119 In *Charron*, the existence of a sufficient connection with the Ontario court was hotly disputed. As in *Van Breda*, the accident itself happened in Cuba. On the other hand, Mrs. Charron returned to Ontario after her husband's death and continued to reside in that province. The damage claimed by the respondents was sustained largely in Ontario. But these facts do not constitute presumptive connecting factors and do not support the assumption of jurisdiction on the basis of the real and substantial connection test.

120 However, the evidence does support the presumptive connecting factor of carrying on business in the jurisdiction. The Superior Court of Justice assumed jurisdiction, and the Court of Appeal upheld its decision, mainly on the basis of an active commercial presence in Ontario that was not limited to advertising campaigns targeting the Ontario market. In the opinion of the courts below, Club Resorts had an active presence in Ontario even though its corporate head office was not in that province. Its presence was not limited to advertising activities or to contacts with travel package wholesalers or travel agents. The courts below concluded that the appellant had engaged in significant commercial activities in Ontario, especially through the office of the SuperClubs group, before the Charrons booked their holiday. The booking resulted at least in part from those activities in Ontario. After reviewing the evidence, Sharpe J.A. wrote the following for the Court of Appeal in respect of this factor:

> The record reveals that CRL [Club Resorts Ltd.] was directly involved in activity in Ontario to solicit business for the resort. Unlike the defendants in *Leufkens*, *Lemmex* and *Sinclair*, CRL did not confine its activities to its home jurisdiction:
>
> • pursuant to its contract with the Cuban hotel owner, CRL was required to and did promote and advertise the resort using the "SuperClubs" brand in Canada;
>
> • CRL relies on maintaining a high profile for the SuperClubs brand in Ontario as residents of Canada and Ontario represent a high proportion of CRL's target market;
>
> • CRL was licenced to use the "SuperClubs" label and itself "created" the "SuperClubs Cuba" label and used these labels to market the resort in Ontario

  

- CRL's witness Abe Moore agreed on cross-examination:
  - "that CRL was in the business of carrying out activities in countries such as Canada to generate paying guests of the resort";
  - that to do so CRL had to "either directly or engage others to undertake the activity of solicitation, promotion and advertising" in Canada;
  - that CRL ensured that it had relationships with others to do so in Ontario to satisfy its contractual obligation to promote the resort;
- CRL representatives regularly travel to Ontario to further CRL's promotional activity;
- CRL arranged for the preparation and distribution of promotional materials in Ontario; and
- as outlined in the following paragraph, CRL benefited from an office in Ontario that provided information and engaged in the promotion of the SuperClubs brand.

. . . . .

In my view, one can fairly infer from this body of evidence that although CRL itself maintained no office in Ontario, CRL is implicated in and benefits from the physical presence in Ontario of an office and contact person held out to the public as representing the same "SuperClubs" brand CRL uses to carry on its business of promoting and operating the resort. [paras. 117 and 119]

121 The Superior Court of Justice considered this evidence at a preliminary stage on the basis of the parties' pleadings. The nature and weight of this evidence has been challenged in this Court. But the courts below made findings about its content and about what it meant. The appellant has not demonstrated that the motion judge made any reviewable errors, and deference must be shown to his findings of fact.

122 Although whether this factor applies was a very hard fought issue in these appeals, the motion judge's findings of fact lead to the conclusion that Club Resorts was carrying on business in Ontario. Club Resorts' commercial activities in Ontario went well beyond promoting a brand and advertising. Its representatives were in the province on a regular basis. It benefited from the physical presence of an office in Ontario. Most significantly, on cross-examination Club Resorts' witness admitted that it was in the business of carrying out activities in Canada. Together, these facts support the conclusion that Club Resorts was carrying on business in Ontario. It follows that the respondents have established that a presumptive connecting factor applies and that the Ontario court is *prima facie* entitled to assume jurisdiction.

123 Club Resorts has not rebutted the presumption of jurisdiction that arises from this presumptive connecting factor. Its business activities in Ontario were specifically directed at attracting residents of the province, including the Charron family, to stay as paying guests at the resort in Cuba where the accident occurred. It cannot be said that the claim here is unrelated to Club Resorts' business activities in the province. Accordingly, I find that the Ontario court has jurisdiction on the basis of the real and substantial connection test.

124 I also find that the motion judge made no error in declining to stay the proceedings on the basis of *forum non conveniens*. Club Resorts failed to discharge its burden of showing that a Cuban court would clearly be a more appropriate forum in the circumstances of this case. Considerations of fairness to the parties weigh heavily in the respondents' favour. The inconvenience to the individual plaintiffs of transferring the litigation is greater than the inconvenience to the corporate defendant of not doing so. On the question of juridical advantage, I refer to my comments about *Van Breda*. I would add that keeping the case in the Ontario courts will probably avert a situation in which the proceedings against the various defendants are split.

**IV. Conclusion**

  

125 For these reasons, I would dismiss Club Resorts' appeals with costs to the respondents other than Bel Air Travel Group Ltd. and Hola Sun Holidays Limited.

*Appeals dismissed.*

*Pourvois rejetés.*

Footnotes

* Binnie and Charron JJ. took no part in the judgment.

** A corrigendum issued by the Court on June 11, 2012 has been incorporated herein.

# TAB 15

2021 QCCS 3402, 2021 CarswellQue 12636, 338 A.C.W.S. (3d) 289, EYB 2021-401831

2021 QCCS 3402
Cour supérieure du Québec

Arrangement relatif à Bloom Lake

2021 CarswellQue 12636, 2021 QCCS 3402, 338 A.C.W.S. (3d) 289, EYB 2021-401831

# (IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:) BLOOM LAKE GENERAL PARTNER LIMITED, QUINTO MINING CORPORATION, CLIFFS QUÉBEC IRON MINING ULC, WABUSH IRON CO. LIMITED AND WABUSH RESOURCES INC., PETITIONERS, and THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, BLOOM LAKE RAILWAY COMPANY LIMITED, WABUSH MINES, ARNAUD RAILWAY COMPANY AND WABUSH LAKE RAILWAY COMPANY LIMITED, MISES EN CAUSE, and FTI CONSULTING CANADA INC., MONITOR, and TWIN FALLS POWER CORPORATION AND CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED, Twinco Mises-en-cause

Pinsonnault J.C.S.

Heard: 6 august 2021
Judgment: 12 august 2021
Docket: C.S. Qué. Montréal 500-11-048114-157

Counsel: Mtre Bernard Boucher, Mtre Milly Chow, for the CCAA Parties.
Mtre Sylvain Rigaud, for the Monitor FTI Consulting Canada Inc.
Mtre Douglas Mitchell, for the Mise-en-cause Twin Falls Power Corporation
Mtre Guy P. Martel, Mtre Nathalie Nouvet, for the Mise-en-cause Churchill Falls (Labrador) Corporation Limited
Mtre Marie-Laure Sallah-Linteau, for the Mises-en-cause Québec North Shore & Labrador Railway Company and Iron Ore Company of Canada
Mtre Nicolas Brochu, for the Mise-en-cause for the Salaried/non-union employees and retirees

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial; International

***Pinsonnault J.C.S.* :**

1 Twin Falls Power Corporation ("*Twinco*") with the support of Churchill Falls (Labrador) Corporation Limited ("*CFLCo*"), is seeking the dismissal of the Petitioners' and of the Mises-en-cause's *Motion for the Winding Up and Dissolution, Distribution of Assets, Reimbursement of Monies and Additional Relief*, pursuant to section 11 of the *Companies' Creditors Arrangement Act* (the "*CCAA*") and sections 214 and 241 of the *Canada Business Corporations Act* (the "*CBCA*") (the "*CBCA Motion*").

2 The dismissal of the CBCA Motion is sought by Twinco [1] on the basis that this Court lacks jurisdiction to entertain and rule on the same as, *inter alia*, the Twinco Mises-en-cause are both residing in Newfoundland with no place of business or any assets in the Province of Québec (the "*Twinco Motion to dismiss*").

3 Should the Court nevertheless find that it has jurisdiction herein, Twinco offers a subsidiary argument based on the doctrine of *forum non conveniens* as article 3135 [2] of the *Civil Code of Québec* ("*CCQ*") stipulates that even if a Québec Court determines it has jurisdiction, it may decline jurisdiction where it considers the courts of another jurisdiction "*are in a better position to decide the dispute*".

4 In other words, Twinco and CFLCo would have the matter and issues raised in the CBCA Motion be adjudicated before the courts of Newfoundland and Labrador (collectively "*Newfoundland*").

 

5 The CCAA Parties [3] take the position that it is a matter for the Commercial Division of the Superior Court of Québec (the "*CCAA Court*"), where the coordinated sale of the CCAA Parties' assets and wind-down of their operations has been overseen for over half a decade, and where the CCAA Court has already asserted its jurisdiction over that of Newfoundland in the present CCAA Proceedings [4] since their commencement five years ago in 2015.

6 At this juncture, the CCAA Court is not called upon to rule on the merits of the CBCA Motion, but solely on the Twinco Motion to dismiss based on a declinatory exception.

**1. THE PROCEDURAL BACKGROUND**

7 On January 27, 2015, the CCAA Court issued an Initial Order (the "*Bloom Lake Initial Order*") commencing these proceedings (the "*CCAA Proceedings*") pursuant to the CCAA in respect of the Petitioners Bloom Lake General Partner Limited, Quinto Mining Corporation, 8568391 Canada Limited and Cliffs Québec Iron Mining ULC and the Mises-en-cause The Bloom Lake Iron Ore Mine Limited Partnership and Bloom Lake Railway Company Limited (collectively, the "*Bloom Lake CCAA Parties*").

8 On May 20, 2015, the CCAA Court issued an Initial Order (the "*Wabush Initial Order*") extending the scope of the CCAA Proceedings to the Petitioners Wabush Iron Co. Limited ("*Wabush Iron*") and Wabush Resources Inc. ("*Wabush Resources*") (Wabush Resources and Wabush Iron are collectively referred to hereafter as "*Wabush*") and the Mises-en-cause Wabush Mines, Wabush Lake Railway Company Limited, and Arnaud Railway Company (collectively, the "*Wabush CCAA Parties*") (the Wabush CCAA Parties and the Bloom Lake CCAA Parties are collectively referred to hereafter as the "*CCAA Parties*").

9 FTI Consulting Canada Inc. was appointed as monitor in respect of the CCAA Parties (the "*Monitor*").

10 On November 5, 2015, the CCAA Court issued an Order (the "*Amended Claims Procedure Order*") approving, *inter alia*, a procedure for the submission, evaluation and adjudication of claims against the CCAA Parties and their current and former directors and officers (the "*Claims Process*").

11 Incidentally, Twinco filed a proof of claim pursuant to the Claims Process against Wabush for approximately $780,000 [5]. The claim was allowed by the Monitor in 2016.

12 On June 29, 2018, Mr. Justice Stephen W. Hamilton ("*Hamilton J.*") issued an Order sanctioning the Joint Plan of Compromise and Arrangement dated as of May 16, 2018, that was submitted by the CCAA Parties (the "*Plan*").

13 On July 30, 2018, Hamilton J. issued the Plan Modification Order, pursuant to which minor modifications were made to the Plan to avoid unanticipated tax consequences.

14 In furtherance of the Plan, the CCAA Parties, with the assistance of the Monitor, have been working to wind down the estates of the CCAA Parties so that the net proceeds from such recoveries and realizations can finally be distributed to the creditors of the Participating CCAA Parties [6] in accordance with the terms and conditions of the Plan as soon as possible.

15 So far, subject to the resolution and collection of certain outstanding tax refunds, the CCAA Parties have sold or realized on all their assets other than the combined 17.062% equity interest held in Twinco by Wabush (the "*Twinco Interest*").

16 The initial interim distributions to the creditors with proven claims under the Plan took place in August and September 2018.

17 A second interim distribution to such creditors with proven claims took place in mid-of May 2021.

18 A final distribution will not occur until the realization or collection of all material assets of the CCAA Parties including the Twinco Interest.

 

19 With respect to the aforesaid distributions, the CCAA Parties were informed by the Monitor that a significant majority of the Wabush creditors are former employees of Wabush Mines, many of whom are elderly, and who are reasonably assumed to be anxious to receive their final distributions as soon as possible.

20 The monetization and realization of the remaining asset (the Twinco Interest), and the resolution of certain disputes surrounding tax issues, are one of the last material steps to be taken before the CCAA Parties can finally wind down the CCAA Proceedings.

**2. THE CBCA MOTION**

21 Based on the CBCA Motion, the Court retained the following relevant facts for the purposes hereof:

- Twinco is an incorporated joint venture formed under the CBCA on February 18, 1960, among CFLCo, Wabush Iron, Wabush Resources and Iron Ore Company of Canada ("**IOC**"), among others;

- As at December 31, 2019, Twinco was owned 33.3% by CFLCo, 49.6% by IOC, and 17.062% interest held jointly by Wabush [7];

- Pursuant to Twinco's fiscal year 2019 Audited Financial Statements, Twinco has approximately $6.1M in cash and cash equivalent assets (the "**Twinco Cash**") and approximately $46,000 of liabilities [8];

- The history of the Twinco Plant [9] is long and complicated and is set out in significant detail in the CBCA Motion. However, the highlights are set out hereafter;

- In 1961, CFLCo licensed to Twinco the rights to develop a 225-megawatt hydroelectric generating plant on the Unknown River in Labrador (the "**Twinco Plant**");

- In addition to the Twinco Plant, Twinco owned a number of other assets including (i) the physical building which houses the Twinco Plant (the "**Twinco Building**"); (ii) the transmission lines from the Twinco Plant to its consumers (the "**Twinco Transmission Lines**"); and (iii) the equipment which comprises the Twinco Plant and which was used in the production of hydroelectric power (the "**Twinco Machinery**") (collectively, with the Twinco Building and Twinco Transmission Lines, and such other assets of Twinco the "**Twinco Assets**");

- In 1974, CFLCo took over the Twinco Plant and the Twinco Assets and undertook comprehensive maintenance obligations in respect of the Twinco Plant (the "**CFLCo Maintenance Obligations**"), and indemnified Twinco in respect of those obligations and environmental liabilities in connection with the Twinco Plant and Twinco Assets (the "**CFLCo Indemnity**") [10];

- The Twinco Plant was placed into an extended shutdown in 1974. Since that time until today, based on various environmental assessments commissioned by Twinco over the years as summarized in various Audited Financial Statements of Twinco, the CCAA Parties understand that potential environmental liabilities may have occurred in respect of the Twinco Plant and Twinco Assets (the "**Potential Environmental Liabilities**");

- The CCAA Parties are of the view that the responsibility for any environmental liability lies with CFLCo and not Twinco, pursuant to CFLCo's Maintenance Obligations and CFLCo Indemnity [11];

- It is not clear to the CCAA Parties and the Monitor whether, and to what extent, Twinco may have funded maintenance or environmental remediation that was CFLCo's responsibility, and for which Twinco may have a claim against CFLCo for reimbursement;

 

• As stated in the CBCA Motion, for years, both prior to and after the commencement of the present CCAA Proceedings, the CCAA Parties, with the support of IOC who is not contesting the CBCA Motion, have sought to obtain a distribution of the Twinco Cash to Twinco's shareholders, but such distribution has been continuously resisted by Twinco and by CFLCo;

• The CCAA Parties have reasons to believe that CFLCo did not support further distributions to the Twinco shareholders because it wants to ensure a cash pool from Twinco to pay for the Potential Environmental Liabilities notwithstanding the CFLCo Indemnity and CFLCo Maintenance Obligations;

• Pursuant to Twinco's Articles of Continuance dated August 1, 1980 [12] , the shareholders are entitled to share rateably in the remaining property of Twinco upon dissolution;

• Wabush's share of the Remaining Twinco Cash [13] is approximately $1,040,000, a material amount, together with their *pro rata* share of what other money may be subject to reimbursement claims against CFLCo;

• As the information to determine the amount of maintenance and other indemnifiable expenses that may be subject to reimbursement by CFLCo is within the knowledge of Twinco, an accounting is requested in the CBCA Motion;

• Without this information, it is impossible for the CCAA Parties or the Monitor to calculate what the approximate true value of the Twinco Interest may be to ensure that the CCAA Parties' creditors receive appropriate recovery from the Twinco Interest.

2.1 **The CBCA Motion and the relief sought**

22 The history of the CCAA Parties' repeated attempts to engage in a constructive dialogue with Twinco and its majority shareholder CFLCo, is more fully set out in detail in the CBCA Motion, which has been continued *sine die* until now pending the outcome of Twinco's Motion to dismiss.

23 While the CCAA Parties were hopeful that a consensual resolution could be achieved, they concluded that based on the lack of desire of Twinco and CFLCo to engage in a constructive manner, a consensual resolution was not possible.

24 Accordingly, on November 16, 2020, the CCAA Parties filed the CBCA Motion before the CCAA Court, seeking the issuance of the following orders against Twinco and CFLCo:

a) confirming CFLCo's liability for Twinco's maintenance obligations and environmental liabilities related to the Twinco Plant from and after July 1, 1974;

b) compelling an accounting from Twinco of all monies expended by Twinco in respect of maintenance and environmental costs that have not been reimbursed by CFLCo pursuant to the CFLCo Indemnity and CFLCo Maintenance Obligations (collectively, the "**Reimbursable Environmental/Maintenance Costs**");

c) directing CFLCo to reimburse all Reimbursable Environmental/Maintenance Costs (such amount to be reimbursed by CFLCo, being the "**CFLCo Reimbursement**") to Twinco for distribution to the shareholders as part of the winding up and dissolution of Twinco pursuant to the relief requested in paragraph (d) below;

d) directing the winding up and dissolution of Twinco pursuant to section 214 and/or section 241 (3)(l) of the CBCA and a distribution of: (i) the Twinco Cash net of all reasonable fees and expenses incurred by Twinco to implement and complete the wind-up and dissolution being sought in this Motion (the "**Remaining Twinco Cash**"), and (ii) the CFLCo Reimbursement to Twinco's shareholders, including Wabush, on a *pro rata* basis; and

  

e) in the alternative to (d), directing Twinco and/or CFLCo to purchase the shares of Twinco held by Wabush pursuant to section 214 (2) and/or section 241 (3)(f) of the CBCA for a purchase price equal to the amount of Wabush's *pro rata* share of: (i) the Twinco Cash, and (ii) the CFLCo Reimbursement.

[the "**Requested Relief**"]

25 Some 61 days later, on January 15, 2021, concurrently with its Contestation of the CBCA Motion, CFLCo filed before the Supreme Court of Newfoundland and Labrador (the "*NL Court*"), an Originating Application for the Issuance of a Court-supervised Liquidation and Dissolution Order regarding Twinco (the "*Twinco Liquidation Application*") pursuant to sections 214 (1)(b)(ii), 215, and 217 of the CBCA, seeking, *inter alia*, the court-supervised liquidation of Twinco [14].

26 Both this CCAA Court and the NL Court adjourned *sine die* the CBCA Motion and the Twinco Liquidation Application [15], in order to allow the parties an opportunity to explore the possibility of a consensual resolution of the matters raised in those proceedings which essentially boils down to disposing of the Twinco Interest.

27 As those negotiations did not proceed in any meaningful way, the CCAA Parties sought to obtain the information necessary to determine with greater certainty the Twinco Interest by presenting their *Motion for the Expansion of the Monitor's Powers* ("*Expanded Monitor Powers Motion*") to facilitate the recovery of assets for the benefit of the CCAA Parties' creditors and the winding up of the CCAA Parties' estate and the termination of the CCAA Proceedings.

28 The Expanded Monitor Powers Motion related essentially to the Twinco Interest which is, to all intents and purposes, the last asset to monetize and realize in the context of the CCAA proceedings.

29 Until the presentation of the Expanded Monitor Powers Motion on June 3, 2021, Twinco and its shareholder CFLCo had been steadfastly blocking all attempts of the CCAA Parties and the Monitor to monetize the Twinco Interest in the furtherance of the Plan, which involved obtaining the relevant and necessary documentation required to determine with reasonable certainty the value of the Twinco Interest in the context of the present CCAA Proceedings.

30 Twinco's and CFLCo's refusal to deal with the Twinco Interest has left little alternative but to seek the wind down and the dissolution of Twinco in the context of the present CCAA Proceedings to finally permit the CCAA Parties, with the assistance of the Monitor, to realize this asset of Wabush, complete the final distribution to the Plan creditors and terminate at last the CCAA Proceedings that have been ongoing since 2015.

31 By judgment rendered on July 14, 2021 [16] (the "*Expanded Monitor Powers Judgment*"), this CCAA Court granted the relief sought in the Expanded Monitor Powers Motion, thus granting additional powers to the Monitor to seek from Twinco and CFLCo the necessary documentation and information that would enable the Monitor to once and for all determine the approximate true value of the Twinco Interest, bearing in mind that should the proper information be communicated to the Monitor, it may lead to the conclusion that it is not financially reasonable for the CCAA Parties to pursue the avenue sought with the CBCA Motion, should the Twinco Interest be mainly limited to the Wabush's share of the Twinco Cash.

32 The Court was informed by the counsel for Twinco that despite CFLCo's present attempt to seek leave to appeal the same [17], the latter's Québec counsel had started communicating some document and information to the Monitor but nevertheless insisted on proceeding with the Twinco Motion to dismiss regardless of the outcome on the information communication process presently engaged and the Application for leave to appeal of CFLCo.

**3. THE QUESTIONS AT ISSUE**

33 The Twinco Motion to dismiss and CFLCo's Contestation of the CBCA Motion raise essentially the lack of jurisdiction of this CCAA Court to hear and rule on the CBCA Motion and consequently, this CCAA Court should yield to the NL Court to hear and dispose of the Twinco Liquidation Application and the CBCA Motion.

  

34 Should this CCAA Court find that it has nevertheless jurisdiction to hear the CBCA Motion, it should apply article 3135 CCQ stipulating that even if a Québec Court determines it has jurisdiction, it may decline jurisdiction where it considers the courts of another jurisdiction "*are in a better position to decide the dispute*".

35 To sum it all up, this CCAA Court has to determine the following questions at issue:

- Does this CCAA Court lack the jurisdiction to hear and dispose of the CBCA Motion?
- In the affirmative, this CCAA Court should dismiss the CBCA Motion;
- In the negative and on a subsidiary basis, should this CCAA Court nevertheless decline jurisdiction in favour of the NL Court with respect to the matters and issues raised and the Requested Relief sought in the CBCA Motion based on the provisions of article 3135 CCQ and in application of the doctrine of *forum non convenience*?

**4. ANALYSIS**

36 With all due respect and upon due consideration of the evidence and arguments put forward by counsel for Twinco and CFLCo, this CCAA Court finds that as a "*national court*", it has jurisdiction to hear and dispose of the CBCA Motion.

37 This CCAA Court also finds that it would not be appropriate to apply the doctrine of *forum non conveniens* in this matter and nevertheless decline jurisdiction in favour of the NL Court with respect to the matters and issues raised and the Requested Relief sought in the CBCA Motion.

38 Here is why.

4.1 **This CCAA Court has jurisdiction to decide the CBCA Motion**

39 It is important to bear in mind that for lack of any success in their previous attempts to resolve their issues with Twinco and CFLCo on an amicable and consensual basis, the CBCA Motion is essentially a mean and an attempt by the Wabush shareholders of Twinco (with the assistance of the Monitor) to finally monetize and realize their shares in said corporation that has been essentially inactive since 1974, the whole for the purpose of distributing the realized proceeds of their shares to their creditors under the Plan approved by this CCAA Court in Québec.

40 CFLCo is clearly amenable to this solution having filed its own Application seeking the dissolution and liquidation of Twinco some two months after the CBCA Motion.

41 Moreover, at the hearing, counsel for Twinco confirmed that its client was now also in agreement to proceed with its dissolution and liquidation.

***4.1.1 The CCAA and sections 214 and 241 CBCA***

42 The Requested Relief sought pursuant to the CBCA Motion are based on sections 214 [18] and 241 CBCA, the latter dealing with oppression remedies.

43 Upon the application of a shareholder, section 214 CBCA permits the Court [19] to order the liquidation and dissolution of a corporation and such other order under 214 or 241 as "*it thinks fit*" where the Court is satisfied that, among other things:

*a) in respect of the corporation or any of its affiliates, there is:*

(i) any act or omission of the corporation or any of its affiliates that effects a result,

(ii) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

  

(iii) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer ("**Oppressive Conduct**"); or

*b) it is just and equitable to do so.*

44 Therefore, in addition to the relief offered by sections 214 and 241 CBCA also permits the CCAA Court to make an order for the liquidation and dissolution of a corporation and even an order directing a corporation or any other person to purchase securities of a security holder, where the Court is satisfied that there is Oppressive Conduct.

45 This CCAA Court agrees with counsel for the CCAA Parties that in the present instance, the provisions of the CCAA grant the Québec Superior Court (Commercial Division) jurisdiction to hear the CBCA Motion and grant the Requested Relief.

46 Indeed, across Canada, CCAA courts have relied on section 11 [20] CCAA to "*make any order that* [they consider] *appropriate in the circumstances*" and section 42 [21] CCAA to "*import remedies from other statutory schemes*" to make orders comparable to the Requested Relief.

47 More precisely, CCAA courts have found that they had jurisdiction to grant oppression remedies even when the oppression remedies were sought under a provincial business corporation act or statute. [22]

48 The Court also shares the view of the counsel for the CCAA Parties that in alleging that the NL Court should have exclusive jurisdiction to hear any motion relating to the dissolution or the liquidation of Twinco pursuant to sections 207 and 214 CBCA merely because Twinco's registered office is in Newfoundland, CFLCo's Contestation fails to appreciate that section 42 CCAA is focused on the remedies that can be imported from other statutes, not the court or the jurisdictional requirements associated with them.

49 Indeed, finding otherwise would be tantamount to asserting that certain requirements under provincial and federal statutes can prevent this CCAA Court from applying the provisions thereunder, on the grounds that it lacks jurisdiction to do so.

50 With all due respect, this line of reasoning defies the purpose sought by the federal legislator by enacting section 42 [23] CCAA and more importantly, it would reduce greatly the utility of section 42 CCAA if not eliminating it altogether. This would arrest this CCAA Court from utilizing any statute that is linked to a court outside of Québec.

51 Moreover, the approach advocated by Twinco and CFLCo undermines the very nature of a Canada's insolvency regime by failing to take into consideration the Supreme Court's reasoning in laying out the "single-control" model.

***4.1.2 The "Single Control" Model***

52 In the case of *Sam Lévy & Associés v. Azco Mining Inc.* [24] ("*Sam Lévy*"), the Supreme Court of Canada stated that the "single-control" model applied to insolvency proceedings, a model which favours litigation involving an insolvent company to be dealt within a single jurisdiction:

> [27] Stewart was, as stated, a winding-up case, but the legislative policy in favour of "single control" applies as well to bankruptcy. There is the same public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse. Section 188 (1) [BIA] ensures that orders made by a bankruptcy court sitting in one province can and will be enforced across the country.
>
> [Emphasis added]

53 While the *Sam Lévy* case involved proceedings under the *Bankruptcy and Insolvency Act* ("*BIA*"), courts have adopted the position that the "single control" model now also applies to CCAA proceedings. [25]

  

54 This CCAA Court must not ignore the fact that in the present instance, in 2017, Hamilton J., then acting as case managing judge in these very CCAA Proceedings since 2015, ruled as follows on the "single control" model:

> **1- The jurisdiction of the CCAA Court**
>
> [29] In principle, all issues relating to a debtor's insolvency are decided before a single court. [26] This rule is based on the "public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse." [27] This public interest favours a "single control" of insolvency proceedings by one court as opposed to their fragmentation among several courts. [28]
>
> [30] The Supreme Court in *Sam Lévy* concluded as follows with respect to the relevant test:
>
> 76 In the present case, we are confronted with a federal statute that *prima facie* establishes one command centre or "single control" (*Stewart*, *supra*, at p. 349) for all proceedings related to the bankruptcy (s. 183 [1]). Single control is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" to send the trustee scurrying to multiple jurisdictions. Parliament was of the view that a substantial connection sufficient to ground bankruptcy proceedings in a particular district or division is provided by proof of facts within the statutory definition of "locality of a debtor" in s. 2(1). The trustee in that locality is mandated to "recuperate" the assets, and related proceedings are to be controlled by the bankruptcy court of that jurisdiction. The Act is concerned with the economy of winding up the bankrupt estate, even at the price of inflicting additional cost on its creditors and debtors. [29]
>
> (Emphasis added [by Hamilton J.])
>
> [31] Although the *Sam Lévy* case was decided in the context of the *Bankruptcy and Insolvency Act* ("BIA"), [30] the same principles apply in the context of the other insolvency legislation, including the CCAA. [31] The CCAA court has jurisdiction to deal with all of the issues that arise in the context of the CCAA proceedings. [32] The stay of proceedings under the CCAA gives effect to this principle by preventing creditors from bringing proceedings outside the CCAA proceedings without the authorization of the CCAA court.
>
> [32] There are clear efficiencies to having a single court deal with all of the issues in a single judgment.
>
> [33] The general rule is therefore that the Court should rule on all issues that arise in the context of these insolvency proceedings. [33]
>
> [Emphasis added]

55 At the time, Hamilton J. refused to refer issues relating to the interpretation of the Newfoundland and Labrador*Pension Benefits Act* to the Supreme Court of Newfoundland.

### *4.1.3 The Superior Court of Québec (Commercial Division) sits as a national court*

56 In the *Sam Lévy* case, the Supreme Court of Canada stated that the court overseeing insolvency proceedings (unlike the court sitting in civil proceedings) is pursuing the objectives of a federal statute that establishes a centralized "*command centre*" for all proceedings related to a debtor:

> 73 In the first place, as stated, the *Amchem* approach has to be applied here with full regard to the context of Canadian bankruptcy legislation. This appeal involves the allocation of a particular bankruptcy matter within a single national bankruptcy scheme created by the Act. As shown in *Holt Cargo Systems, supra*, consideration of the allocation of

  

> a matter having different aspects (e.g. maritime law and bankruptcy law), as between Canadian courts and foreign courts operating under quite different legislative or other schemes, may raise different problems.
>
> 74 Secondly, *Amchem* and its progeny involved private litigation. Here, as explained in *Holt Cargo Systems, supra*, there is the important public interest aspect mentioned above. The Court looks not only at the *Amchem* factors but must strive to give effect to Parliament's intent to create an economical and efficient national system for the administration of bankrupt estates, as evidenced in the Act.
>
> [ . . . ]
>
> 76 In the present case, we are confronted with a federal statute that *prima facie* establishes one command centre or "single control" (*Stewart, supra*, at p. 349) for all proceedings related to the bankruptcy (s. 183 (1)). Single control is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and **who cannot claim to be a "stranger to the bankruptcy"**, has the burden of demonstrating "sufficient cause" to send the trustee scurrying to multiple jurisdictions. Parliament was of the view that a substantial connection sufficient to ground bankruptcy proceedings in a particular district or division is provided by proof of facts within the statutory definition of "locality of a debtor" in s. 2(1). The trustee in that locality is mandated to "recuperate" the assets, and related proceedings are to be controlled by the bankruptcy court of that jurisdiction. The Act is concerned with the economy of winding up the bankrupt estate, even at the price of inflicting additional cost on its creditors and debtors.
>
> 77 The "balancing test" advocated by the appellant based on the *Amchem* factors and general principles of private international law fails to take these important public policies into account. The Québec Superior Court sitting in Bankruptcy is, in a very real sense, sitting as a national court.
>
> [Emphasis added]

57 As such, the Québec Superior Court (Commercial Division) sitting in the present CCAA Proceedings *is, in a very real sense, sitting as a national court*.

***4.1.4 Twinco and CFLCo are not "Strangers to the Bankruptcy"***

58 Bearing in mind that the teachings in the *Sam Lévy* case also apply to proceedings governed by the CCAA, the Supreme Court of Canada held that a creditor who cannot claim to be a "*stranger to the bankruptcy*" but wishes to *fragment the proceedings*, in spite of the single-control model, has the burden of demonstrating sufficient cause to send the "*trustee scurrying to multiple jurisdictions*."

59 The Supreme Court of Canada indicated that such cause may be demonstrated where the dispute relates to a matter that is *outside even a generous interpretation of the administration of the bankruptcy*:

> 36 Despite the fact that England is a unitary state without the constitutional limitations imposed by our division of powers, the courts in Canada have generally hewn ever since 1874 to the basic dividing line between disputes related to the administration of the bankrupt estate and disputes with "strangers to the bankruptcy". The principle is that if the dispute relates to a matter that is outside even a generous interpretation of the administration of the bankruptcy, or if the remedy is not one contemplated by the Act, the trustee must seek relief in the ordinary civil courts. [ . . . ]

60 In other words, such cause may be demonstrated where the opposite party is a "*stranger to the bankruptcy*".

61 This might explain why in the Twinco Motion to dismiss, Twinco alleged that it and its shareholder CFLCo were strangers to the present CCAA Proceedings:

> 10. Neither Twinco nor CFLCo is asking for their contractual rights to be determined by this Honourable Court. Further, neither Twinco nor CFLCo is a party to the CCAA Proceedings, nor is either corporation a party governed by the original

  

or any subsequent order issued in the CCAA Proceedings. **Rather, both Twinco and CFLCo are strangers to the CCAA Proceedings in which the Wabush Motion has been brought**.

[Emphasis added]

62 This CCAA Court already broached this issue in the Expanded Monitor Powers Judgment and found that Twinco's assertion was inaccurate at best if not misleading:

> [48] In connection with the last argument [34] put forward by both Twinco and CFLCo that there is a limit to the statutory discretion under section 11 of the CCAA, they added that the present CCAA Proceedings which aim at restructuring corporations as opposed to their liquidation, are not the appropriate vehicle for investigation of third parties to the CCAA Proceedings.
>
> [49] In line with the forgoing, Twinco makes the astonishing if not misleading affirmation that it is a third party (a stranger) herein, with no link to the CCAA Proceedings:
>
> > 17. Further, neither Twinco nor CFLCo is a party to the CCAA Proceedings, nor is either corporation a party governed by the original or any subsequent order issued in the CCAA Proceedings.
> >
> > 18. Rather, both Twinco and CFLCo are strangers to the CCAA Proceedings in which the Wabush Motion has been brought.
>
> 117. Here, Twinco is a third party, with no link with the CCAA Proceedings. [ . . . ] Twinco is neither the debtor, **nor a creditor**, an employee, a director, a shareholder, nor another party doing business with the insolvent company. It has no interest whatsoever in the recovery, and now, in the liquidation of the CCAA Parties. [35]
>
> [50] **Contrary to the foregoing assertions, Twinco is not a "stranger to the CCAA Proceedings"**.
>
> [51] Pursuant to the Claims Process [36] authorized by the Court, Twinco filed a proof of claim against Wabush for approximately $780,000 [37] . Twinco's claim was allowed by the Monitor in 2016 [38] .
>
> [52] The Court understands that Twinco even received a partial distribution in respect of its claim under the Plan and is likely to participate in the final distribution.

[Emphasis added]

63 The Expanded Monitor Powers Judgment essentially granted additional powers enabling the Monitor to obtain from Twinco and CFLCo the relevant information and documentation that would permit at last the determination of the true value of the Twinco Interest for realization purposes. Until that time, Twinco and CFLCo had steadfastly denied the requested information.

64 This led the Court to make the following comments in the Expanded Monitor Powers Judgment:

> [61] The Court also understands that it is the steadfast and the somewhat inexplicable refusal of Twinco and of its shareholder CFLCo to provide any of the Twinco Requested Information [39] to the CCAA Parties and to the Monitor that prevents the latter from determining with a minimum of accuracy what is the estimated value of the Twinco Interest.
>
> [62] This determination expected to be performed by the Monitor relates directly to an asset of the CCAA Parties that is covered by the Plan sanctioned by this Court, and such a determination falls squarely on the tasks, duties and responsibilities of the Monitor within the present CCAA Proceedings regardless of the eventual dissolution or not of Twinco.

  

> [63] Moreover, of obvious significance in the eyes of the Court, Twinco filed a proof of claim for $780,000 that was accepted by the Monitor pursuant to the Claims Process approved by the Court.
>
> [64] It is somewhat incomprehensible that Twinco would nevertheless affirm that it is a third party, a "stranger" with no link with the CCAA Proceedings and that it is neither the debtor, nor a creditor, an employee, a director, a shareholder, nor another party doing business with the CCAA Parties that include two of its shareholders (Wabush).
>
> [65] How can Twinco seriously pretend that it has no interest whatsoever in the recovery, and presently, in the liquidation of the CCAA Parties when it filed a proof of claim for $780,000?
>
> [66] Twinco even stands to retrieve by way of the final distribution, a portion of the Twinco Interest once realized by the Monitor, as the case may be.
>
> [67] Moreover, didn't Twinco attorn to the jurisdiction of the Québec Superior Court (Commercial Division) by deciding to file a proof of claim against the Wabush shareholders in the present CCAA Proceedings? [40]
>
> [Emphasis added]

65 The Court must answer to the latter question in the affirmative.

66 As Courts have routinely found that the filing of a proof of claim in insolvency proceedings amounts to an attornment and consent by the filing party to the CCAA court [41] , this CCAA Court also finds that by filing a proof of claim with the Monitor, Twinco has already attorned and consented to the jurisdiction of this CCAA Court.

67 Be that as it may, it is highly relevant to point out that with the present CCAA Proceedings and more particularly, via the CBCA Motion, the CCAA Parties with the assistance of the Monitor are endeavoring to realize the Twinco Interest in order to distribute the proceeds to their creditors which includes Twinco.

68 First and foremost, the CBCA Motion purports to monetize and revendicate the Twinco Interest which constitutes, in the eyes of the Court, a property that forms part of the CCAA Parties' patrimony and that is subject to the court-sanctioned Plan.

69 The Court believes that the parties that are in possession of that property, namely the Twinco Interest, and who refuse to cooperate with the Monitor in the execution of its court-granted powers to implement the Plan, are no "*strangers*" to the present CCAA Proceedings especially if Twinco is a creditor of the Wabush who filed a $780,000 proof of claim that was accepted by the Monitor.

70 Therefore, the Commercial Division of the Québec Superior Court clearly has jurisdiction herein.

71 In other words, the Court finds that where the ultimate objective of the CBCA Motion is to recover assets belonging to the Wabush patrimony, this Court sitting as a CCAA Court who has been managing these CCAA Proceedings since 2015, has jurisdiction herein, especially since this approach facilitates the prompt resolution of insolvency cases. [42]

***4.1.5 Conclusion on the jurisdiction of this CCAA Court***

72 In conclusion, this CCAA Court finds that it has jurisdiction to hear the CBCA Motion.

73 To reach that conclusion, the Court shares the opinion of the counsel for the CCAA Parties that in the present matter, Twinco and CFLCo are no "*strangers to the bankruptcy*" (or the CCAA Proceedings) as the Monitor stands to recover assets which belong to the CCAA Parties' estate, being the Wabush portion of the Twinco Cash on hand and any other amount which may become payable to the latter.

74 More precisely:

  

a) the CBCA Motion relates to the administration of the CCAA Parties' estate, as it is in respect of an asset of the CCAA Parties, being the Twinco Interest;

b) the Twinco Interest is a material asset of the CCAA Parties. If the Requested Relief is granted by this CCAA Court, it would have a material impact on the Plan creditors as it would increase the amounts available to them in any future distributions under the Plan;

c) Twinco has filed a proof of claim in these CCAA Proceedings which has been accepted by the Monitor, making Twinco a creditor of the CCAA Parties in these CCAA Proceedings;

d) by filing its proof of claim with the Monitor, Twinco has attorned and consented to the jurisdiction of this CCAA Court; and

e) the CBCA Motion essentially seeks to revendicate the Wabush's property (the Twinco Interest) that remains in their possession.

4.2 **Subsidiarily, this CCAA Court should not decline to exercise its jurisdiction based on the doctrine of *forum non conveniens***

75 At the outset, it is relevant to bear in mind, with all due respect, that Twinco and CFLCo failed to meet the required burden for this CCAA Court to decline jurisdiction for the reasons more fully discussed above.

76 Under such circumstances, Twinco offered a subsidiary argument based on article 3135 CCQ that gives rise to the doctrine of *forum non conveniens* by stipulating that even if a Québec Court determines it has jurisdiction, it *may* decline jurisdiction where it considers the courts of another jurisdiction "*are in a better position to decide the dispute*".

77 The application of the doctrine of *forum non conveniens* is contextual and the factors that the court will consider vary in each case.

78 The jurisprudence has identified the following non-exhaustive list of factors:

(i) the location of the parties; (ii) the contractual provisions that specify applicable law or accord jurisdiction; (iii) the avoidance of a multiplicity of proceedings; (iv) the geographical factors suggesting the natural forum; (v) the jurisdiction in which the factual matters arose; (vi) the place of business of the parties; (vii) the location in which the majority of witnesses reside; (viii) the cost of transferring the case or declining the stay; (ix) the impact of a transfer on the conduct of the litigation or on related parallel proceedings; (x) the possibility of conflicting judgments; (xi) the location of evidence; (xii) the applicable law; and (xiii) the recognition and enforcement of a judgment.

79 Relying on many of those factors, Twinco's counsel[43] argued that in light of the issues raised in the CBCA Motion leading to the Requested Relief (the "*Issues*"), the Superior Court of Québec is not an appropriate forum to hear and dispose of those Issues.

80 In fact, the real and substantial connection between the said Issues and the forum of Newfoundland is evident for the following reasons:

• Twinco and CFLCo are not domiciled or resident in Québec; they are headquartered and chiefly operate in Newfoundland and Labrador;

• All material agreements referred to in the CBCA Motion are not governed by the laws of Québec; two of those agreements expressly provide that they are governed by the laws of Newfoundland (now Newfoundland and Labrador); the third one is silent on jurisdiction but is a subsidiary document of one of the other two agreements mentioned above;

  

• Any consideration of any potential environmental liabilities that Twinco might have would arise exclusively under the laws of Newfoundland and Labrador;

• Moreover, the jurisdiction of Newfoundland and Labrador is where witnesses and evidence required for the determination of the aforementioned Issues are located; and

• On January 15, 2021, CFLCo, in its capacity of shareholder of Twinco, filed the Twinco Liquidation Application before the NL Court seeking the issuance of a liquidation and dissolution order in respect of Twinco pursuant to the CBCA with Wabush Resources and Wabush Iron being parties to these proceedings.

81 In light of the foregoing, the NL Court would be the court having a real and substantial connection to Twinco and CFLCo, the material agreements raised in the CBCA Motion and with the laws which govern them.

82 According to Twinco and CFLCo, the NL Court is a clearly the more appropriate forum and, as such, it is, in the interest of justice, better suited to take jurisdiction of this matter.

83 Twinco's counsel also argued that the only thing connecting Twinco to the CCAA Proceedings was that Wabush Resources and Wabush Iron collectively own a total of 17.062% of the shares of Twinco, the remainder being held by Iron Ore Company of Canada [44] (IOC) (49.6%) and CFLCo (33.3%), it does not constitute a "connecting factor" under article 3148 CCQ.

84 However, setting aside the finding that Twinco attorned to the jurisdiction of this CCAA Court by filing a proof of claim, the undersigned did not come to the conclusion that this CCAA Court had jurisdiction herein based on article 3138 CCQ.

85 Twinco also argued that the existence of proceedings pending between the parties in another jurisdiction (Newfoundland) militated in favour of the CBCA Motion being heard before the NL Court, as otherwise, there is a risk of contradictory judgments resulting from the multiplication of proceedings.

86 With all due respect, the Court finds it difficult to entertain the idea of conflicting judgments with both proceedings actually being heard in Québec *and* in Newfoundland, given that they both seek the dissolution and liquidation of Twinco which also involves in all instances the determination and the realization of the Wabush Twinco Interest.

87 Be that as it may, this CCAA Court understands that the discretion to decline to hear legal proceedings on the basis of the doctrine of *forum non conveniens* as it is conferred pursuant to article 3135 CCQ, must only be exercised by the judge in exceptional circumstances [45] .

88 More recently in 2012, in the case of *Van Breda,* the Supreme Court of Canada reiterated that principle and held that:

• the party raising the doctrine of *forum non conveniens* must show that the alternative forum is "*clearly*" more appropriate, and that it would be "*fairer and more efficient*" to transfer the proceedings to it; and

• the court "*should not exercise its discretion . . . solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces*". [46]

89 With all due respect, this CCAA Court agrees with the counsel for the CCAA Parties that in the present context, the combination of the relevant facts raised by Twinco and CFLCo do not lead to a finding that it is "*clearly*" more appropriate and warranted to decline jurisdiction and to transfer the CBCA Motion to the NL Court.

90 On the contrary, such an exercise of its judicial discretion would lead to unfair and inefficient results as:

• a) the parties would incur additional expenses in transferring the CBCA Motion to the NL Court;

• b) transferring the CBCA Motion would result in a multiplicity of proceedings;

  

> • c) as this CCAA Court as case manager is seized of and is already familiar with the details of the CCAA Proceedings and the CCAA Parties, as opposed to the NL Court;
>
> • d) the CBCA Motion is in respect of a material asset of the CCAA Parties and has an impact on and relates to the CCAA Proceedings, the administration of the CCAA Parties' estate and the implementation of the court-sanctioned Plan;
>
> • e) except for the interpretation of certain contractual provisions where the laws of Newfoundland are elected as applicable law, none of the issues in the CBCA Motion are related to Newfoundland law as most of the Issues are in respect of federal corporate legislation, in which this CCAA Court is particularly familiar with;
>
> • f) in a global pandemic context which unfortunately seems to continue for the time being, factors of geographical nature are not relevant since evidence can be adduced electronically and any hearing will most likely be conducted in a virtual manner;
>
> • g) having already found that this CCAA Court has jurisdiction to hear the CBCA Motion, transferring the same would offend the "single-control" model previously discussed; and
>
> • h) lastly, contrary to the allegations of Twinco and CFLCo, the Twinco Liquidation Application filed on January 15, 2021, in the NL Court cannot be considered as an existing proceeding in another jurisdiction as it was filed simultaneously with CFLCo's Contestation some 61 days after the CBCA Motion.

91 The fact that this CCAA Court will be called upon to apply and interpret certain contractual provisions of agreements which provide that the laws of Newfoundland are applicable does not at all bar this CCAA Court from exercising its jurisdiction.

92 In fact, in the present CCAA Proceedings, this CCAA Court has already exercised such jurisdiction over these matters when it was asked to interpret a series of contracts governed by the laws of Newfoundland to determine if Wabush Iron had the obligation to pay mining royalties to Canadian Javelin Foundries & Machine Works Limited. [47]

93 Moreover, this is not the first time where this CCAA Court is called upon to consider the application of the doctrine of *forum non conveniens* in these CCAA Proceedings which previously involved legislation from competing jurisdictions which happened to be in relation to, among other things, Newfoundland's *Pension Benefit Act*.

94 Although everyone recognized the jurisdiction of this CCAA Court at the time, certain parties [48] requested that Hamilton J. should seek the aid of the NL Court to interpret and rule on contracts governed by the laws of Newfoundland.

95 In the previously mentioned judgment rendered on January 30, 2017, Hamilton J. ruled that he would not refer the matter involving Newfoundland's *Pension Benefit Act* to the NL Court [49] .

96 Recalling the clear efficiency of the "single control" model [50] , Hamilton J. made the following comments about the legal considerations that militated in favour of a referral to the NL Court and pointing, *inter alia*, on the fact that a dispute is governed by foreign law does not have much weight in a *forum non conveniens* analysis:

> [41] This is the key argument [the legal considerations] put forward by the parties suggesting that the NLPBA issues be referred to the NL Court: the issues relate to the NLPBA, and the NL Court is best qualified to interpret the NLPBA.
>
> [42] The Court accepts as a starting point that the NLPBA applies in the present matter: the pension plans are regulated by the NL Superintendent in accordance with the NLPBA (although OSFI also regulates the Union Plan in accordance with the PBSA) and the plans expressly provide that they are interpreted in accordance with the NLPBA.

  

> [43] The Court also accepts the obvious proposition that the NL Court is more qualified to deal with an issue of Newfoundland and Labrador law than the courts of Québec, particularly since Newfoundland and Labrador is a common law jurisdiction and Québec is a civil law jurisdiction.
>
> [44] However, that does not mean that the Court will automatically refer every issue governed by the law of another jurisdiction to the courts of that other jurisdiction.
>
> [45] First, there are rules in the *Civil Code* with respect to how Québec courts deal with issues governed by foreign law. Articles 3083 to 3133 C.C.Q. set out the rules to determine which law is applicable to a dispute before the Québec courts, and Article 2809 C.C.Q. sets out how the foreign law is proven before the Québec courts.
>
> [46] Further, pursuant to these rules, Québec courts regularly hear matters governed by foreign law. The Court of Appeal recently held that the fact that a dispute is governed by foreign law does not have much weight in a *forum non conveniens*analysis:
>
> > [98] Si on revoie les considérations du Juge, portant sur dix points, pour conclure que le for géorgien est préférable, deux aspects principaux en ressortent, soit les coûts et la loi applicable.
> >
> > [99] Quant à cette dernière considération, elle n'est pas d'un grand poids, à mon avis. Parce que le débat porte sur les faits plutôt que sur le droit. Parce que la *common law* est tout de même familière aux tribunaux québécois. Parce que faire la preuve de la loi d'un État américain n'est pas un grand défi, c'est même chose courante.
> >
> > [100] Et surtout, parce que le critère de la loi applicable ne constitue pas en soi un facteur important. Dans tout litige international, les conflits de lois sont l'ordinaire et non l'exception. [51]
>
> [47] In other words, the mere fact that a dispute is governed by foreign law is not a good reason to send the case to the foreign jurisdiction. This principle was applied in a CCAA context in the *MMA*case. [52]
>
> [48] There are examples in the insolvency context of the court with jurisdiction over the insolvency declining to send an issue governed by foreign law to the foreign court. In *Sam Lévy*, the Supreme Court declined to send an insolvency matter to British Columbia simply because there was a choice of B.C. law, stating, "The Québec courts are perfectly able to apply the law of British Columbia." [53]
>
> [ . . . ]
>
> [50] The Monitor submitted cases in which Québec courts have interpreted different provisions of the pension laws of other provinces. [54] The Court also notes that it dealt to a more limited extent with the deemed trust under the NLPBA in its decision dated June 26, 2015 [55] .
>
> [ . . . ]
>
> [70] The Court will not refer issues of Québec law or federal law to the NL Court, and if those issues are too closely interrelated to the NLPBA issues, or if in the interests of simplicity and expediency they should all be decided by the same court, then the solution is not to refer any issues to the NL Court.

97 With all due respect, based on the facts of the case at bar, this CCAA Court does not find any compelling reasons justifying declining jurisdiction in favour of the NL Court with respect to the CBCA Motion as requested by Twinco and CFLCo.

98 In conclusion, this CCAA Court having jurisdiction with respect to the matter and the Issues raised in the CBCA Motion, shall dismiss the Twinco Motion to dismiss and CFLCo's Contestation.

  

*FOR THOSE REASONS, THE COURT:*

99 *DECLARES* that the Superior Court of Québec (Commercial Division) standing as a CCAA Court, has jurisdiction to hear and dispose of the matter and the issues raised by the Petitioners and the Mises-en-cause in the *Motion for the Winding Up and Dissolution, Distribution of Assets, Reimbursement of Monies and Additional Relief* dated November 16, 2020 [the "*Application*"];

100 *DISMISSES* the *Modified Motion by Twin Falls Power Corporation to dismiss the Application for lack of jurisdiction and for forum non-conveniens* dated May 17, 2021, and *Churchill Falls (Labrador) Corporation Limited's Amended Contestation of the Petitioners' Motion for the winding up and dissolution, distribution of assets, reimbursement of monies and additional relief* dated May 19, 2021;

101 *THE WHOLE* with judicial costs payable by Twin Falls Power Corporation and Churchill Falls (Labrador) Corporation Limited.

Footnotes

1 With the support of its shareholder CFLCo.

2 **3135.**Even though a Québec authority has jurisdiction to hear a dispute, it may, exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another State are in a better position to decide the dispute.

3 As defined hereafter in paragraph 8.

4 *Ibid*.

5 **R-14** of the Motion to expand the powers of the Monitor.

6 As defined in the Plan.

7 4.6% held by Wabush Iron Co. Limited and 12.5% by Wabush Resources Inc.

8 **R-2** of the CBCA Motion.

9 As defined below.

10 As more fully detailed in the CBCA Motion.

11 **R-6** of the CBCA Motion.

12 **R-4**.

13 As defined below.

14 **C-1** (Court File No. 2021 01G 0432).

15 As defined below.

16 2021 QCCS 2946 (Application for leave to appeal this judgment by CFLCo only is presently pending).

17 Twinco's counsel also informed the Court that unlike CFLCo, its client was not seeking leave to appeal the judgment of July 14, 2021, and was in agreement to proceed to its dissolution and liquidation, which is now requested by the CCAA Parties in the CBCÙ Motion filed in Québec and by CFLCo with the Twinco Liquidation Application filed subsequently in Newfoundland.

  

18 214 (1) A court may order the liquidation and dissolution of a corporation or any of its affiliated corporations on the application of a shareholder,

(a) if the court is satisfied that in respect of a corporation or any of its affiliates

(i) any act or omission of the corporation or any of its affiliates effects a result,

(ii) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or (iii) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer; or

(b) if the court is satisfied that

(i) a unanimous shareholder agreement entitles a complaining shareholder to demand dissolution of the corporation after the occurrence of a specified event and that event has occurred, or

(ii) it is just and equitable that the corporation should be liquidated and dissolved.

(2) On an application under this section, a court may make such order under this section or section 241 as it thinks fit.

(3) Section 242 applies to an application under this section.

19 In Québec, this jurisdiction is exercised by the Commercial Division of the Superior Court, being the CCAA Court as well.

20 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]

21 42. The provisions of this Act may be applied together with the provisions of any Act of Parliament, or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them. [Emphasis added]

22 *Lightstream Resources Ltd (Re)*, 2016 ABQB 665, at paragraph 52; *Stelco Inc., Re,* [2005] O.J. No. 1171, at paragraphs 52-54.

23 Previously, section 20 CCAA.

24 *Sam Lévy & Associés v. Azco Mining Inc.*, 2001 SCC 92.

25 *Essar Steel Algoma Inc., Re.*, 2016 ONSC 595, paragraphs 29-30; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, paragraph 22.; *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, paragraph 21.; *Montréal, Maine & Atlantic Canada Co., Re.*, 2013 QCCS 5194, at paragraphs 24-25.

26 *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, 2001 SCC 92, par. 25-28.

27 *Ibid*, par. 27.

28 *Ibid*, par. 64.

29 *Ibid*, par. 76.

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

31 *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, par. 22; *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, par. 21; *Montreal, Maine & Atlantic Canada Co./Montréal, Maine & Atlantique Canada Cie (Arrangement relatif à)*, 2013

  

QCCS 5194, par. 24-25; *Re Nortel Networks Corporation et al*, 2015 ONSC 1354, par. 24; *Re Essar Steel Algoma Inc.*, 2016 ONSC 595, par. 29-30, judgment of Court of Appeal ordering (i) Cliffs to seek leave to appeal the Order, (ii) the hearing of the leave to appeal motion be expedited, and (iii) the issuance of a stay pending the disposition of the leave to appeal motion, 2016 ONCA 138.

32 Section 16 CCAA provides that the orders of the CCAA court are enforced across Canada.

[16] *Every order made by the court in any province in the exercise of jurisdiction conferred by this Act in respect of any compromise or arrangement shall have full force and effect in all the other provinces and shall be enforced in the court of each of the other provinces in the same manner in all respects as if the order had been made by the court enforcing it*.

33 *Arrangement relatif à Bloom Lake*, 2017 QCCS 284 (January 30, 2017).

34 [47] [ . . . ] The statutory discretion under section 11 of the CCAA does not extend to the Expanded Monitor Powers sought by the CCAA Parties in the Motion.

35 Paragraphs 17, 18 and 117 of the Twinco's Argument Plan.

36 On November 5, 2015, the CCAA Court issued an Order, *inter alia*, approving a procedure for the submission, evaluation and adjudication of claims against the CCAA Parties and their current and former directors and officers (the "**Claims Process**").

37 **R-14**.

38 *Ibid*.

39 Purposely limiting the same to documents that the Wabush shareholders already have.

40 *Bouygues Building Canada inc. v. Iannitello et Associés inc*, 2018 QCCA 504:

[23] By submitting a proof of claim to the Trustee and appealing the disallowance, the Joint Venture attorned to the jurisdiction of the Québec Superior Court sitting in bankruptcy matters. It could hardly blame the Trustee after the fact as it did for having decided on the validity of the claim as submitted, since the Trustee was obliged to do so. The Joint Venture did not seek permission to continue the Ontario proceedings with a view to qualifying its contingent claim prior to filing a proof of claim with the Trustee. [References omitted]

41 *Van Breda v. Village Resorts Ltd*, 2012 SCC 17, at paragraph 79; *Microbiz Corp v. Classic Software Systems Inc*, [1996] OJ no 5094, at paragraph 1 (SCJ); *Joint Venture c. Iannitello et Associés inc*, footnote 39.

42 *Cantore v. Nemaska Lithium Inc.*, 2020 QCCA 1333, at paragraphs 9-10;

*Compagnie de pavage d'asphalte Beaver ltée v. Morency*, 1991 CanLII 3680 (QC

CA), at paragraphs 7-9.

43 With the support of the counsel for CFLCo.

44 Incidentally, IOC with 49.6% of Twinco's shares, is one of the CCAA Parties and is not contesting the CBCA Motion.

45 *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, at paragraph 77.

46 *Van Breda v. Village Resorts Ltd*, 2012 SCC 17, at paragraphs 105,108, 109 and 110.

47 *Bloom Lake General Partner Ltd., Re.*, 2018 QCCS 996, at paragraphs 36 and *ff*:

[37] Wabush Mines produced the report of Kevin F. Stamp, Q.C., who is licensed and qualified to practice law in the Province of Newfoundland and Labrador since 1978. His report was not contested by MFC and he did not testify at the trial.

48 With the objection of the Monitor, *inter alia*.

  

49 *Bloom Lake General Partner Ltd., Re.*, *supra* note 33.

50 *Ibid.*, paragraphs 32-33.

51 *Stormbreaker Marketing and Productions Inc. c. Weinstock*, 2013 QCCA 269, par. 98-100.

52 *Montreal, Maine & Atlantic Canada Co./Montréal, Maine & Atlantique Canada Cie (Arrangement relatif à)*, 2013 QCCS 5194, paragraph 20.

53 *Sam Lévy*, *supra* note 23, par. 61.

54 *Emerson Électrique du Canada ltée c. Chatigny*, 2013 QCCA 163; *Bourdon c. Stelco inc.*, 2004 CanLII 13895 (QC CA).

55 2015 QCCS 3064.

# TAB 16

2001 SCC 92, 2001 CSC 92
Supreme Court of Canada

Eagle River International Ltd, Re

2001 CarswellQue 2725, 2001 CarswellQue 2726, 2001 SCC 92, 2001 CSC 92, [2001] 3 S.C.R. 978, [2001] S.C.J. No. 90, 110 A.C.W.S. (3d) 596, 207 D.L.R. (4th) 385, 280 N.R. 155, 30 C.B.R. (4th) 105, J.E. 2002-93, REJB 2001-27203

# Azco Mining Inc., Appellant v. Sam Lévy & Associés Inc., Respondent

McLachlin C.J.C., L'Heureux-Dubé, Iacobucci, Major, Binnie, Arbour, LeBel JJ.

Heard: May 15, 2001
Judgment: December 20, 2001
Docket: 27876

Proceedings: affirming [2000] R.J.Q. 392 (C.A. Que.); affirming [1999] R.J.Q. 1497 (C.S. Que.)

Counsel: *Yves Martineau*, for Appellant
*Jean-Philippe Gervais*, for Respondent

Subject: Insolvency; International; Civil Practice and Procedure; Estates and Trusts

APPEAL by venture capital company from judgment reported at 2000 CarswellQue 127, [2000] R.J.Q. 392, [2000] Q.J. No. 417 (C.A. Que.) dismissing motion to transfer bankruptcy proceedings from Quebec to British Columbia.

POURVOI de la société à capital de risque à l'encontre de l'arrêt publié à 2000 CarswellQue 127, [2000] R.J.Q. 392, [2000] Q.J. No. 417 (C.A. Que.) qui a rejeté la requête demandant le renvoi en Colombie-Britannique des procédures engagées au Québec.

***Binnie J.*:**

1 The long arm of the Quebec Superior Court sitting in Bankruptcy reached out to the appellant in Vancouver, British Columbia, in respect of a claim for shares and warrants and other debts allegedly due to the bankrupt which the trustee in bankruptcy values in excess of $4.5 million. The appellant protested that the dispute, which involves the financing of an African gold mine, has nothing to do with Quebec. It argues that the claim of the respondent trustee in bankruptcy is an ordinary civil claim that rests entirely on agreements that are to be interpreted according to the laws of British Columbia. For this and other reasons of convenience and efficiency, the appellant says, the claim ought to proceed in British Columbia. The bankruptcy court and the Quebec Court of Appeal rejected these submissions and, in my view, the further appeal to this Court ought also to be dismissed.

## I. Facts

2 The appellant Azco Mining Inc. ("Azco"), a company incorporated under the laws of Delaware, offered venture capital services from its office in Vancouver, British Columbia. In 1996 it was introduced to Eagle River International Limited and Eagle River Exchange and Financial Services Inc. (hereinafter collectively referred to as "Eagle"), with offices in Gatineau, Quebec. Eagle was in the process of trying to develop promising gold mining properties in a 500 square mile area of Mali, West Africa. A deal was struck whereby Eagle would continue to use its expertise to bring the mines to production through subsidiary companies in Mali, and Azco would provide the financing. The parties reduced their agreement to a series of documents, each of which contained what the appellant contends is a choice of forum clause and the respondent argues is no more than a choice of law clause, as follows:

**June 7, 1996 financing agreement**

  

28. The agreement shall be governed by the law of British Columbia.

**June 12, 1996 management agreement**

13. **Arbitration**: The Parties hereto agree that all questions or matters in dispute with respect to this Agreement shall be submitted to arbitration pursuant to the terms hereof.

. . . . .

20. **Applicable Law**: The situs of this Agreement is Vancouver, British Columbia, and, for all purposes this Agreement, will be governed exclusively by and construed and enforced in accordance with the laws prevailing in the Province of British Columbia.

3 In addition, Azco relies on the terms of the debenture entered into by Azco with Eagle's subsidiary company in Mali (called West African Gold & Exploration S.A.), as follows:

**West African Gold & Exploration S.A. Debenture dated August 9, 1996**

17. [The] situs of this Debenture is Vancouver, British Columbia, and for all purposes this Debenture will be governed exclusively by and construed and enforced in accordance with the laws prevailing in the Province of British Columbia. In addition, the Company hereby expressly acknowledges and agrees to forthwith execute any and all documentation which may be necessary in order to ensure both the enforceability of this Debenture and the valid registration thereof as against the Mortgaged Property under the laws prevailing in each of the Province of British Columbia and the Republic of Mali and, in addition, and without limiting the generality of the foregoing, to attorn, if required, to any courts of competent jurisdiction in the Province of British Columbia in order to either administer or interpret this Debenture in accordance with the laws prevailing in the Province of British Columbia.

4 It was envisaged that if the project were successful Azco would ultimately own a majority interest in what the trustee describes as a joint venture holding company, Sanou Mining Corporation ("Sanou"). Eagle was to be a minority partner.

5 During the period of May 16, 1996 and May 1, 1997, Azco paid Eagle a total of U.S.$3,844,858. For each payment, Eagle executed a promissory note, undertaking to repay Azco if it failed to fulfill its contractual obligations.

6 On September 12, 1997, Eagle was adjudged bankrupt. The respondent firm was appointed trustee in bankruptcy. Despite Eagle's bankruptcy, the Mali project proceeded and, according to Azco, it is still underway. The trustee says that the appellant now controls the holding company Sanou and continues to withhold, wrongfully, the 3.5 million shares and 4 million warrants to which Eagle was (and is) entitled.

7 On January 18, 1999, the respondent trustee presented a petition to the Quebec Superior Court sitting in Bankruptcy ("the bankruptcy court") seeking to "recuperate the assets" of Eagle, including the monetary value of what it considers the wrongfully withheld property of the debtor, namely 125,000 shares in Azco itself and 3.5 million shares and 4 million warrants of Sanou. The respondent trustee values the Azco shares at CAN $337,500 and the Sanou interest at U.S. $1,875,000. In addition the trustee advances some monetary claims for a variety of alleged debts.

8 On February 24, 1999, the appellant brought a motion to transfer the petition "to the Supreme Court of British Columbia, Bankruptcy Division of Vancouver". In support of its motion, the appellant stated that "it is a certainty that Azco will file a counterclaim for an amount in excess of $5,000,000 Cdn., principally" based on the financing agreements to recover about U.S. $3.85 million in the payments to Eagle mentioned above which, as stated, were secured by promissory notes. The contractual arrangement, says Azco, was that if certain conditions in the agreements were not met, the advances would be treated as a demand loan. Azco says the conditions were not met and that it is entitled to immediate repayment of all advances. Azco submitted that "[t]he Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco". Its position, as stated, was that the file should be transferred to the Bankruptcy Division of Vancouver.

 

9 Azco's Vice-President of Finance, Ryan Modesto, who lives in the United States, testified in support of the motion that Azco is a creditor in the bankruptcy:

> Q. So is it Azco Mining's position that it is the creditor in that bankruptcy of Eagle River?
>
> A. Yes, it is.
>
> Q. For what amount?
>
> A. For three million eight hundred forty-four thousand eight hundred and fifty-eight dollars ($3,844,858) plus accrued interest.
>
> Q. That's U.S. currency?
>
> A. That is U.S. currency.
>
> Q. And you refer to interest. Are you referring to the interest referred to in the promissory note?
>
> A. Exactly.

10 Azco's motion was dismissed by Isabelle J. of the Quebec Superior Court on May 6, 1999. That decision was upheld by the Quebec Court of Appeal on February 21, 2000.

**II. Judicial History**

***A. Quebec Superior Court, [1999] R.J.Q. 1497 (C.S. Que.)***

11 Isabelle J. held that the Quebec Superior Court sitting in Bankruptcy had jurisdiction to deal with the respondent's petition. The relevant provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "Act"), were clear and there was no need to refer to the *Civil Code of Québec*, S.Q. 1991, c. 64, or the Quebec *Code of Civil Procedure*, R.S.Q., c. C-25.

12 Azco had not argued that the bankrupt's affairs could be more efficiently administered in British Columbia but rather that there were other "sufficient" reasons for transferring the proceeding to that province, including, in particular, certain clauses in the agreement (reproduced above) that Azco said required the dispute to be tried in British Columbia. Isabelle J. ruled that these clauses had to do with choice of law rather than choice of forum and in any event lacked an "imperative" character.

13 Isabelle J. accepted that he could transfer the proceeding to the Vancouver division of the Supreme Court of British Columbia sitting in Bankruptcy under s. 187(7) of the Act. There was no need to turn to the specific rules governing *forum non conveniens* set out in art. 3135 of the *Civil Code of Québec*. Having regard to all the circumstances, however, Isabelle J. did not think a transfer of proceedings would be justified. The legislator bestowed on the trustee the power to manage the affairs of the bankrupt in the most practical and economical manner possible. Vancouver may be convenient for the appellant, but the interests of all the creditors prevailed over the convenience of only one creditor. Accordingly, the appellant's motion was dismissed.

***B. Quebec Court of Appeal, [2000] R.J.Q. 392 (C.A. Que.)***

14 A unanimous Court of Appeal dismissed Azco's appeal. Robert J.A., concurred in by Proulx and Rousseau-Houle JJ.A., agreed that the Quebec Superior Court had jurisdiction over Eagle's bankruptcy, noting that the company was carrying on business in Quebec when the bankruptcy proceedings were initiated. The petition against Azco was authorized by s. 30(1)(d) of the Act which empowers a trustee to bring legal proceedings relating to the property of the bankrupt with the permission of the inspectors.

15 Robert J.A. agreed with the motions judge that it would be most efficient and equitable to have a single court oversee the administration of the bankrupt estate despite the fact that a centralized bankruptcy might present certain difficulties and

 

inconveniences for parties residing in provinces far from the bankruptcy forum. However, like Isabelle J., he noted that the courts retain some discretion under s. 187(7) to transfer a case to another division where there is proof that the bankrupt's estate would be administered more economically or where some other sufficient reason exists. In the present case, Robert J.A. found that Azco had not demonstrated it would be more economical to proceed before the bankruptcy court in British Columbia. As to other circumstances, Robert J.A. ruled that the contractual terms that Azco characterized as choice of forum clauses did not bind the trustee in bankruptcy, who represented and acted for the benefit of all creditors. The clauses in question were not exclusive jurisdiction clauses but even if they were, the Act is a law of public order and its provisions must be rigorously applied given the consequences for the rights of both debtors and creditors.

**III. Relevant Statutory Provisions**

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

**2.** (1) In this Act

"locality of a debtor" means the principal place

(*a*) where the debtor has carried on business during the year immediately preceding his bankruptcy,

(*b*) where the debtor has resided during the year immediately preceding his bankruptcy, or

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

**30.** (1) The trustee may, with the permission of the inspectors, do all or any of the following things:

. . . . .

(*d*) bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt;

**43.** (5) The petition shall be filed in the court having jurisdiction in the judicial district of the locality of the debtor.

**72.** (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

**183.** (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

. . . . .

(*b*) in the Province of Quebec, the Superior Court;

(*c*) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

**187.** (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.

**188.** (1) An order made by the court under this Act shall be enforced in the courts having jurisdiction in bankruptcy elsewhere in Canada in the same manner in all respects as if the order had been made by the court hereby required to enforce it.

(2) All courts and the officers of all courts shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of one court seeking aid, with a request to another court, shall be deemed sufficient to enable the

  

latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within its jurisdiction.

*Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 (am. SOR/98-240)

**3.** In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

*Civil Code of Québec*, S.Q. 1991, c. 64

**3135.** Even though a Quebec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.

. . . . .

**3148.** In personal actions of a patrimonial nature, a Québec authority has jurisdiction where

. . . . .

(5) the defendant submits to its jurisdiction.

However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Quebec authority.

**IV. Analysis**

17 Parliament has conferred on the bankruptcy court the capacity and authority to exercise "original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act" (s. 183(1)). On the face of it, the intent of this provision is to confer on the bankruptcy court powers and duties co-extensive with Parliament's jurisdiction over "Bankruptcy" under s. 91(21) of the *Constitution Act, 1867* except insofar as that jurisdiction has been limited or specifically assigned elsewhere by Parliament itself.

18 While the appellant's motion simply asked that the dispute be transferred to the Vancouver Division of the Supreme Court of British Columbia sitting in Bankruptcy (thereby appearing to concede that the dispute is properly dealt with as a bankruptcy matter), its motion also contended that the trustee's claims are "exclusively contractual" (para. 6) and that the "Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco" (para. 20). Moreover, much of its oral argument suggested that the dispute ought to be tried in the ordinary civil courts. In addition the appellant takes the position that Quebec is not the convenient forum to deal with this dispute, and that the Quebec Superior Court sitting in Bankruptcy lacks a sufficiently long arm to require Azco to take its witnesses east to litigate. The proper forum, it says, is British Columbia because there is no substantial connection at all between this case and the Province of Quebec.

19 It is convenient to address the legal issues raised by the appellant in the following order:

1. Was the bankruptcy petition properly filed in the Hull Division of the Quebec Superior Court sitting in Bankruptcy?

2. If so, did that court thereby acquire jurisdiction to deal with matters affecting the bankrupt estate arising in British Columbia?

3. If so, are contract claims nevertheless excluded from federal bankruptcy jurisdiction?

4. If not, does this particular contract claim come within the bankruptcy court's jurisdiction?

5. Even if fully clothed with jurisdiction to hear this case, should the bankruptcy court in Hull nevertheless have transferred the file to the court exercising counterpart bankruptcy jurisdiction in Vancouver?

***1. Was the Bankruptcy Petition Properly Filed in the Hull Division of the Quebec Superior Court Sitting in Bankruptcy?***

  

20 Parliament decided to utilize the superior courts of the provinces and territories to exercise bankruptcy jurisdiction (s. 183). It has long been established that, with respect to matters coming within the enumerated heads of s. 91, "the Parliament of Canada may give jurisdiction to provincial courts and regulate proceedings in such courts to the fullest extent": *Atlas Lumber Co. v. Winstanley* (1940), [1941] S.C.R. 87 (S.C.C.), *per* Rinfret J., at p. 100. The courts mentioned in s. 183 retain their character as superior courts of inherent jurisdiction, but will be referred to here, perhaps with some imprecision of language, as the bankruptcy courts.

21 A creditor who wishes to obtain a receiving order against a debtor is required to file a bankruptcy petition "in the court having jurisdiction in the judicial district of the locality of the debtor" (s. 43(5)).

22 The "locality of the debtor" is defined under s. 2(1) as the "principal place"

> (a) where the debtor has carried on business during the year immediately preceding his bankruptcy,
>
> (b) where the debtor has resided during the year immediately preceding his bankruptcy, or
>
> (c) in cases not coming within paragraph (*a*) or (*b*) where the greater portion of the property of the debtor is situated;

23 Section 43(5) expresses a rule of jurisdiction that apportions among the courts named in s. 183(1) judicial power over the adjudication of bankruptcy petitions. The evidence was that Eagle carried on business in Quebec even though it had not obtained a licence to do so. The agreements between Azco and Eagle (and the promissory notes on which Azco's counterclaim is based) recite that Eagle has an office at 212 Labrosse Boulevard, Gatineau, Quebec. The same address appears on its corporate letterhead. Azco's Vice-President of Finance testified that his meetings with respect to the financing were held at that office. There is no suggestion that Eagle vacated the premises prior to its bankruptcy, or that it had any other offices in Canada.

24 It appears that Eagle's only connection to British Columbia is that the agreements mentioned above refer to the law of that province. It is clear that s. 43(5) would not have permitted the filing of the bankruptcy petition in British Columbia on such a ground. Nothing in the evidence, in my view, suggests that the bankruptcy court in Hull lacked subject matter jurisdiction over the petition and personal jurisdiction over Eagle when it made the receiving order on September 12, 1997.

***2. Did the Bankruptcy Court Thereby Acquire Jurisdiction to Deal With Matters Affecting the Bankrupt Estate Arising in British Columbia?***

25 The Act establishes a nationwide scheme for the adjudication of bankruptcy claims. As Rinfret J. pointed out in *Boily v. McNulty* (1927), [1928] S.C.R. 182 (S.C.C.), at p. 186: [translation] "This is a federal statute that concerns the whole country, and it considers territory from that point of view". The national implementation of bankruptcy decisions rendered by a court within a particular province is achieved through the cooperative network of superior courts of the provinces and territories under s. 188: *Mount Royal Lumber & Flooring Co., Re* (1926), 8 C.B.R. 240 (C.A. Que.), *per* Rivard J.A., at p. 246, [translation] "The *Bankruptcy Act* is federal and the orders of the Quebec Superior Court sitting as a bankruptcy court under that Act are enforceable in Ontario...". See also: *Associated Freezers of Canada Inc. (Trustee of) v. Retail, Wholesale Canada, Local 1015* (1996), 39 C.B.R. (3d) 311 (N.S. C.A.), at p. 314, and *Maska U.S. Inc. v. Alfieri (Liquidator of)*, [1998] R.J.Q. 1380 (C.A. Que.), at p. 1389.

26 The trustees will often (and perhaps increasingly) have to deal with debtors and creditors residing in different parts of the country. They cannot do that efficiently, to borrow the phrase of Idington J. in *Stewart v. LePage* (1916), 53 S.C.R. 337 (S.C.C.), at p. 345, "if everyone is to be at liberty to interfere and pursue his own notions of his rights of litigation". *Stewart* dealt with the winding up of a federally incorporated trust company in British Columbia. As a result of the winding up, a client in Prince Edward Island instituted a proceeding in the superior court of that province for a declaration that certain moneys held by the bankrupt trust company were held in trust and that the bankrupt trust company should be removed as trustee. This Court held that the dispute, despite its strong connection to Prince Edward Island, could not be brought before the court of that province without leave of the Supreme Court of British Columbia. Anglin J. commented at p. 349:

 

> No doubt some inconvenience will be involved in such exceptional cases as this where the winding-up of the company is conducted in a province of the Dominion far distant from that in which persons interested as creditors or claimants may reside. But Parliament probably thought it necessary in the interest of prudent and economical winding-up that the court charged with that duty should have control not only of the assets and property found in the hands or possession of the company in liquidation, but also of all litigation in which it might be involved. The great balance of convenience is probably in favour of such single control though it may work hardship in some few cases.

27 *Stewart* was, as stated, a winding-up case, but the legislative policy in favour of "single control" applies as well to bankruptcy. There is the same public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse. Section 188(1) ensures that orders made by a bankruptcy court sitting in one province can and will be enforced across the country.

28 I have concluded that the jurisdiction of the Quebec Superior Court sitting in Bankruptcy was properly invoked by the petitioning creditors in this case but counsel for the appellant company says that his client, with its office in British Columbia, is not within its reach. The argument, in part, is that whatever the power of Parliament to confer national jurisdiction on a provincial superior court, that court is nevertheless provincially constituted, and for service of process its long arm statute must be complied with. The factual record does not show precisely how service of the trustee's petition was effected on the appellant, but if the appellant had any concerns regarding the proprieties of service of the petition to initiate proceedings against it, such concerns were waived when Azco did not raise them in its motion brought in Hull. A good deal of time was occupied on the appeal with arguments about how a Quebec court could acquire *in personam* jurisdiction over a corporation resident in British Columbia, and whether the Quebec rules for service *ex juris* applied. The argument that the Quebec Superior Court sitting in Bankruptcy cannot exercise *in personam* jurisdiction over creditors in another province under the Act is rejected for the reasons of national jurisdiction already mentioned. Any objections regarding service of process are answered by the fact that Azco not only appeared in Quebec but invoked the jurisdiction of the Quebec Superior Court sitting in Bankruptcy to transfer the proceedings pursuant to s. 187(7) of the Act to the bankruptcy court sitting in Vancouver. Any remaining issue with respect to *in personam* jurisdiction was thereby waived.

29 Azco did not, of course, waive its objection to jurisdiction over the subject matter of this particular dispute. That was a major point in its motion. I turn now to that issue.

***3. Are Contract Claims Nevertheless Excluded From Federal Bankruptcy Jurisdiction?***

30 The appellant's motion, as stated, argued that the trustee's claims against it are "exclusively contractual in nature" (para. 6) and that "[t]he Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco" (para. 20). The theory underlying these contentions seems to be that contract claims relate to "Property and Civil Rights" within the meaning of s. 92(13) of the *Constitution Act, 1867* and on that account lie outside the jurisdiction of the bankruptcy court. At para. 42 of its factum, for example, the appellant argues:

> [TRANSLATION]
>
> Contrary to what the Court of Appeal affirms, the trustee's claim is therefore purely contractual in nature, under the civil law. It is not a remedy specifically provided for under the *BIA* such as the application to have preferential payments declared void (see sections 91 to 100 *BIA*). The mere fact that the plaintiff is a trustee does not alter the nature of the claim and does not turn it into a bankruptcy dispute.

31 Most bankruptcy issues, of course, present a property and civil rights aspect. It is true, however, that some of the decided cases which deny jurisdiction to the bankruptcy court do so on grounds that have a constitutional flavour, e.g., *Lofsky, Re* (1947), 28 C.B.R. 164 (Ont. C.A.), *per* Roach J.A., at p. 167; *Sigurdson v. Fidelity Insurance Co. of Canada* (1980), 35 C.B.R. (N.S.) 75 (B.C. C.A.), at p. 102; *Holley v. Gifford Smith Ltd.* (1986), 54 O.R. (2d) 225 (Ont. C.A.); *Ireland, Re* (1962), 5 C.B.R. (N.S.) 91 (C.S. Que.), *per* Bernier J., at p. 94, and *Falvo Enterprises Ltd. v. Price Waterhouse Ltd.* (1981), 34 O.R. (2d) 336 (Ont. H.C.).

  

32 It is therefore necessary to come to an understanding of what is included in the subject matter of "bankruptcy" within the meaning of s. 91(21) of the *Constitution Act, 1867*.

33 In *Saskatchewan Moratorium Legislation, Re* (1955), [1956] S.C.R. 31 (S.C.C.), it was stated by Rand J., at p. 46, that:

> Bankruptcy is a well understood procedure by which an insolvent debtor's property is coercively brought under a judicial administration in the interests primarily of the creditors.

34 The core concept of coercive administration appeared early in our bankruptcy jurisprudence. In *L'Union St-Jacques de Montréal v. Bélisle* (1874), L.R. 6 P.C. 31 (Quebec P.C.), Lord Selborne L.C., speaking at p. 36 of general laws governing bankruptcy and insolvency, said: "The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation".

35 More helpful still was Lord Selborne's description of bankruptcy in the context of the English Act in *Ellis v. Silber* (1872), 8 Ch. App. 83 (Eng. Ch. Div.), at p. 86:

> That which is to be done in bankruptcy is the administration in bankruptcy. The debtor and the creditors, as the parties to the administration in bankruptcy, are subject to that jurisdiction. The trustees or assignees, as the persons intrusted with that administration, are subject to that jurisdiction. The assets which come to their hands and the mode of administering them are subject to that jurisdiction; and there may be, and I believe are, some special classes of transactions which, under special clauses of the Acts of Parliament, may be specially dealt with as regards third parties. But the general proposition, that whenever the assignees or trustees in bankruptcy or the trustees under such deeds as these have a demand at law or in equity as against a stranger to the bankruptcy, then that demand is to be prosecuted in the Court of Bankruptcy, appears to me to be a proposition entirely without the warrant of anything in the Acts of Parliament, and wholly unsupported by any trace or vestige whatever of authority. [Emphasis added.]

36 Despite the fact that England is a unitary state without the constitutional limitations imposed by our division of powers, the courts in Canada have generally hewn ever since 1874 to the basic dividing line between disputes related to the administration of the bankrupt estate and disputes with "strangers to the bankruptcy". The principle is that if the dispute relates to a matter that is outside even a generous interpretation of the administration of the bankruptcy, or the remedy is not one contemplated by the Act, the trustee must seek relief in the ordinary civil courts. Thus in the Quebec case of *Ireland, Re*, *supra*, the trustee brought proceedings to determine who had the right to proceeds of insurance policies taken out by the trustee on properties of the bankrupt estate. Bernier J. concluded that the Quebec Superior Court sitting in Bankruptcy lacked jurisdiction over the subject matter of the dispute. The controversy raised purely civil law questions and nothing in the Act conferred on the bankruptcy court a special jurisdiction to entertain these matters. Similar arguments prevailed in *Cry-O-Beef Ltd./Cri-O-Boeuf Ltée (Trustees of) v. Caisse populaire de Black-Lake* (1987), 66 C.B.R. (N.S.) 19 (C.A. Que.); *Martin, Re* (1953), 33 C.B.R. 163 (Ont. S.C.), at p. 169; *Reynolds, Re* (1928), 10 C.B.R. 127 (Ont. S.C.), at p. 131; *Galaxy Interiors Ltd. (1971), Re* (1971), 15 C.B.R. (N.S.) 143 (Ont. S.C.); *Mancini (Trustee of) v. Falconi* (1987), 65 C.B.R. (N.S.) 246 (Ont. S.C.), and *Lofsky, Re*, supra, at p. 169.

37 The Quebec Court of Appeal has perhaps led the argument for a more expansive interpretation of what disputes properly come under the bankruptcy umbrella and can therefore properly be litigated in the bankruptcy court: *Geoffrion c. Barnett*, [1970] C.A. 273 (C.A. Que.); *Arctic Gardens Inc., Re* (1989), [1990] R.J.Q. 6 (C.A. Que.); *Excavations Sanoduc Inc. c. Morency*, [1991] R.D.J. 423 (C.A. Que.). See also the dissenting judgment of LeBel J.A., as he then was, in *Cry-O-Beef Ltd./Cri-O-Boeuf Ltée (Trustees of)*, supra, and *Atlas Lumber Co., Re* (1922), 3 C.B.R. 226 (Que. Bktcy.); but the push is not confined to Quebec: *Maple Leaf Fruit Co., Re* (1949), 30 C.B.R. 23 (N.S. C.A.); *Westam Development Ltd., Re* (1967), 10 C.B.R. (N.S.) 61 (B.C. C.A.), at p. 65; *M. B. Greer & Co., Re* (1953), 33 C.B.R. 69 (Ont. S.C.), at p. 70; *M.P. Industrial Mills Ltd. v. Manitoba Development Corp.* (1972), 17 C.B.R. (N.S.) 226 (Man. Q.B.).

 

38 It seems to me that the decided cases recognize that the word "Bankruptcy" in s. 91(21) of the *Constitution Act, 1867* must be given a broad scope if it is to accomplish its purpose. Anything less would unnecessarily complicate and undermine the economical and expeditious winding up of the bankrupt's affairs. Creation of a national jurisdiction in bankruptcy would be of little utility if its exercise were continually frustrated by a pinched and narrow construction of the constitutional head of power. The broad scope of authority conferred on Parliament has been passed along to the bankruptcy court in s. 183(1) of the Act, which confers a correspondingly broad jurisdiction.

39 There are limits, of course. If the trustee's claim is in relation to a stranger to the bankruptcy, i.e. "persons or matters outside of [the] Act" (*Reynolds, Re*, supra, at p. 129) or lacks the "complexion of a matter in bankruptcy" (*Lofsky, Re*, supra, at p. 169) it should be brought in the ordinary civil courts and not the bankruptcy court. However, claims for specific property may clearly be advanced in the bankruptcy courts (*Galaxy Interiors Ltd. (1971), Re*, supra, and *Sigurdson*, supra), as can claims for relief specifically granted by the Act (*Ireland, Re*, supra, and *Atlas Lumber Co., Re*, *supra*). That said, it is sometimes difficult to discern the particular "golden thread" running through the cases. L.W. Houlden and L.B. Morawetz observe:

> There has been a great deal of litigation on this issue, and the cases are not always easy to reconcile. The difficulty flows from the division of constitutional powers in Canada, bankruptcy and insolvency being a federal power, and property and civil rights and the administration of justice being provincial powers.
>
> *Bankruptcy and Insolvency Law of Canada* (3rd ed. (looseleaf)), at I§4.

40 The short answer to the "property and civil rights" argument, however, is that the appellant poses the wrong question. The issue is whether the contractual dispute between it and the respondent trustee properly relates to the bankruptcy. If so, the fact it also has a property and civil rights aspect does not in any way impair the bankruptcy court's jurisdiction.

***4. Does this Particular Contract Claim Come Within the Bankruptcy Court's Jurisdiction?***

41 In this case, the respondent trustee, with the permission of the inspectors, is instituting a "legal proceeding" in the bankruptcy court under s. 30(1)(*d*) "relating to the property of the bankrupt". In addition to the Azco and Sanou shares, the trustee says the definition of "property" in s. 2 includes "things in action" which, it is argued, includes the trustee's monetary claims.

42 As to the shares and warrants, the trustee alleges in para. 108 of its petition that Azco is "acknowledged to be the nominal owner of 100% of Sanou Mining Corporation" which owns Western African Gold and Exploration Ltd., which in turn runs the mining concessions in Mali. The allegation, in effect, is that Azco holds the Sanou shares and warrants that rightfully belong to the bankrupt estate and is in a position to transfer them to the trustee if required to do so by the bankruptcy court.

43 As discussed above, it cannot plausibly be argued that the bankruptcy court lacks subject-matter jurisdiction over the dispute because it is a contract case. The objection, more narrowly defined, is whether the bankruptcy court lacks jurisdiction because (i) the appellant is properly considered a "stranger to the bankruptcy", or (ii) the bankruptcy court cannot award the remedy which the trustee seeks.

*(i) Is the Appellant a "Stranger to the Bankruptcy"?*

44 If a potential defendant is a "stranger" to the bankruptcy, the bankruptcy court may have no subject matter jurisdiction over the dispute (because it is not part of the bankruptcy) even though the "stranger" resides within the territorial jurisdiction of the court.

45 At the time of the trustee's petition, the appellant had filed no proof of claim in the bankruptcy. It seems to have adopted a "come and get me approach", that is to say, it would file a claim only if claimed against by the trustee. Eventually the trustee *did* claim against it by way of the January 18, 1999 petition and the appellant *did* give notice of its counterclaim in its February 24, 1999 motion, including the fact it held promissory notes for $3,844,858 signed by the bankrupt, payable on demand, constituting potential obligations now inherited by the trustee.

 

46 In a decision released concurrently, *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, 2001 SCC 90 (S.C.C.), we uphold a decision of the Federal Court of Canada to dispose of the claims of maritime lienholders against a ship whose owner was adjudged bankrupt after the ship was arrested but before the *in rem* action had proceeded to judgment. We concluded that the Federal Court did not lose subject matter jurisdiction by virtue of the subsequent bankruptcy of the shipowner. We held that the Federal Court *could* have stayed its proceedings in deference to the bankruptcy court but was not, in the circumstances, obliged to do so.

47 The issue here is somewhat different. The appellant is resisting a claim by the trustee in bankruptcy and threatening to bring a counterclaim against the bankrupt estate based on the same set of commercial agreements. The appellant sought only to have the proceedings transferred to a different division of the bankruptcy court within Canada.

48 In *Lofsky, Re*, supra, the Ontario Court of Appeal dealt with a case where the trustee sought a declaration that the transfer of an automobile from the bankrupt to his wife was fraudulent and void as against the trustee and that it formed part of the property of the bankrupt. The wife resisted the claim on the ground that the automobile never belonged to the bankrupt (even though it was registered in his name). Roach J.A., at p. 169, found the wife was a stranger to the bankruptcy:

> In my opinion, it must be concluded that the issue between the trustee and the appellant is not a matter in bankruptcy and that it is purely a matter of property and civil rights. It has none of the elements that would bring it within the former. No question as between debtor and creditor here arises in the distribution of a bankrupt estate. The appellant does not claim title to the automobile through the bankrupt. Indeed she says that the bankrupt never had title and that she was always the owner. I cannot think of any aspect of the issue that gives it the complexion of a matter in bankruptcy unless perhaps this, that the bankrupt pending the bankruptcy caused the new motor vehicle permit to be issued in her name. That does not make the issue one in bankruptcy when the sole question is who, as between the bankrupt and the appellant, was always the true owner.

49 See also *Reynolds, Re*, supra, at p. 131.

50 On the record before us, however, the appellant takes the position that it is the largest creditor of the bankrupt estate and that it will "with certainty" counterclaim in answer to the trustee's petition. The trustee, for its part, regards the appellant as the biggest debtor of the bankrupt estate. Far from being a "stranger" to the bankruptcy, Azco is potentially the most significant player in the role of either creditor or debtor, as the case may be.

*(ii) Does the Bankruptcy Court Have Jurisdiction to Grant the Remedy Sought by the Trustee?*

51 It is well established that the bankruptcy court does not have the general jurisdiction of a civil court to award damages in breach of contract cases. It is restricted to the jurisdiction and remedies contemplated by the Act. *Sigurdson* , supra, the trustee in bankruptcy sued two former directors of the bankrupt for fraud in the Supreme Court of British Columbia. During the course of its reasons on another point, the Court of Appeal remarked that if the trustee had sued in the bankruptcy court "he would have been in the wrong court" as "[h]e must use the ordinary civil courts to sue for damages" (p. 102). See also *Ireland, Re*, supra.

52 In my view, however, the trustee's claim here is not properly characterized as a simple claim in damages, even though the trustee has attempted to place a monetary value on the shares which it says belong to the bankrupt estate but which the appellant, it says, wrongfully withholds. I do not think the bankruptcy court is precluded from considering an order that substitutes money for the claimed property in circumstances where the claimed property cannot be delivered up. The bulk of the trustee's claim, it will be recalled, is for 125,000 shares of Azco itself, plus 3.5 million shares of Sanou and 4 million warrants of Sanou, which the trustee says is wholly controlled by the appellant. The trustee's petition states in para. 65:

> The Debtor/Company is also entitled to receive 3,500,000 shares of Sanou and 4,000,000 warrants of said Sanou, as per the terms of the Agreement, the whole as it has been acknowledged by the Respondent itself in their annual report to United States Securities and Exchange commission for the fiscal year ending June 30, 1997, filed as Exhibit R-24;

 

53 As to the Azco shares, the trustee states in para. 101 of its petition that it claims "125,000 shares of Azco Mining Corporation which had a value at 2.70$ Cdn dollars per share".

54 Equally significantly, the appellant acknowledges that the gist of the action against it is the delivery up of the shares. It says at para. 25 of its factum:

> [TRANSLATION]
>
> It seems that the trustee's claim is a real action rather than a personal one since the trustee is primarily seeking the rights to 125,000 shares of Azco and 3,500,000 shares and 4,000,000 warrants of Sanou (see in particular paragraphs 95, 98, 99 and 102 of the trustee's petition).

55 The parties therefore seem to agree, despite some obfuscating language in the trustee's petition, that the bulk of the trustee's claim is properly characterized as a claim to specific property of the bankrupt which is being wrongfully withheld by the appellant. As such, the trustee is entitled to claim the shares and warrants (s. 17(1)) and, with the permission of the inspectors (which it obtained) to bring a legal proceeding in relation thereto in the bankruptcy court (s. 30(1)(*d*)). The trustee, relying on these statutory provisions and remedies, clearly brings its claim within the Act. See *Galaxy Interiors Ltd. (1971), Re*, supra, per Houlden J. at p. 144, *Mancini (Trustee of)* , supra, per Catzman J. at pp. 250-51, *Atlas Lumber Co., Re*, supra, per Rinfret J., at p. 234.

56 It will be for the bankruptcy court in Hull to scrutinize the petition when the facts are known and the parties' positions on the issues are clarified to determine whether any particular element of the trustee's multiple claims falls outside its jurisdiction. For present purposes, it is sufficient to hold that the bulk of the trustee's claim is cognizable in bankruptcy for the reasons previously discussed. On the present state of the record (this being a preliminary motion), we can go no further.

***5. Even if Fully Clothed with Jurisdiction to Hear this Case, Should the Bankruptcy Court in Hull Nevertheless Have Transferred the File to the Court Exercising Counterpart Bankruptcy Jurisdiction in Vancouver?***

57 If persuaded that the affairs of the bankrupt could be (i) more economically administered in another bankruptcy district of division or (ii) for "other sufficient cause", the bankruptcy court is authorized to transfer "any proceedings" pending before it to the other bankruptcy district or division (s. 187(7)).

58 Section 187(7) provides a method for transferring proceedings between the various bankruptcy courts in Canada. As discussed below, it raises different issues than the specific international situation dealt with in *Holt Cargo Systems*, supra, released concurrently.

59 The motions judge exercised his discretion against making a transfer order in this case. The appellant must therefore show an error of law or principle or failure to take into consideration a major element in the determination of the case: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 (S.C.C.), at p. 588. The scope of this discretion in bankruptcy cases was recognized in *Lions d'Or Ltée, Re* (1965), 8 C.B.R. (N.S.) 171 (C.S. Que.), and *Pollack Ltée c. Giroux* (1979), 30 C.B.R. (N.S.) 256 (C.S. Que.).

60 The appellant says the courts below erred in both law and principle. They erred in law, it argues, because art. 3148 of the *Québec Civil Code* required the bankruptcy court to decline jurisdiction in light of the "choice of forum" clauses, and they erred in principle because there is no substantial connection between the dispute and the Province of Quebec. In this regard, it relies on *Bourque Consumer Electronics Inc. (Syndic de), Re* (May 14, 1991), Doc. Montreal 500-11-001899-901 (C.S. Que.) and *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 (S.C.C.).

*(i) Choice of Forum Clause*

61 The appellant's point is that the applicable rules are found in the *Québec Civil Code*, and in particular art. 3148 which provides in part that:

  

> ... a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.

62 The choice of forum objection fails, with respect, both on the facts and on the law. In terms of facts, the only relevant agreements are those to which Eagle was a party. Clause 28 in the June 7, 1996 financing agreement and clause 20 of the management agreement are both no more than choice of law provisions. The Quebec courts are perfectly able to apply the law of British Columbia. The import of clause 17 of the West African Gold and Exploration S.A. debenture of August 9, 1996 is more obscure, but as Azco is not a party to the debenture and therefore cannot be sued upon it, its terms are irrelevant.

63 As to the legal issue, the question is whether arts. 3148 or 3135 of the *Québec Civil Code* have any application to this proceeding at all. These provisions will only apply in bankruptcy court "in cases not provided for in the Act or these Rules" (*Bankruptcy and Insolvency General Rules*, s. 3). The fact is that s. 187(7) specifically provides that a transfer will be ordered only where there is satisfactory proof that a proceeding will be "more economically administered" in another division or district, which the appellant did not allege, or "for other sufficient cause". The appellant argues that such general words need to be "supplemented" by the more specific provisions of the *Québec Civil Code*. But this is incorrect. Resort is to be had to the provincial rules only "in cases not provided for". Here, provision has been made. The door is therefore not open to these particular provisions of the *Québec Civil Code*. This interpretation of s. 3 is not only inevitable, it is desirable. The *Québec Civil Code* applies across a vast range of subjects. When s. 187(7) speaks of "sufficient cause", it does so in the specific context of bankruptcy.

64 Leaving aside, then, the inapplicable directives of the *Québec Civil Code*, the question is whether a choice of forum clause would amount to "sufficient cause" for the purpose of s. 187(7) to the extent that it would be an error of law for the motions judge to have declined to give it effect in the circumstances of this case. In my view a choice of forum clause (where there really is one) ought to be taken into careful consideration by a motions judge but it is not binding: J.-G. Castel, *Canadian Conflict of Laws*, (4th ed. 1997) pp. 262-63. See *Sarabia v. "Oceanic Mindoro" (The)* (1996), 26 B.C.L.R. (3d) 143 (B.C. C.A.), *per* Huddart J.A., at p. 153 (leave to appeal to S.C.C. refused [1997] 2 S.C.R. xiv (S.C.C.)); *Volkswagen Canada Inc. v. Auto Haus Frohlich Ltd.* (1985), [1986] 1 W.W.R. 380 (Alta. C.A.), *per* Kerans J.A., at p. 381; *Ash v. Corp. of Lloyd's* (1991), 6 O.R. (3d) 235 (Ont. Gen. Div.); aff'd (1992), 9 O.R. (3d) 755 (Ont. C.A.), (leave to appeal to S.C.C. refused [1992] 3 S.C.R. v (S.C.C.)); *Maritime Telegraph & Telephone Co. v. Pre Print Inc.* (1996), 131 D.L.R. (4th) 471 (N.S. C.A.).

*(ii) Public Policy Considerations*

65 It could be argued that the public policy favouring a "single control" of bankruptcy proceedings and opposition to their fragmentation demands that a choice of forum clause receive lesser effect in bankruptcy than in the context of ordinary commercial litigation: *Industrial Packaging Products Co. v. Fort Pitt International Inc.*, 161 A.2d 19 (U.S. Penn. S.C., 1960); *Treco, Re*, 239 B.R. 36 (U.S. Dist. Ct. S.D. N.Y., 1999), aff'd 240 F.3d 148 (U.S. C.A. 2nd Cir., 2001).

66 In *Saskatchewan Moratorium Legislation, Re*, supra, Rand J. discussed important "public policy" objectives of bankruptcy legislation, at p. 46:

> To this proceeding not only a personal stigma may attach but restrictions on freedom in future business activity may result. The relief to the debtor consists in the cancellation of debts which, otherwise, might effectually prevent him from rehabilitating himself economically and socially.

See also *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109 (S.C.C.), at p. 120.

67 In his treatise on bankruptcy, Professor Albert Bohémier states on the purpose of the Act:

> [TRANSLATION]

  

> The purpose of the *Bankruptcy Act* is to protect the debtor, his or her creditors and the public interest. These objectives have always been present but to varying degrees. It can be stated with certainty that the more a society promotes credit and therefore debt, the more the legislation will tend to give priority to alleviating the lot of honest and hapless debtors. A scheme based on debt must include a self-regulating system so that defaulting debtors may eventually be reintegrated into the system and become productive elements once again.
>
> (A. Bohémier, *Faillite et Insolvabilité*, Montréal, Les Éditions Thémis, Vol. 1, 1992, at p. 48)

68 The implementation of these public policies might be expected to take priority over private "choice of forum" agreements where the two come into conflict, as indeed Robert J.A. concluded in the Quebec Court of Appeal. A similar position is expressed in Fletcher, I.F., *Insolvency in Private International Law* (Oxford: Clarendon Press 1999) at p. 47, fn. 73:

> [P]rivate contractual arrangements between parties cannot prevail over the exercise of bankruptcy jurisdiction, which belongs to the realm of public policy, serving a wider spread of interests including, ultimately, those of society at large.

In the United States, however, there is a competing body of judicial opinion that a trustee in bankruptcy who sues on an agreement containing a forum selection clause should, as a general rule, be bound by that clause to the same extent as the parties thereto: see *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (U.S. C.A. 3rd Cir., 1983); *Diaz Contracting Inc., Re*, 817 F.2d 1047 (U.S. C.A. 3rd Cir., 1987), and *Hays & Co. v. Merrill Lynch*, 885 F.2d 1149 (U.S. C.A. 3rd Cir., 1989).

69 In my view, for the reasons previously mentioned, the choice of forum clause would be a significant factor under s. 187(7) but not, in the context of the public policies expressed in the Act, a controlling factor.

70 In light of my conclusion that the appellant does not have the benefit of a "choice of forum" clause, I need not undertake the exercise of considering whether in this case there is any conflict between private choice and public interest, and if so, how "choice of forum" considerations should be balanced in this case against the *Amchem*, supra, and public interest factors within the framework of s. 187(7) of the Act.

71 The bottom line is that the appellant is unable to show that the motions judge committed any error of law in declining to transfer the proceeding to Vancouver.

*(iii) Error of Principle*

72 The appellant, relying on *Amchem*, supra, argues that this dispute has its most real and substantial connection to British Columbia, and that the motions judge erred in principle in ignoring relevant factors in coming to the opposite conclusion.

73 Again, with respect, I do not think this position is sustainable on the law or the facts.

74 In the first place, as stated, the *Amchem* approach has to be applied here with full regard to the context of Canadian bankruptcy legislation. This appeal involves the allocation of a particular bankruptcy matter within a single national bankruptcy scheme created by the Act. As shown in *Holt Cargo Systems*, supra, consideration of the allocation of a matter having different aspects (e.g. maritime law and bankruptcy law), as between Canadian courts and foreign courts operating under quite different legislative or other schemes, may raise different problems.

75 Secondly, *Amchem* and its progeny involved private litigation. Here, as explained in *Holt Cargo Systems*, supra, there is the important public interest aspect mentioned above. The Court looks not only at the *Amchem* factors, but must strive to give effect to Parliament's intent to create an economical and efficient national system for the administration of bankrupt estates, as evidenced in the Act.

76 It is in the public interest to facilitate the speedy resolution of the fallout from a financial collapse. This, as noted in *Holt Cargo Systems* was not present in the *Amchem* fact situation. In fact, there are stronger policy considerations here than in *Holt Cargo Systems*. That case dealt with a choice between a maritime law action in Halifax for the determination of claims

  

of *secured* creditors that had already proceeded to default judgment and, as an alternative, the exercise of jurisdiction by the Quebec Superior Court sitting in Bankruptcy acting at the behest of the bankruptcy court in Belgium in a matter that was still in its early stages of organization. In those circumstances the Federal Court of Canada declined to stay the maritime law action, and its exercise of discretion was upheld by the Federal Court of Appeal and by this Court.

77 In the present case, we are confronted with a federal statute that *prima facie* establishes one command centre or "single control" (*Stewart* , supra, at p. 349) for all proceedings related to the bankruptcy (s. 183(1)). Single control is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" to send the trustee scurrying to multiple jurisdictions. Parliament was of the view that a substantial connection sufficient to ground bankruptcy proceedings in a particular district or division is provided by proof of facts within the statutory definition of "locality of the debtor" in s. 2(1). The trustee in that locality is mandated to "recuperate" the assets, and related proceedings are to be controlled by the bankruptcy court of that jurisdiction. The Act is concerned with the economy of winding up the bankrupt estate, even at the price of inflicting additional cost on its creditors and debtors.

78 The "balancing test" advocated by the appellant based on the *Amchem* factors and general principles of private international law fails to take these important public policies into account. The Quebec Superior Court sitting in Bankruptcy is, in a very real sense, sitting as a national court.

79 Finally, in point of fact, even if the principles of private international law did apply without modification for the bankruptcy context, it is difficult to discern any connection at all between the dispute and Vancouver except that Eagle signed some agreements with a choice of law clause directed to the laws of that jurisdiction. The links between the appellant and Vancouver are not particularly strong. It has, amongst other offices, a Vancouver address, but the bulk of the activities at issue here occurred outside British Columbia. Its key employee, Mr. Ryan Modesto, resides in the United States. The management services agreement of June 12, 1996 recites that Azco's corporate office is in Arizona. Azco's press release of September 17, 1996, announcing this project to the world, was issued in Arizona. Moreover there is no juridical advantage to the appellant in proceeding under the same bankruptcy regime in Vancouver as in Hull. In either case, the law of British Columbia may be applied. Vancouver may be marginally more convenient for the appellant and some of its witnesses, but that is all that can be said for it. The trustee, for its part, complains that if the appeal succeeds, it would, on the same reasoning, be required to bring other actions (unrelated to Azco) in Chicoutimi, Toronto, Halifax, Winnipeg, Charlottetown and Calgary. The trial judge has much factual support for his decision to retain the case in Hull.

80 I do not wish to be taken, however, as squeezing the life out of s. 187(7). While the facts in this case do not show "sufficient cause" to make the transfer to British Columbia, other cases may arise of course where the transfer is justifiable. Even in *Stewart* , supra, which established the "single control" paradigm, Anglin J. went out of his way to say that the case probably should have been heard in P.E.I. The claimants' problem in that case is that they failed to seek leave from the court in British Columbia before launching their case in P.E.I. Just before the "single control" passage previously cited, Anglin J. says (at p. 349):

> I decline to assume that upon its being shewn to the Supreme Court of British Columbia that the questions as to the existence of the trust alleged by the plaintiffs and the earmarking of certain property held by the liquidator as trust assets can be best inquired into in Prince Edward Island — as from what is now before us would seem to be the case — an order of transfer will not be made, preceded or accompanied by the necessary leave under s. 22.

And Brodeur J. said this (at p. 352):

> In this case it looks to me as if the ends of justice would be better served by having the question raised in this proceeding disposed of by the courts of Prince Edward Island. However, it was the duty of the respondents to have the leave of the court of British Columbia which they did not secure.

81 The point is that it was up to Azco to demonstrate "sufficient cause" on the facts of *this* case, and it failed to do so.

**V. Conclusion**

  

82 I would dismiss the appeal with costs.

*Appeal dismissed.*

*Pourvoi rejeté.*

# TAB 17

# *Century Services Inc. v. Canada (Attorney General), [2010] 3 S.C.R. 379*

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

Heard: May 11, 2010;

Judgment: December 16, 2010.

File No.: 33239.

**[2010] 3 S.C.R. 379** | *[2010] 3 R.C.S. 379* | *[2010] S.C.J. No. 60* | *[2010] A.C.S. no 60* | *2010 SCC 60* | *2010 CarswellBC 3419* | *72 C.B.R. (5th) 170* | *12 B.C.L.R. (5th) 1* | *296 B.C.A.C. 1* | *326 D.L.R. (4th) 577* | *409 N.R. 201* | *[2011] 2 W.W.R. 383*

Century Services Inc. Appellant; v. Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada Respondent.

(136 paras.)

## Counsel

*Mary I. A. Buttery*, *Owen J. James* and *Matthew J. G. Curtis*, for the appellant.

*Gordon Bourgard*, *David Jacyk* and *Michael J. Lema*, for the respondent.

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The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

**DESCHAMPS J.**

**1** For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, *R.S.C. 1985, c. C-36* ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, *R.S.C. 1985, c. E-15* ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency [page389] Act*, *R.S.C. 1985, c. B-3* ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

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

**3** Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but

unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

[page390]

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

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

**6** The Crown's appeal was allowed by the British Columbia Court of Appeal (*2009 BCCA 205*, *270 B.C.A.C. 167*). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

**7** First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and [page391] that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* *(2005), 73 O.R. (3d) 737* (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

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

2. Issues

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

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

[page392]

3. Analysis

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

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

3.1 *Purpose and Scope of Insolvency Law*

**12** Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain [page393] a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

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

**14** Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either [page394] the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

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

**16** Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors [page395] Arrangement Act*, *[1934] S.C.R. 659*, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

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

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

**19** The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make [page396] the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

**20** Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

**21** In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a [page397] flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

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

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

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, [page398] rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

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

**24** With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

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

[page399]

3.2 *GST Deemed Trust Under the CCAA*

**26** The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so

doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

**27** The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

**28** The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims [page400] largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as added by S.C. 1997, c. 12, s. 126).

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

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

**31** With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property [page401] held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

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

**33** In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, this

Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

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

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

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

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

**37** Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, [page403] subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

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

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

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

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

> **18.3** ...

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

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

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

> **18.4** ...
>
> ...
>
> (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution ... .

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

**40** The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize [page405] conflicts, apparent or real, and resolve them when possible.

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

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

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

**43** Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré v. Verdun (City)*, [[1997] 2 S.C.R. 862](#), and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, [page406] the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

**44** Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

**45** I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists [page407] in those Acts carving out an exception for GST claims.

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

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

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**48** Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

**49** Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's

express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

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

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

**52** I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough [page410] contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

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

**54** I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, *R.S.C. 1985, c. I-21*, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding [page411] the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the

statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

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

**56** My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

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3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

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

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

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

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

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282

, at para. 57, *per* Doherty J.A., dissenting)

**60** Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by [page413] staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge,*

*Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

**61** When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

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**62** Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Ct. (Gen. Div.)); *United Used Auto & Truck Parts Ltd., Re*, *2000 BCCA 146*, *135 B.C.A.C. 96*, aff'g (1999), 12 C.B.R. (4th) 144 (S.C.); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalfe & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA*'s supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

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

**64** The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against [page415] purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, *2003 BCCA 344*, *13 B.C.L.R. (4th) 236*, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

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

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

**67** The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the [page416] matter, ... subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

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

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

**70** The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all [page417] stakeholders are treated as advantageously and fairly as the circumstances permit.

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

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

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

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

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

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

reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament ... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as [page419] the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

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

**78** Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be [page420] lost in bankruptcy (*Ivaco Inc. (Re)* *(2006), 83 O.R. (3d) 108*, at paras. 62-63).

**79** The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

**80** Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA.* The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition [page421] to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

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

3.4 *Express Trust*

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

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

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

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**85** At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus, there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

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

**87** Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008 denying the Crown's application to enforce the trust once it was clear [page423] that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

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

**89** For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in

favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

FISH J. --

I

**90** I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

**91** More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). [page424] And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

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

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

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

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

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II

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

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

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

> (4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the

person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

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

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

(*a*) to be held, from the time the amount was deducted or withheld by the person, separate and [page426] apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...

...

... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

**100** The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

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

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

**101** The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

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

**102** Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

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**103** The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

**104** As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) of the *CCAA* and in s. 67(3) of the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

**105** The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust

notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust -- or expressly provide for its continued operation -- in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

**106** The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

> **222.** (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a [page428] security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).
>
> ...
>
> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and InsolvencyAct*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> > (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest,
> > ...
>
> ...
>
> ... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

**107** Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

**108** In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

**109** With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (*2009 BCCA 205*, *98 B.C.L.R. (4th) 242*, at para. 37). *All* of the deemed trust [page429] provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

**110** Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit -- rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

**111** Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

**112** Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account

during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

**113** For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada [page430] be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

**ABELLA J. (dissenting)**

**114** The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

**115** Section 11[1] of the *CCAA* stated:

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

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

[page431]

> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest
>
> and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

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

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

**117** As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737

(C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory [page432] interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

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

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act*... . The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

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

**120** The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from [page433] various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

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

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

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

**123** Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative

intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

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

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

[page435]

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

**126** The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, *[1997] 2 S.C.R. 862*).

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

> ... the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, *[1944] S.C.R. 226*, ... at p. 239 ... :
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the [page436] legislature, if such intention can reasonably be gathered from all of the relevant legislation.

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

**128** I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more

recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3).

**129** It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(*f*) of the *Interpretation Act*, *R.S.C. 1985, c. I-21*, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, *[1977] 2 F.C. 663*, dealing with the predecessor provision to s. 44(*f*)). It directs that new enactments not be construed as [page437] "new law" unless they differ in substance from the repealed provision:

> **44.** Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> ...
>
> (*f*) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

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

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

> **37.** (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

**131** The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to re-order the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the [page438] Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic* ] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic* ] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.
>
> (*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

**132** Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

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

**134** While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, *R.S.C. 1985, c. W-11*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request [page439] for payment of the GST funds during the *CCAA* proceedings.

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

**136** I would dismiss the appeal.

* * * * *

**APPENDIX**

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

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

...

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

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

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

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

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

[page440]

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

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

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

...

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

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

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

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

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

(i) the expiration of the order,

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

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

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

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

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

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

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

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

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

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

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

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, [page442] as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

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

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

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

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

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

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

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

(A) has been withheld or deducted by a person from a payment to another person [page443] and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

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

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

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

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

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

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

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

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same [page444] effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

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

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

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

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

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

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

...

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

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

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

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

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

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

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and [page446] in respect of any related interest, penalties or other amounts.

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

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

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

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

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

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

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

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

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

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

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

(3) [Burden of proof on application] The court shall not make the order unless

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

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

**11.09** (1) [Stay -- Her Majesty] An order made under section 11.02 may provide that

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

(i) the expiry of the order,

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

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

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

(v) the performance of a compromise or an

arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income [page448] Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

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

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

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

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

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

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

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

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the [page449] collection of a sum, and of any related interest, penalties or other amounts, and the sum

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

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

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

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

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

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

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

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection [page450] 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

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

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

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

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

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

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

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

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

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

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

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

*Excise Tax Act*, R.S.C. 1985, c. E-15 (as at December 13, 2007)

**222.** (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured [page452] creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

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

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

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

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

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (as at December 13, 2007)

**67.** (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

[page453]

(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(*b*.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) [Deemed trusts] Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

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

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

[page454]

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

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

**86.** (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) [Exceptions] Subsection (1) does not affect the operation of

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

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

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

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

[page455]

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

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a

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

*Appeal allowed with costs,* ABELLA J. *dissenting.*

**Solicitors:**

*Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.*

*Solicitor for the respondent: Attorney General of Canada, Vancouver.*

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1 Section 11 was amended, effective September 18, 2009, and now states:

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

2 The amendments did not come into force until September 18, 2009.

# TAB 18

2022 BCCA 331
British Columbia Court of Appeal

1296371 B.C. Ltd. v. Domain Mortgage Corp.

2022 CarswellBC 2665, 2022 BCCA 331, 2022 A.C.W.S. 5808

# 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. 2002, c. 57, as amended

And In the Matter of a Plan of Compromise and Arrangement of Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership

1296371 B.C. Ltd. (Appellant / Respondent) And Domain Mortgage Corp. and Aviva Insurance Company of Canada (Respondents / Respondents) And Evergreen House Development Limited Partnership (Respondent / Petitioner)

DeWitt-Van Oosten J., In Chambers

Heard: September 16, 2022
Judgment: September 20, 2022
Docket: Vancouver CA48534

Proceedings: refusing leave to appeal *Port Capital Development (EV) Inc. (Re)* (2022), 2022 BCSC 1655, 2022 CarswellBC 2648, Fitzpatrick J. (B.C. S.C.)

Counsel: H.C.R. Clark, K.C., for Appellant
S.H. Stephens, for Respondent, Domain Mortgage Corp.
W.L. Roberts, S.B. Hannigan, for Respondent, Aviva Insurance Company of Canada
P. Bychawski, for Monitor, Ernst & Young Inc.
K.M. Jackson, T.A. Posyniak, for Proposed Respondent, Solterra Acquisitions Corp.

Subject: Civil Practice and Procedure; Insolvency

APPLICATION by secured creditor for leave to appeal judgment reported at *Port Capital Development (EV) Inc. (Re)* (2022), 2022 BCSC 1655, 2022 CarswellBC 2648, 5 C.B.R. (7th) 168 (B.C. S.C.), dismissing application for extension; APPLICATION by secured creditor for stay of execution.

***DeWitt-Van Oosten J., In Chambers*:**

1 *DEWITT-VAN OOSTEN J.A.*: On September 16, 2022, I made a number of orders arising out of two "urgent applications" brought pursuant to Rule 57 of the Court of Appeal Rules, B.C. Reg. 120/2022, with reasons to follow. These are the reasons.

**Background**

2 On July 22, 2022, Justice Fitzpatrick of the Supreme Court approved a sale of the assets of Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership (the "Petitioners") to Solterra Acquisitions Corp. ("Solterra"). The purchase price is $18.5 million. The sale is scheduled to close on September 20, 2022. Reasons for judgment are indexed as 2022 BCSC 1464.

3 The Petitioners' assets consist of a proposed 19-storey luxury residential and commercial strata development in Vancouver known as the Terrace House. The Solterra sale is supported by the first secured creditor, Domain Mortgage Corp. ("Domain");

the second most senior secured creditor, Aviva Insurance Company of Canada ("Aviva"); and the Monitor in related proceedings under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C–36 [CCAA].

4 Justice Fitzpatrick is supervising the *CCAA* proceedings and approved the Solterra sale in that context. She was satisfied the sale "is the best achievable in the circumstances" (at para. 56). She also found the sale to be in the best interests of the stakeholder group, as a whole, given significant ongoing risks and costs associated with the Terrace House development (at para. 57).

5 The *CCAA* proceedings have been ongoing since May 2020. It is not necessary to detail the entirety of the protracted background. The litigation chronology, the parties involved and the myriad developments that led to the applications before me are comprehensively set out in 2022 BCSC 1464, as well as the reasons of this Court in 2021 BCCA 382.

6 On August 15, 2022, 1296371 B.C. Ltd. ("129") filed a notice of appeal from the order approving the Solterra sale (CA48485). 129 is also a secured creditor. The grounds of appeal were stated as:

> 1. The Learned Chambers Judge erred in law in granting an order in breach of the rules of natural justice.
>
> 2. The Learned Chambers Judge erred in principle in failing to consider potentially higher offers, failing to direct service on [129] who, along with Aviva Insurance Company of Canada had the only financial interest in a higher price and failing to require production of a private agreement between Aviva and Solterra Acquisitions Corp.

7 Two days later, 129 filed an application seeking leave to appeal in CA48485, and a stay of the order approving the sale:

> The Order of the Honourable Madam Justice Fitzpatrick, made July 22, 2022, approving an Agreement of Purchase of Sale entered into on July 22, 2022, be reversed and that the appeal brought by [129] be allowed; and The Order of the Honourable Madam Justice Fitzpatrick be stayed pending the hearing of the appeal. Directions be granted for an expedited appeal. The time limited for bringing this appeal be extended to August 15, 2022.
>
> Both applications were scheduled to be heard in this Court on September 7, 2022.

8 It is common ground that 129's notice of appeal was filed out of time. An extension of time was required to proceed. 129 brought an application for an extension before Justice Fitzpatrick. Sections 13—14 of the CCAA provide that:

> 13 Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.
>
> > 14(1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.
> >
> > (2) All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, or, in Yukon, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his or her appeal, and within that time he or she has made a deposit or given sufficient security according to the practice of the court appealed to that he or she will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal.
> >
> > [Emphasis added.]

9 The application for an extension was heard on August 29, 2022. It was dismissed, with reasons to follow. Those reasons are expected to be released some time the week of September 19, 2022.

10 129 subsequently filed a requisition in CA48485 adjourning its applications for leave to appeal and a stay. That file is now in abeyance and nothing has occurred since August 31, 2022. Given the denial of an extension, CA48485 is functionally no longer extant.

11 On September 13, 2022, 129 filed a second notice of appeal, this time from the dismissal of its application for an extension: CA48534. The notice of appeal does not articulate specific errors in principle. Rather, it simply states that: "The decision [of Justice Fitzpatrick] was unreasonable and clearly wrong".

12 On September 15, 2022, 129 filed a notice of urgent application in CA48534 for a hearing on September 16, 2022, along with an application book consisting of two volumes of material. In its material, 129 sought:

> 1. Leave to appeal the decision of Madame Justice Fitzpatrick, made August 29, 2022. 2. Execution of the order of Madam Justice Fitzpatrick made July 22, 2022 be stayed until the hearing of the within appeal. 3. The time for bringing this application be shortened to permit it to be heard on September 16, 2022 or such other date as the court may direct. 4. Directions for an expedited appeal.

13 Solterra also filed an urgent application on September 15, asking to be added as a respondent to CA48534. The application was not contested. Accordingly, I allowed Solterra's application to be heard and granted the order sought.

14 All parties were ready to proceed with 129's applications on September 16. Given the pending closing, I allowed 129's request for an urgent hearing and agreed to proceed. It was not ideal in the absence of Justice Fitzpatrick's reasons for the denial of the extension, but the parties required a decision. The Petitioners were given notice of 129's applications. They elected to not participate.

**Legal Principles**

15 The legal principles that govern 129's applications are not in dispute.

***Application for Leave to Appeal***

16 To obtain leave to appeal, 129 must show that: (1) the appeal is *prima facie* meritorious, or not frivolous; (2) one or more points it seeks to raise is of significance to the practice; (3) one or more points is of significance to the action; and (4) the appeal will not unduly hinder the progress of the action: Vancouver (City) v. Zhang,2007 BCCA 280 (Chambers) at para. 10; Goldman, Sachs & Co. v. Sessions et al., 2000 BCCA 326 (Chambers). The ultimate question to be answered is whether granting leave is in the interests of justice: *Zhang* at para. 10. Even where the four criteria have been met, leave may still be denied where granting it would not be in the interests of justice: South Star Developments Ltd. v. Quest University Canada, 2020 BCCA 364 at para. 23.

17 The threshold for a *prima facie* meritorious appeal is relatively low. There need only be an arguable case of sufficient merit to warrant appellate scrutiny: Bartram v. Glaxosmithkline Inc.,2011 BCCA 539 (Chambers) at para. 16.

***Application for a Stay of Proceedings, Including Execution***

18 The power to stay an order is found in ss. 30(c) and 33 of the Court of Appeal Act, S.B.C. 2021, c. 6. Section 33(1) authorizes a justice to "*order a stay of all or part of proceedings, including execution, in the cause or matter from which the appeal is brought*".

19 This is a discretionary power and should only be exercised "where it is necessary to preserve the subject matter of the litigation" or to prevent irremediable damage: Contact Airways Limited v. De Havilland Aircraft of Canada Limited (1982), 42 B.C.L.R. 141 (C.A.) at 143. The applicant bears the onus of justifying a stay: Bancroft–Wilson v. Murphy,2008 BCCA 498 at para. 9.

20 A three-part test applies. As set out in RJR–MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, the applicant for a stay must establish:

a) there is some merit to the appeal;

b) the applicant will suffer irreparable harm if a stay is refused; and

c) the balance of convenience favours granting a stay.

21 The threshold for the first of these criteria is not high. An arguable case is generally sufficient: Tanguay v. Bridgewater Bank, 2012 BCCA 234 (Chambers) at para. 18. The third of the *RJR-MacDonald* criterion requires a weighing of the interests of the parties and a balancing of the potential harm should a stay issue, or be refused: Mission Creek Mortgage Ltd. v. Angleland Holdings Inc., 2013 BCCA 146 (Chambers) at paras. 36 — 37. Ultimately, the court must ask itself whether granting a stay is in the interests of justice: Coburn v. Nagra, 2001 BCCA 607 at para. 9.

**Application of Legal Principles**

22 It is not necessary to detail the positions taken by the parties. Instead, I will focus on the conclusions reached. Domain, Aviva and Solterra opposed 129's applications. The Monitor does not support the relief sought by 129.

***Application for Leave to Appeal***

23 As a preliminary issue, some of the respondents asserted that this Court has no jurisdiction to entertain an application for leave to appeal from the August 29, 2022 order and the matter should be dismissed on that basis. In making that argument, they relied on Bank of Montreal v. Cage Logistics Inc., 2003 ABCA 36.

24 I have read *Bank of Montreal* . I accept that on a plain reading of ss. 13—14 of the CCAA, the jurisdiction to grant an extension to file an appeal from an "order or a decision made under" that statute lies exclusively with the court appealed *from*. However, at least on a preliminary basis, I do not agree with the suggestion in *Bank of Montreal* that the court appealed *to* has no jurisdiction to review a decision to deny an extension. The case is not binding on me and to adopt its interpretation of the *CCAA* would mean that a supervising judge in *CCAA* proceedings can immunize their denial of an extension from appellate review even in the face of a clear error in principle, no evidentiary support for the denial, or a palpable injustice. I question whether that result is consistent with the plain text of ss. 13—14, a harmonious reading of those provisions, the objectives of the statute, or Parliament's intent.

25 However, for the purposes of this case, I need not resolve the interpretation issue. That is because assuming, without deciding, that this Court has jurisdiction to entertain 129's application for leave to appeal, I was satisfied the application should be dismissed on the merits.

*Merits of the Appeal*

26 Without access to Justice Fitzpatrick's reasons, I cannot say 129's proposed appeal from the extension denial is frivolous or that it raises no arguable issues. The notice of appeal was filed and served less than one week past the prescribed deadline; the reasons for delay appear to be grounded in inadvertent error by counsel and technical difficulties with electronic filings; and the affected parties were notified of the intention to seek leave to appeal before the filing deadline.

27 However, I also cannot say the appeal is one of any substance. The denial of an extension of time is discretionary. Discretionary decisions attract significant deference in this Court and a division would only interfere if 129 was able to establish a material error in principle, that the impugned order was not supported by the evidence, or that it resulted in an injustice: Vancouver Aquarium Marine Science Centre v. Charbonneau, 2017 BCCA 395 at para. 35.

28 Before me, 129 acknowledged it cannot presently identify an error in principle or any misapprehension of evidence. Instead, distilled to its essence, the argument advanced in support of a meritorious appeal was that given the facts surrounding the late filing, Justice Fitzpatrick must have erred in principle or misapprehended the relevant evidence because otherwise, she would have granted the extension.

29 Respectfully, I did not find that submission persuasive. It fails to appreciate that the discretion to grant or deny an extension of time is contextually informed and considers more than simply the reasons for the late filing. A judge must also consider the merits of the proposed application for leave to appeal/appeal, whether the respondents would be unduly prejudiced by an extension and, importantly, whether an extension is in the interests of justice: Davies v. C.I.B.C. (1987), 15 B.C.L.R. (2d) 256 at 259—260 (C.A.); Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership, 2018 BCCA 283 at paras. 29—31.

30 Moreover, the order at issue was granted by a supervising judge with extensive knowledge of the *CCAA* proceedings. She was well-positioned to assess the merits of 129's proposed challenge to the approval of the Solterra sale, which was based on allegations of inadequate notice. Critically, she was also well-positioned to assess prejudice and whether an extension was in the interests of justice. Because of her familiarity with the circumstances, Justice Fitzpatrick would have appreciated the adverse effects of appellate delay on the respondents; the nature and extent of prejudice realistically borne by 129 if denied an extension; and the impact of an application for leave to appeal and potential appeal on the *CCAA* proceedings themselves.

31 At the time Justice Fitzpatrick approved the Solterra sale, she was satisfied there was "no evidence before [her] to suggest the availability of any sale transaction that would achieve [the] result" sought by 129, namely, full repayment as a creditor: 2022 BCSC 1464. She also found "no evidence to suggest that any further sales process . . . would produce a superior offer to the Solterra Offer, either in terms of price or closing terms" (at para. 56).

32 As at May 2022, the Petitioners had run out of working capital (a fact not disputed by 129). Attempts to secure additional financing fell through. The Petitioners lacked liquidity to make payments. By July 2022, their accounts payable exceeded $400,000. There were no funds to defray ongoing expenses and no funds to pay the Monitor. The Monitor estimated site preservation costs accruing at approximately $79,000 per month. The Monitor, its legal counsel and the Petitioners' counsel had gone unpaid. The respondents contend, and I accept, that nothing had materially changed by August 29, 2022, when 129 applied for an extension of time. In fact, the overall financial situation had worsened.

33 All of these circumstances were known to Justice Fitzpatrick when she denied an extension. Her application of the relevant legal principles would necessarily have been informed by the surrounding circumstances; her role as the supervising judge; her familiarity with the parties; their conduct during the *CCAA* proceedings; the viability of plans previously put forward; potentially outstanding expressions of intent; the urgent need for a resolution to protect stakeholders' interests; and the Monitor's support for the Solterra sale. That support came after the Monitor reviewed Aviva's efforts to produce a sale and satisfied itself "that those efforts had produced the best and timeliest offer available" (at para. 47).

34 129's appeal from the denial of an extension may not be frivolous; but, in light of the discretionary nature of the decision, the overall context and Justice Fitzpatrick's unique position as the supervising judge, I consider it highly unlikely that 129 would be able to convince this Court to interfere with the ruling.

*Significance to Practice and the Action*

35 The principles governing extensions of time are well-settled. I see nothing about the proposed appeal that raises questions of significance to practice specific to that issue. Rather, 129's complaint about the August 29, 2022 order is focused on the application of those principles to the particular facts of this case. It is an individualized complaint.

36 The ultimate objective of 129's appeal is to overturn the extension denial so that it can proceed with challenging the order approving the Solterra sale. 129 argues that its appeal from *that* order raises issues of significance to practice and I should give

that fact weight on this application, including the extent to which the real-time litigation nature of *CCAA* proceedings properly allows a supervising judge to dispense with formal notice of an application for the approval of a sale.

37 The difficulty with that argument, as emphasized by the respondents, is that even if it is proper for me to take issues raised by the first-in-time appeal into account, Justice Fitzpatrick found as a fact that Tobi Reyes, the principal of 129 and Port Capital Development (EV) Inc., was "well aware" before July 22 of creditor intentions to revive a sale of Terrace House and, in fact, had "been making efforts to generate his own offer, to no effect": 2022 BCSC 1464. There is also considerable merit to the submissions of Domain and Solterra that it is readily apparent from the record that all parties, including 129 and the Petitioners, were aware before the July 22 hearing that a "return to market had occurred and an application for court approval [of a sale] was imminent". The Petitioners' counsel was present at the July 22 hearing and informed the court of 129's opposition to any sale that would not provide for full repayment. Mr. Reyes instructs counsel for the Petitioners. This discussion took place before the court stood down until 3:20 p.m. for presentation of the Solterra offer. Counsel for the Petitioners was also present at two hearings preceding July 22, in which it was anticipated that an offer to purchase might be ready for approval by July 22.

38 Given these circumstances, appeal CA48485, even if allowed to proceed, would not be about the authority of a supervising judge to dispense with formal notice or process requirements, generally, or the factors that properly guide the exercise of that discretion. Rather, it would ask whether the manner in which *this* case proceeded was procedurally unfair in light of the judge's factual findings and the evidentiary record. I have reviewed a transcript of the July 22, 2022 hearing. I saw nothing there, from a practice perspective, that would transcend the factual matrix of the case. Although not strictly necessary for present purposes, I am also of the view based on the transcript and the argument made by 129 when applying for an extension (included in its material), that 129's application for leave to appeal the July 22 order is not compelling.

39 There is no doubt the appeal carries significance to the parties. Whether leave is granted or denied has significant implications for all involved. However, as will be apparent from my discussion under the heading "Interests of Justice", I am satisfied the respondents would suffer significant and likely irremediable prejudice if leave is granted (particularly, if coupled with an interim stay), and I have no confidence that 129's proposed amelioration of that prejudice sufficiently counterbalances the risks.

*Unduly Hinder the Progress of the Action*

40 The *CCAA* proceedings remain outstanding. I have been told that the stay of proceedings granted in the ordinary course of *CCAA* proceedings remains in place and will not expire until September 30, 2022, subject to an extension. The most significant and pending development in those proceedings is the Solterra sale.

41 If 129 is granted leave to appeal the denial of an extension, it will next proceed to an appeal before a division. If that appeal succeeds, the denial of the extension is overturned and an extension is granted by this Court, to challenge the order approving the Solterra sale, 129 would still need to obtain leave to appeal that order and, if successful, appear before a division to persuade the division to set the order aside. It is plain that even if the two appeals were expedited, the appellate process would likely require months if not more than a year to complete. In submissions before me, it was made clear that if leave to appeal and an interim stay are granted, thereby preventing the September 20 closing, Solterra will abandon its purchase of Terrace House. I agree with the respondents that if this occurs, it will unduly hinder the progress of the *CCAA* proceedings. In fact, in the words of counsel, it will result in "chaos". The parties will be back to square one, with no approved sale and rapidly accruing development costs for which there is no working capital. Moreover, as I understand it, there would be no order in place granting the Monitor expanded powers and allowing it to marshal another offer to purchase without further appearances before Justice Fitzpatrick.

42 Domain put it this way in its written argument:

> . . . the one qualified purchaser with a firm offer will be lost. Interest and critical site preservation costs accrue at more than $310,000 per month . . . in order to simply tread water, any subsequent offer would need to exceed Solterra's $18.5 million purchase price by at least $310,000 (increasing with compounding) for each passing month. On the evidence, that is highly unlikely . . .

43 129 argues that granting leave and an interim stay will not be catastrophic, as suggested by the respondents, because 129 has secured an irrevocable offer to purchase Terrace House from another entity and that offer is more favourable than the Solterra sale.

44 In support of this position, 129 tendered affidavits from Tobi Reyes and Bruce Martinuik. Mr. Martinuik is the principal of Martinuik Properties Ltd. ("Martinuik Properties").

45 Mr. Reyes deposes that after the August 29, 2022 hearing, he approached two parties (other than Solterra) that expressed interest in purchasing Terrace House at the time of the July 22, 2022 approval. According to Mr. Reyes, these parties remain interested in a purchase; however, following dismissal of the extension of time, they were not prepared to proceed with an offer given the tight timeframe. Mr. Reyes says he subsequently entered into negotiations with Martinuik Properties, which led to an irrevocable offer to purchase Terrace House. The offer (dated September 12, 2022), is for $18,750,000, plus an additional $5,203,381 payable to 129 upon an assignment of its security to Martinuik Properties. Mr. Reyes says he believes Martinuik Properties has the financing necessary to complete the proposed purchase. He has also deposed that he is willing to fund the cost and expenses of the Monitor if leave to appeal the August 29 order is granted and the July 22 order is stayed.

46 In his affidavit, Bruce Martinuik confirms the offer to purchase. He says Martinuik Properties was incorporated in 2018 to "develop and partner in real estate projects". The affidavit states that either Mr. Martinuik or Martinuik Properties (it is unclear to me), owns interests in projects in the Lower Mainland, the Okanagan and Vancouver Island. However, none of those projects are identified. Mr. Martinuik confirms he has been able to make financial arrangements in support of the irrevocable offer to purchase. However, details of the arrangements have not been provided, including the identity of any lenders, amounts available, confirmation of letter(s) of commitment, or the terms of the lending.

47 When the September 16 hearing commenced, counsel for 129 informed me that as a show of good faith, a first deposit of $1,000,000 under the new offer was scheduled to have been made first thing in the morning. He candidly acknowledged that without payment of the deposit, 129 likely faced an "uphill battle" in justifying a stay. By the time submissions completed in late afternoon, no deposit had been made. When we resumed at 3:45 p.m. for a decision, I was informed that approximately $500,000 had been or was in the process of being transferred. This was, at best, half the amount I was initially told would be paid and it was transferred at the last minute. I also note, in any event, that under the terms of the Martinuik Properties offer, the $1,000,000 deposit does not become binding until two business days after execution of the sale agreement, which would be well into the future.

48 I am not prepared to assign the Reyes and Martinuik affidavits much weight. The affidavits are general; provide few details about Martinuik Properties and whether it is an entity of proven financial means; and, importantly, there is no supportive documentation confirming the financing arrangements that have apparently been put in place to facilitate an $18,750,000 purchase. In my view, a more robust and assuring evidentiary foundation was necessary to sufficiently counterbalance the palpable risk borne by the respondents if Solterra withdraws its agreement to purchase because the sale cannot close.

49 Granting leave to appeal, particularly if coupled with an interim stay, would unduly hinder the progress of the *CCAA* proceedings.

*Interests of Justice*

50 129 contends that without leave to appeal and the ability to challenge the denial of the extension and, ultimately, the order of July 22, 2022, any opportunity to facilitate a sale of Terrace House that allows 129 to recover its funds as creditor will be lost. As I understand it, the current debt-stack of the development includes a third charge of approximately $8.4 million that is shared between 129 and Aviva, respectively, in a 65/35% split. The Solterra purchase price is insufficient to cover 129's liability. From the perspective of 129, to proceed with the Solterra sale is grossly unfair and the interests of justice weigh heavily in favour of granting leave and an interim stay.

51 In my view, the interests of justice do not weigh in favour of granting leave. To the contrary, they weigh in the opposite direction. I see little possibility (if any) of a division of this Court interfering with the denial of the extension. 129's proposed appeal does not raise issues of significance to practice and the uncertainty, unpredictability and delay engendered by appeal proceedings (particularly if accompanied by an interim stay), realistically carries the risk of substantial prejudice to the respondents. 129 has sought to ameliorate that prejudice, but I have serious concerns about the reliability of the supporting evidence and no confidence, given the history of this matter, that a sale to Martinuik Properties would actually materialize. This history includes the fact that 129's October 2021 refinancing plan has collapsed; the Petitioners, with Mr. Reyes as a principal, have run out of working capital and are unable to meet their project payables; and an arrangement by the Petitioners to secure additional financing in May 2022, did not close as they said it would: 2022 BCSC 1464.

52 I also agree with the respondents, based on my review of the application record, that even if a sale to Martinuik Properties occurred, by the time it took place, the accrued costs of the development would render that sale markedly inferior to the one set to close on September 20. I agree with the respondents that the actual purchase price of this latest offer is only $250,000 more than the Solterra offer. Martinuik Properties' intention to acquire 129's debt and security does not form part of the funds payable to the vendors.

53 129 recognizes in its written argument that if granting its applications means Solterra is likely to withdraw its agreement to purchase (which appears to be the case), the interests of justice would not "permit" granting leave in the absence of sufficiently mitigating the respondents' prejudice. In my view, the evidence surrounding the Martinuik Properties' offer does not do so.

54 I also agree with the respondents that in the circumstances of this case, the comments of Justice Tysoe in Edgewater Casino Inc. (Re), 2009 BCCA 40 are apposite:

> [19] . . . In non-*CCAA* proceedings, a justice will be reluctant to grant leave where the order constitutes an exercise of discretion by the judge because the grounds for interfering with an exercise of discretion are limited: see *Silver Standard Resources Inc. v. Joint Stock Co. Geolog*, [1998] B.C.J. No. 2298 (C.A. Chambers). Most orders made in *CCAA* proceedings are discretionary in nature, and the normal reluctance to grant leave to appeal is heightened for two reasons . . .
>
> [20] First, one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavouring to balance the various interests. Secondly, *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances. These considerations are reflected in the comment made by Madam Justice Newbury in *New Skeena Forest Products* that "[a]ppellate courts also accord a high degree of deference to decisions made by Chambers judges in CCAA matters and will not exercise their own discretion in place of that already exercised by the court below" (para. 20).
>
> [21] . . . In most non-*CCAA* cases, the events giving rise to the underlying action have already occurred, and a consideration of this factor involves the prejudice to one of the parties if the trial is adjourned or if the action cannot otherwise move forward pending the determination of the appeal. *CCAA* proceedings are entirely different because events are unfolding as the proceeding moves forward and the situation is constantly changing — some refer to *CCAA* proceedings as "real-time" litigation.
>
> [22] The fundamental purpose of *CCAA* proceedings is to enable a qualifying company in financial difficulty to attempt to reorganize its affairs by proposing a plan of arrangement to its creditors. The delay caused by an appeal may jeopardize these efforts. The delay may also have the effect of upsetting the balance between competing stakeholders that the supervisory judge has endeavoured to achieve.
>
> [Emphasis added.]

See also *Southern Start Developments* at paras. 21 — 25; Port Capital Development (EV) Inc. v. 1296371 B.C. Ltd., 2021 BCCA 319 at paras. 45—48; *Wedgemount* at paras. 43 — 44.

55 For these reasons, I dismissed the application for leave to appeal.

***Stay of Execution***

56 The purpose of an interim stay would be to prevent prejudice to 129 while pursuing its appeal and to avoid rendering that appeal moot. Without leave to appeal, the need for a stay loses its force.

57 However, given the fact that the issue was fully argued before me and my decision to deny leave is subject to review under s. 29(1) of the Court of Appeal Act, I consider it appropriate to state my conclusions on this component of 129's applications.

58 Before doing so, it is necessary to address a preliminary issue. Some of the respondents suggested that I have no jurisdiction to stay the order approving the Solterra sale because 129's application for leave to appeal/appeal of that order is extant. 129 argued that I do have jurisdiction because of the broad wording of s. 33(1) of the Court of Appeal Act. 129 says the denial of an extension and 129's attempt to appeal the order approving the sale are so closely intertwined that the July 22 order reasonably forms part of the "cause or matter from which the appeal is brought".

59 For the purpose of this application, I did not consider it necessary to resolve the jurisdictional issue. That is because assuming, without deciding, that I do have jurisdiction to grant an interim stay, I dismissed 129's application for that remedy on the merits. 129 did not persuade me that it met the *RJR-MacDonald* criteria.

*Merits of the Appeal*

60 My conclusions on the request for a stay will be briefly stated. There is considerable overlap between this issue and the application for leave to appeal. There is no need to reiterate the relevant portions of my analysis. For the reasons set out earlier, I consider it highly unlikely that 129 would succeed in convincing this Court to intervene with the denial of an extension.

*Irreparable Harm and Balance of Convenience*

61 129's arguments of irreparable harm are the same as the arguments it advanced in support of leave to appeal, namely: that without a stay, 129 will lose the opportunity of a sale to Martinuik Properties (or some other entity) and full repayment.

62 As noted, I have serious concerns about the reliability of the evidence surrounding the Martinuik Properties offer and no confidence, given the history of this matter, that this sale would actually materialize. I also agree with the respondents that, considered in context, the Martinuik Properties offer is markedly inferior to the sale set to close on September 20.

63 I am satisfied it is the respondents who are likely to suffer irreparable harm if an interim stay is granted, pending the hearing of an appeal, and the balance of convenience weighs in favour of allowing the pending closing to proceed. If a stay is granted, the respondents will likely lose the benefit of a sale that Justice Fitzpatrick has determined is in the best interests of the stakeholder group because of significant ongoing risk and costs associated with the development project.

*Interests of Justice*

64 As stated, 129 acknowledges in its written argument that if the risk of Solterra withdrawing its agreement to purchase cannot be sufficiently ameliorated, a stay should not be granted. In other words, 129 does not dispute that in those circumstances, the respondents will suffer irreparable harm and it is not in the interests of justice to put the approved sale on hold. On the basis of the material before me, what unfolded on September 16, and the history of this matter, 129 has not persuaded me that its proposed amelioration sufficiently addresses the respondents' risks. In her reasons explaining the approved sale, Justice Fitzpatrick stated (at para. 56):

As he has done many times in this proceeding, Mr. Reyes only wishes to avoid a sale at this time to buy himself more time; however, it is crystal clear that any further time will come at a significant cost and risk to other stakeholders. In essence, Mr. Reyes' only remaining "kernel of a plan" is simply delay.

65 Regrettably, I am left with this same impression.

**Disposition**

66 For the reasons provided, I:

a) granted 129 an urgent hearing and agreed to have the matter proceed on September 16, 2022;

b) dismissed the application for leave to appeal Justice Fitzpatrick's order of August 29, 2022 denying an extension of time;

c) dismissed the application for a stay of Justice Fitzpatrick's order of July 22, 2022, approving a sale of the Petitioners' assets to Solterra; and

d) granted Solterra's application for an urgent chambers hearing, agreed to have the related application proceed on September 16, 2022 and, with consent, ordered that Solterra be added as a party to appeal CA48534.

*Application dismissed; application dismissed.*

# TAB 19

2007 ABCA 317
Alberta Court of Appeal (In Chambers)

Matco Capital Ltd. v. Interex Oilfield Services Ltd.

2007 CarswellAlta 1336, 2007 ABCA 317, [2008] A.W.L.D. 135, 162 A.C.W.S. (3d) 12

# In the matter of an application under sections 46 and 47(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

Matco Capital Limited (Plaintiff) and Interex Oilfield Services Ltd., Cam-Star Resources (1990) Ltd. and Roblyn Oilfield Maintenance Ltd. (the Interex Group) (Defendants)

Midfield Supply Ltd., Spartan Controls Ltd., Startec Refrigeration Services Ltd., Cox Crane Service Ltd., Lampman Electric Ltd., A.M.E. Mechanical Ltd., Bergen Consulting, Millenia Resource Consulting, NIWA Crane Ltd., Lynco Construction Ltd., Border Insulators Inc., 779208 Alberta Ltd., Sabine C02 Logistics Inc., Bowridge Manufacturing (Appellants) and The Interex Group by its Receiver-Manager Hardie & Kelly Inc. (The Receiver) (Respondent)

M. Paperny J.A.

Heard: October 10, 2007
Judgment: October 12, 2007
Docket: Calgary Appeal 0701-0273-AC

Counsel: T.P. Lysak for Appellant
R.S. Van De Mosselaer for Respondent, Hardie & Kelly Inc.
R.S. Nishumura, C.A. Murray for Purchasers Arc Resources Limited
C. Nicholson for Purchasers Milagro Energy Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

APPLICATION for stay of execution of orders for sale and liquidation of property.

***M. Paperny J.A.*:**

1 The appellants are a group of lienholders who seek to stay execution of the orders of the chambers judge granted September 28, 2007, approving the sale of various assets of Interex Oilfield Services Ltd., Cam-Star Resources (1990) Ltd., and Roblyn Oilfield Maintenance Ltd. (the "Interex Group") to three different purchasers and liquidation of a CO2 plant.

2 By order dated July 26, 2006, Hardie & Kelly Inc. was appointed receiver-manager of the Interex Group. By orders dated February 9 and March 22, 2007, the court approved a process for the sale of the assets of the Interex Group. The appellants had notice of those orders and of the sale process, which included a deadline for the submission of sealed bids. Having determined the most favourable bids and negotiated agreements of purchase and sale with various purchasers, the receiver brought a motion seeking court approval of the sales and of the liquidation. That motion was returnable on September 26, 2007 but was adjourned to September 28, 2007 at the request of these appellants to give the stakeholders time to resolve their differences. At that time, the appellants sought disclosure of the purchase prices of all the assets (including the liquidation expenses and the projected liquidation revenues) and requested an adjournment for one week in order to determine their position, including the possibility that they might bid on the assets. The appellants submitted that as interested and affected stakeholders, they were entitled to disclosure of the purchase prices of each proposed sale before making submissions on the approval application.

3 The receiver agreed that in the usual course of a receivership, all affected stakeholders were entitled to know the purchase price on an approval hearing. However, he was of the view that the unique position of the appellants and the integrity of the sale

process demanded that the purchase prices not be disclosed. Specifically, the receiver noted that the appellants had indicated early on that they might be interested bidders on the assets, and that despite their knowledge of the ongoing sale process, they chose not to bid but were now using their position as lienholders to require disclosure of the purchase prices to put together a competing late bid. The receiver submitted that that would work a fundamental unfairness to the court approved sale process it had undertaken. The chambers judge agreed and declined to disclose the purchase prices to the lienholders or grant the requested adjournment. She granted the four orders approving the sales and the liquidation.

4 The test for a stay of enforcement of a court order is well known and requires application of the tripartite test articulated by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.): the applicant must show there is a serious question to be tried; that the applicant will suffer irreparable harm if the stay is refused; and that the balance of convenience favours the applicant, namely, if the stay is refused the applicant will suffer greater harm than the respondent would if the stay was granted.

5 On the first branch of the test, this court must consider whether an appeal from the orders approving the sales and the liquidation raises a serious issue. The appellants submit that as a court-authorized process, the process as a whole should be transparent and fair. Accordingly, all interested parties should be given access to crucial information necessary for them to assess their positions, based on their respective rights and interests. As such, it was a reviewable error for the chambers judge to decline to provide the purchase prices for their consideration in the context of an approval application. The respondents to the application submit that a chambers judge supervising a receivership is often called upon to exercise a discretion to preserve the integrity of the process and there is no error in her having declined to disclose the purchase prices to the lienholders here.

6 In declining to require disclosure of the purchase prices, and approving the sales and liquidation as requested, the chambers judge stated:

> There has been a thorough and diligent sales process with respect to the CO2 assets, commencing in early February of this year through to mid-July. The deadline was extended twice for particular reasons in order to maximize value for the stakeholders. I note that unsecured creditors have little to hope for from the process so this is not a case of a last minute offer coming in that would improve matters for all stakeholders, recognizing of course that the lienholders certainly are major stakeholders.
>
> I also note that Mr. Busse and his clients [the lienholders] have been part of this process since the beginning, that they have participated in court applications and were certainly aware of the sales process as it occurred. ... [The lienholders] have come forward asking that approval of the sales to [purchasers] who have complied with the process and whose offers have been recommended by the receivers should be delayed to allow them to try to put together what they say should not be characterized as a competing bid, but certainly appears to be that[.] [T]hey wish to consider whether they want to put together a scheme to have the assets turned over to the lienholders in settlement of their liens. This is not a firm proposal of any kind, but an idea and would require successful negotiations to take out the major secured creditor that have not yet been effected.
>
> The lienholders have made it clear that they are acting in two capacities, as creditors and as potential bidders of some kind. I have heard from the receiver the reason why the receiver felt that they — it would not be appropriate to provide information to the lienholders, given the two hats that they wore, that they wear, and I am satisfied that this is justifiable given what the lienholders have said in this court, they want to do with the information.

7 While recognizing that candour and fairness of process were critical, she further held ". . . fairness of process does not mean that lienholders are entitled to, in effect, lie in the weeds to see if they are happy with the price for the assets and then obtain that information in order to determine whether they can come up with something better."

8 The determination of whether there is a serious question to be tried is a preliminary assessment of the merits of the case only, and I need only be satisfied that the application is neither frivolous nor vexatious. I am satisfied that the appeal here raises a serious issue.

9 The sale process in the context of a court-appointed receiver includes both the submission of bids and the court approval process. Fairness and candour are paramount in both stages of the process. As this court noted in *Bank of Nova Scotia v. Henuset Resources Ltd.* (1989), 70 Alta L.R. (2d) 320, [1989] A.J. No. 945 (Alta. C.A.) the entire process must be objectively fair to all parties having a legitimate interest in it. The purchase price is material information to which a creditor would be entitled in the usual course. In other words, public disclosure is part of a judicial approval process. The integrity of the sale process is but one aspect of a court approval process that demands fairness and equality of treatment to all, including disclosure of all necessary information for stakeholders to make informed decisions. How those competing interests could or should be balanced to achieve these objectives is such an issue.

10 The second branch of the test, irreparable harm, refers to the nature of the harm that would be suffered were a stay not to be granted. The applicants submit that absent a stay, the sales "may be closed" and the disassembly of the Interex Group's CO2 plant will begin, thus precluding consideration of "potential alternatives available" to them. In other words, the appeal will be moot and as such, their interest in considering alternatives will be gone. However, the chambers judge found that the appellants were well aware of the orders authorizing the sale process and of the deadline for bids. They made no effort to pursue other alternatives or to make a reserve bid, an option that was open to them and that would have preserved the integrity of the court-ordered sale process. Any harm resulting from declining a stay is not entirely the result of the appellants' lack of access to the purchase prices. It was open to the appellants to prevent such potential harm earlier in the process. The lienholders also concede that there may be no harm at all if the prices are high enough to leave them with no concerns regarding approval of the sales. At its highest, the irreparable harm here is the loss of an opportunity to put a different deal together, an opportunity which is at best speculative. However, it may be sufficient to establish irreparable harm where it can be shown that the relief sought would be nugatory if a stay was not allowed: *Triple Five Corp. v. United Western Communications Ltd.* (1994), 19 Alta. L.R. (3d) 153, 27 C.P.C. (3d) 201 (Alta. C.A.), (motion for a stay of execution dismissed: [1994] S.C.C.A. No. 226 (S.C.C.)). I am prepared to so find for the purpose of this application.

11 Finally, does the balance of convenience favour granting a stay? Do the interests of the appellants in a stay outweigh the interests of the other stakeholders and the estate as a whole? Serious potential consequences of a stay include a loss of all of the sales approved by the court below, and a "tainting of the market" such that the value of the assets are diminished in the eyes of prospective purchasers, a potential harm to all of the stakeholders, including the appellants. No one has challenged the propriety or efficacy of the receiver's sale process. In other words, there has been a broad canvassing of the available market with a view to maximizing the return to all stakeholders. The process undertaken by the receiver is not impugned. Nor are its conclusions that the sale agreements represent the best offers available for the assets. In assessing the balance of convenience, I am obliged to consider the impact of a stay on the sale process and on the stakeholders as a whole. The real prospect that the sales will not proceed and that the market will be negatively affected with no assurance that there will be any other comparable offer forthcoming from the appellants or elsewhere tips the balance of convenience in favour of the respondents. The potential harm to the entire estate from granting a stay far outweighs any benefit to the appellants.

12 The application for a stay pending appeal is dismissed.

*Application dismissed.*

**End of Document**

# TAB 20

2015 SCC 51, 2015 CSC 51
Supreme Court of Canada

Alberta (Attorney General) v. Moloney

2015 CarswellAlta 2091, 2015 CarswellAlta 2092, 2015 SCC 51, 2015 J.E. 1777, 2015 CSC 51, [2015] 12 W.W.R. 1, [2015] 3 S.C.R. 327, [2015] A.W.L.D. 4293, [2015] A.W.L.D. 4294, [2015] A.W.L.D. 4341, 22 Alta. L.R. (6th) 287, 259 A.C.W.S. (3d) 20, 29 C.B.R. (6th) 173, 391 D.L.R. (4th) 189, 476 N.R. 318, 606 A.R. 123, 652 W.A.C. 123, 85 M.V.R. (6th) 37, J.E. 2015-1777

# Attorney General of Alberta, Appellant and Joseph William Moloney, Respondent and Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General for Saskatchewan and Superintendent of Bankruptcy, Interveners

McLachlin C.J.C., Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté JJ.

Heard: January 15, 2015
Judgment: November 13, 2015
Docket: 35820

Proceedings: affirming *Moloney v. Alberta (Administrator, Motor Vehicle Accident Claims Act)* (2014), 64 M.V.R. (6th) 82, 569 A.R. 177, 370 D.L.R. (4th) 267, 9 C.B.R. (6th) 278, 91 Alta. L.R. (5th) 221, [2014] 4 W.W.R. 272, 2014 CarswellAlta 225, 2014 ABCA 68, Frans Slatter J.A., Jack Watson J.A., Ronald Berger J.A. (Alta. C.A.); affirming *Moloney v. Alberta (Administrator, Motor Vehicle Accident Claims Act)* (2012), 550 A.R. 257, 39 M.V.R. (6th) 21, 2012 ABQB 644, 2012 CarswellAlta 1757, [2012] A.J. No. 1094, 73 Alta. L.R. (5th) 44, A.B. Moen J. (Alta. Q.B.)

Counsel: Lillian Riczu for Appellant
R. Jeremy Newton for Respondent
Josh Hunter, Daniel Huffaker for Intervener, Attorney General of Ontario
Alain Gingras for Intervener, Attorney General of Quebec
Richard M. Butler for Intervener, Attorney General of British Columbia
Thomson Irvine for Intervener, Attorney General, for Saskatchewan
Peter Southey, Michael Lema for Intervener, Superintendent of Bankruptcy

Subject: Constitutional; Insolvency; Public

APPEAL by Attorney General from judgment reported at *Moloney v. Alberta (Administrator, Motor Vehicle Accident Claims Act)* (2014), 2014 ABCA 68, 2014 CarswellAlta 225, 9 C.B.R. (6th) 278, [2014] 4 W.W.R. 272, 91 Alta. L.R. (5th) 221, 370 D.L.R. (4th) 267, 64 M.V.R. (6th) 82, 569 A.R. 177 (Alta. C.A.), dismissing appeal from judgment granting application for judicial review of suspension of driver's licence.

POURVOI formé par le procureur général à l'encontre d'un jugement publié à *Moloney v. Alberta (Administrator, Motor Vehicle Accident Claims Act)* (2014), 2014 ABCA 68, 2014 CarswellAlta 225, 9 C.B.R. (6th) 278, [2014] 4 W.W.R. 272, 91 Alta. L.R. (5th) 221, 370 D.L.R. (4th) 267, 64 M.V.R. (6th) 82, 569 A.R. 177 (Alta. C.A.), ayant rejeté un appel interjeté à l'encontre d'un jugement ayant accordé une demande de contrôle judiciaire d'une décision ayant suspendu un permis de conduire.

***Gascon J.*** **(Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring):**

## I. Overview

1 In Canada, the federal and provincial levels of government must enact laws within the limits of their respective spheres of jurisdiction. The *Constitution Act, 1867* defines which matters fall within the exclusive legislative authority of each level. Still, even when acting within its own sphere, one level of government will sometimes affect matters within the other's sphere of jurisdiction. The resulting legislative overlap may, on occasion, lead to a conflict between otherwise valid federal and provincial laws. In this appeal, the Court must decide whether such a conflict exists, and if so, resolve it.

2 The alleged conflict in this case concerns, on the one hand, the federal Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA"), and on the other hand, Alberta's Traffic Safety Act, R.S.A. 2000, c. T-6 ("TSA"). It stems from a car accident caused by the respondent while he was uninsured, contrary to s. 54 of the TSA. The province of Alberta compensated the individual injured in the accident and sought to recover the amount of the compensation from the respondent. The latter, however, made an assignment in bankruptcy and was eventually discharged. The *BIA* governs bankruptcy and provides that, upon discharge, the respondent is released from all debts that are claims provable in bankruptcy. The *TSA* governs the activity of driving, including vehicle permits and driver's licences, and allows the province to suspend the respondent's licence and permits until he pays the amount of the compensation.

3 As a result of his bankruptcy and subsequent discharge, the respondent did not pay the amount of the compensation in full; because of this failure to pay, Alberta suspended his vehicle permits and driver's licence. The respondent contested this suspension, arguing that the *TSA* conflicted with the *BIA*, in that it frustrated the purposes of bankruptcy. The province replied that there was no conflict since the *TSA* was regulatory in nature and did not purport to enforce a discharged debt. The Court of Queen's Bench and the Court of Appeal found that there was a conflict between the federal and provincial laws. Relying on the doctrine of federal paramountcy, they declared the impugned provision of the *TSA* to be inoperative to the extent of the conflict. I agree with the outcome reached by the lower courts, and I would dismiss the appeal.

**II. Facts**

4 The car accident caused by the respondent occurred in 1989. In 1996, the individual injured in the accident obtained judgment against the respondent in the amount of $194,875. The Administrator appointed under the Motor Vehicle Accident Claims Act, R.S.A. 2000, c. M-22 ("MVACA"), indemnified the injured party for the amount of the judgment debt and was assigned the debt in accordance with the *MVACA*. Initially, the respondent made arrangements with the Administrator to pay the debt in instalments. Some years later, however, in January 2008, he made an assignment in bankruptcy. He listed the Administrator's claim in his Statement of Affairs. It is not disputed that the judgment debt assigned to the Administrator was a claim provable in bankruptcy. It was, by far, the respondent's most substantial debt and, in fact, the reason for his financial difficulties. At the time of the assignment, the outstanding amount due to the Administrator stood at $195,823.

5 In June 2011, the respondent obtained an absolute discharge, which no one opposed. In October of the same year, he received a letter from the Director, Driver Fitness and Monitoring, notifying him that, by application of s. 102(1) of the TSA, his operator's licence and vehicle registration privileges would be suspended until payment of the outstanding amount of the judgment debt. Later, in November, his lawyer received another letter, this time from Motor Vehicle Accident Recoveries, advising the respondent that he "remains indebted for the judgment debt obtained against him ... 'until the judgment is satisfied or discharged, otherwise than by a discharge in bankruptcy'" (A.R., at p. 49). The letter proposed that new payment arrangements be made, failing which the suspension of his driving privileges would continue.

6 Given this situation, in March 2012, the respondent sought an order from the Court of Queen's Bench to stay the suspension of his driving privileges. He claimed that he had been discharged in bankruptcy and that s. 178 of the BIA precluded the Administrator from enforcing the judgment debt.

**III. Judicial History**

***A. Alberta Court of Queen's Bench, 2012 ABQB 64473 Alta. L.R. (5th) 44 (Alta. Q.B.)***

7 Moen J. first found that, as a result of the discharge, there was no longer a liability on the basis of which the judgment could be enforced (para. 21). In her view, the question at issue was whether the discharge precluded the province from suspending the respondent's driving privileges because of the unpaid judgment debt. This entailed looking at the operation of the *TSA* and the *BIA* and determining whether the relevant provisions were in conflict, making the doctrine of paramountcy applicable. According to Moen J., an "operational conflict" could arise in two situations, namely where (1) "compliance with both acts is rendered inconsistent or impossible by directly conflicting with an express provision of the *BIA*" or (2) "the *TSA* has the intent and/or effect of interfering with the provisions of the *BIA* or its fundamental objectives" (para. 30).

8 Moen J. emphasized the rehabilitative purpose of the *BIA* (para. 31). She described the purpose of the *TSA* as being the "protection of public safety via the regulation of traffic and motor vehicles" (para. 33), and the purpose of s. 102 of the TSA as "preventing 'irresponsible drivers from having the continued privilege of driving ... without being made to account for the normal consequences of their vast irresponsibilities'" (para. 34). She distinguished situations in which the purpose of licence suspension is the collection of a debt from those in which it is the regulation of conduct (paras. 37-42). She concluded that the sole purpose of s. 102 is the collection of an unpaid judgment debt. In her view, the provision had nothing to do with the regulation of the respondent's misconduct (para. 43). She thus held that the province's actions were not disciplinary, but rather "a method of debt collection, and a colourable attempt to circumvent the provisions of the *BIA*" (para. 45). This "improper purpose" of the *TSA* created an "operational conflict" with the *BIA* (para. 45). She therefore stayed both the enforcement of the judgment debt and the suspension of the respondent's driving privileges (para. 49), and she declared the *TSA* ineffective to the extent of the conflict with the *BIA* (para. 48).

### *B. Alberta Court of Appeal, 2014 ABCA 6891 Alta. L.R. (5th) 221* ***(Alta. C.A.)***

9 Writing for a unanimous court, Slatter J.A. described the two types of conflict that trigger the application of the doctrine of paramountcy as follows: (1) "it is impossible to comply with both the provincial and the federal legislation", or (2) "even though it is technically possible to comply with both, the application of the provincial statute can fairly be said to frustrate Parliament's legislative purpose" (para. 10). He concluded that because the respondent could comply with both laws by not driving, there was no conflict under the first branch of the test (para. 10).

10 Turning to the second branch, Slatter J.A. described the two purposes of the *BIA* as being, first, equal distribution, and second, rehabilitation. He observed that s. 178 lists the debts that are not discharged by bankruptcy, none of which corresponds to judgment debts for damages resulting from motor vehicle accidents (paras. 13-15). According to him, while discharge from bankruptcy does not extinguish debts, nonetheless, "[w]hatever conceptual distinction there may be, it is somewhat artificial in the present context", as creditors cease to be able to enforce the discharged debts (para. 19). Slatter J.A. rejected the province's argument that driving privileges can be used as fresh consideration to revive a discharged debt; such consideration is not genuine and it is inconsistent with the policy of the *BIA* (paras. 20-21). Rejecting another of the province's arguments, he held that it is irrelevant that driving privileges do not constitute property of the bankrupt. The province cannot withhold privileges arbitrarily in a way that frustrates the purposes of the *BIA* (paras. 23-24).

11 Slatter J.A. observed that s. 102 of the TSA specifically provides that it operates notwithstanding a discharge in bankruptcy. In his view, this is a "*prima facie* signal of a potential operational conflict" (para. 39). Although s. 102 is not coercive and the respondent could choose not to drive, Slatter J.A. concluded that it nonetheless frustrates the purposes of the *BIA*. One of these purposes is that the discharged bankrupt "will not have to make any such 'choices'" and will be "free to make independent and unencumbered personal and economic decisions going forward" (para. 43). Because s. 102 is focused on debt collection and is not connected to traffic safety considerations (paras. 40 and 45-47), it interferes with a driver's ability to make a fresh start (paras. 48-49). Slatter J.A. also concluded that s. 102 disrupts fair and equal distribution to creditors because it permits the province to collect amounts in addition to the dividend ordinarily distributed to creditors (para. 50). He held that s. 102 frustrates both purposes of the *BIA* and that the words "otherwise than by a discharge in bankruptcy" are in "operational conflict" with the *BIA* (para. 54).

## IV. Issue

12 The Chief Justice formulated the following constitutional question:

> Is s. 102(2) of the Alberta *Traffic Safety Act*, R.S.A. 2000, c. T-6, constitutionally inoperative by reason of the doctrine of federal paramountcy?

Although the constitutional question, as formulated, refers only to s. 102(2), the proceedings below and the parties' submissions concern the section in its entirety. Accordingly, I will examine all of the relevant aspects of s. 102.

**V. Analysis**

13 Various government actors have been involved in this dispute. Unless otherwise specified, I will refer to the province of Alberta as encompassing these different actors. I will first review the principles applicable to the doctrine of federal paramountcy and then apply them to the facts of this appeal.

***A. The Doctrine of Federal Paramountcy***

14 Each level of government — Parliament, on the one hand, and the provincial legislatures, on the other — has exclusive authority to enact legislation with respect to certain subject matters. Sections 91 and 92 of the Constitution Act, 1867 assign each power to the level of government best suited to exercise it: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.) ("*Secession Reference*"), at para. 58. Broad powers were given to the provincial legislatures with respect to local matters, in recognition of regional diversity, while powers relating to matters of national importance were given to Parliament, to ensure unity: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.), at para. 22.

15 Legislative powers are exclusive, and one government is not subordinate to the other: *Secession Reference*, at para. 58, citing *Reference re Initiative & Referendum Act (Manitoba)*, [1919] A.C. 935 (Jud. Com. of Privy Coun.), at p. 942. However, the legislative matrix is not as clearly defined as ss. 91 and 92 might suggest. It is often impossible for one level of government to legislate effectively within its jurisdiction without affecting matters that are within the other level's jurisdiction: *Western Bank*, at para. 29; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at p. 465. Furthermore, it is often impossible to make a statute fall squarely within a single head of power: *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.), at pp. 180-81. This leads to overlap in the exercise of provincial and federal powers. The tendency has been to allow these overlaps to occur as long as each level of government properly pursues objectives that fall within its jurisdiction: *Reference re Securities Act (Canada)*, 2011 SCC 66, [2011] 3 S.C.R. 837(S.C.C.), at para. 57; *PHS Community Services Society v. Canada (Attorney General)*, 2011 SCC 44, [2011] 3 S.C.R. 134 (S.C.C.), at para. 62; *Western Bank*, at paras. 37 and 42. This tendency reflects the theory of co-operative federalism: *Western Bank*, at para. 24; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.), at para. 162.

16 That said, there comes a point where legislative overlap jeopardizes the balance between unity and diversity. In certain circumstances, the powers of one level of government must be protected against intrusions, even incidental ones, by the other level: *Western Bank*, at para. 32. To protect against such intrusions, the Court has developed various constitutional doctrines. For the purposes of this appeal, I need only refer to one: the doctrine of federal paramountcy. This doctrine "recognizes that where laws of the federal and provincial levels come into conflict, there must be a rule to resolve the impasse": *Western Bank*, at para. 32. When there is a genuine "inconsistency" between federal and provincial legislation, that is, when "the operational effects of provincial legislation are incompatible with federal legislation", the federal law prevails: *Newfoundland (Workplace Health, Safety & Compensation Commission) v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53 (S.C.C.), at para. 65, quoting Western Bank, at para. 69; see also *Marine Services*, at paras. 66-68; Multiple Access, at p. 168. The question thus becomes how to determine whether such a conflict exists.

17 First and foremost, it is necessary to ensure that the overlapping federal and provincial laws are independently valid: *Western Bank*, at para. 76; *Husky Oil*, at para. 87. This means determining the pith and substance of the impugned provisions by looking at their purpose and effect: *Western Bank*, at para. 27; *Reference re Firearms Act (Canada)*, 2000 SCC 31, [2000] 1 S.C.R. 783 (S.C.C.), at para. 16. Once a provision's true purpose is identified, its validity will depend on whether it falls within

the powers of the enacting government: *Law Society (British Columbia) v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113 (S.C.C.), at para. 24. If the legislation of one level of government is invalid, no conflict can ever arise, which puts an end to the inquiry. If both laws are independently valid, however, the court must determine whether their concurrent operation results in a conflict.

18 A conflict is said to arise in one of two situations, which form the two branches of the paramountcy test: (1) there is an operational conflict because it is impossible to comply with both laws, or (2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment.

19 What is considered to be the first branch of the test was described as follows in *Multiple Access*, the seminal decision of the Court on this issue:

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other. [Emphasis added; p. 191.]

In *Western Bank*, Binnie and LeBel JJ. referred to this passage as "the fundamental test for determining whether there is sufficient incompatibility to trigger the application of the doctrine of federal paramountcy" (para. 71). Under that test, the question is whether there is an actual conflict in operation, that is, whether both laws "can operate side by side without conflict" (*Marine Services*, at para. 76) or whether both "laws can apply concurrently, and citizens can comply with either of them without violating the other": *Western Bank*, at para. 72; see also *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 60; *Marine Services*, at para. 68; *Burrardview Neighbourhood Assn. v. Vancouver (City)*, 2007 SCC 23, [2007] 2 S.C.R. 86 (S.C.C.), at paras. 77 and 81-82; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.), at para. 53; *R. v. Smith*, [1960] S.C.R. 776 (S.C.C.), at p. 800, per Martland J.

20 In her concurring reasons, my colleague Côté J. formulates this first branch of the test as impossibility of dual compliance as a result of or caused by "an express conflict" (paras. 93 and 122). She cites in support (paras. 102-103) this Court's use of the terms "express contradiction" in *114957 Canada Ltée (Spray-Tech, Société d'arrosage) c. Hudson (Ville)*, 2001 SCC 40, [2001] 2 S.C.R. 241(S.C.C.), at para. 34, and *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961 (S.C.C.), at para. 17, as well as the use by Bastarache J. of the terms "express or 'operational conflict'" in *Western Bank* (para. 126) and *Lafarge* (para. 113). She insists that under this first branch, the express conflict or express contradiction must be found merely on the basis of the "actual words" of the provisions at issue (paras. 105 and 108) and their "literal" sense or requirement (para. 97). She considers that prior cases in which this Court found that an operational conflict existed either mischaracterized the test (at paras. 116-17 she cites *Lafarge*) or conflated it with the second branch pertaining to frustration of purpose (at paras. 115 and 118, she cites *Husky Oil* and *M & D Farm*).

21 I respectfully disagree with these propositions and with my colleague's assessment of this Court's past cases on the first branch of the paramountcy test. I would not characterize these as being "not helpful authority" (para. 118) and as having "confused" the two branches (para. 114). Rather, in my view, this Court's decisions on operational conflict have been coherent and consistent since *Multiple Access*.

22 First, the expression "express contradiction" used in those cases originated in *Multiple Access*. Dickson J. initially used it — at p. 187, in discussing prior decisions of the Court — to describe the test that he ultimately formulated, in the above-quoted passage, as that of "actual conflict in operation" or operational conflict (p. 191). An express contradiction is nothing more than a clear, direct or definite conflict in operation, as opposed to an indirect or imprecise one. It is not an additional condition for a finding of actual conflict in operation.

23 Second, I find no indication in the Court's decisions pertaining to this first branch that the assessment of an actual conflict in operation is limited to the actual words or to the literal meaning of the words of the provisions at issue; quite the contrary. In its recent decision in *Marine Services* for instance, in assessing whether there was an actual conflict in operation under the first branch (paras. 71-83), the Court did not limit itself to a mere literal reading of the provisions at issue. Rather, it found that a proper reading of the provisions based on the modern approach to statutory interpretation (paras. 77-79) led to the conclusion

that the provincial and federal laws could operate side by side without conflict (para. 76). With respect, my colleague misreads my remarks when she states that I support in this regard a broad interpretation of ambiguous federal statutes under this first branch (paras. 111-13). This is not so. *Marine Services* emphasizes that it is the proper meaning of the provision that remains central to the analysis, not merely its literal sense. As I explain below, the provisions at issue in this case are not ambiguous, and I do not give them a broad interpretation to find their ordinary and undisputed meaning. The harmonious interpretation referred to by my colleague is a rule of constitutional interpretation that applies to both branches of the paramountcy test, not merely the first one: *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53 (S.C.C.), at para. 68. It has, however, no bearing on the actual conflict in operation that is, in my view, established here when both laws operate.

24 Finally, I consider that in *Husky Oil* (para. 87) and *M & D Farm* (para. 40), Gonthier J. and Binnie J. respectively referred to the "actual conflict in operation" concept drawn from *Multiple Access* without confusing the two branches of the paramountcy test. As for the reasons of Binnie and LeBel JJ. in *Lafarge*, issued on the same day as *Western Bank* (in which they also penned the majority reasons), I find it hard to suggest that they misstated the test or conflated its two branches, which they in fact analyzed separately (the first at paras. 81-82 and the second at paras. 83-85). On operational conflict, their reference to an "impossibility of ... simultaneous application" (*Lafarge*, at para. 77) echoed the similar comments made in *Western Bank* to the effect that the test amounts to assessing whether "the [two] laws can apply concurrently" (*Western Bank*, at para. 72): see also, on the concept of possible concurrent "application" of both laws, *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188 (S.C.C.), at para. 23.

25 If there is no conflict under the first branch of the test, one may still be found under the second branch. In *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121 (S.C.C.), the Court formulated what is now considered to be the second branch of the test. It framed the question as being "whether operation of the provincial Act is compatible with the federal legislative purpose" (p. 155). In other words, the effect of the provincial law may frustrate the purpose of the federal law, even though it does "not entail a direct violation of the federal law's provisions": *Western Bank*, at para. 73.

26 That said, the case law assists in identifying typical situations where overlapping legislation will not lead to a conflict. For instance, duplicative federal and provincial provisions will generally not conflict: *Marcotte c. Banque de Montréal*, 2014 SCC 55, [2014] 2 S.C.R. 725 (S.C.C.), at para. 80; *Western Bank*, at para. 72; Multiple Access, at p. 190; Hall, at p. 151. Nor will a conflict arise where a provincial law is more restrictive than a federal law: *Lemare Lake*, at para. 25; *Marine Services*, at paras. 76 and 84; *Laferrière c. Québec (Juge de la Cour du Québec)*, 2010 SCC 39, [2010] 2 S.C.R. 536 (S.C.C.) ("*COPA*"), at paras. 67 and 74; *Western Bank*, at para. 103; *Rothmans*, at paras. 18 ff.; *Spraytech*, at para. 35; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 964. The application of a more restrictive provincial law may, however, frustrate the federal purpose if the federal law, instead of being merely permissive, provides for a positive entitlement: *Bruyère c. Québec (Commission de la santé & de la sécurité du travail)*, 2011 SCC 60, [2011] 3 S.C.R. 635 ("*HRSD*"), at paras. 32-33 and 36; *Lafarge*, at paras. 84-85; *Mangat*, at para. 72; Hall, at p. 153. As will become evident from the discussion below, this appeal involves two laws that directly contradict each other, rather than a provincial law which does not fully contradict the federal one, but is only more restrictive than it: see *M & D Farm*; *Clarke v. Clarke*, [1990] 2 S.C.R. 795 (S.C.C.).

27 Be it under the first or the second branch, the burden of proof rests on the party alleging the conflict. Discharging that burden is not an easy task, and the standard is always high. In keeping with co-operative federalism, the doctrine of paramountcy is applied with restraint. It is presumed that Parliament intends its laws to co-exist with provincial laws. Absent a genuine inconsistency, courts will favour an interpretation of the federal legislation that allows the concurrent operation of both laws: *Western Bank*, at paras. 74-75, citing *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.) ("*Law Society of B.C.*"), at p. 356; see also Rothmans, at para. 21; *O'Grady v. Sparling*, [1960] S.C.R. 804(S.C.C.), at pp. 811 and 820. Conflict must be defined narrowly, so that each level of government may act as freely as possible within its respective sphere of authority: *Husky Oil*, at para. 162, per Iacobucci J. (dissenting, but not on this particular point), referring to *Deloitte, Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board)*, [1985] 1 S.C.R. 785(S.C.C.), at pp. 807-8, per Wilson J.

28 This is not to say, however, that courts must refrain from applying the doctrine where the two laws are genuinely inconsistent. In the assessment of such inconsistency for the purposes of paramountcy, a provincial intention to interfere with the federal jurisdiction is neither necessary nor sufficient. In fact, an intention to intrude may call into question the independent

validity of the provincial law: *Husky Oil*, at paras. 44-45. The focus of the paramountcy analysis is instead on the effect of the provincial law, rather than its purpose:

> ... there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy ... in order to render the provincial law inapplicable. It is sufficient that the effect of provincial legislation is to do so.
>
> [Emphasis added.]
>
> (*Husky Oil*, at para. 39)

Assessing the effect of the provincial law requires looking at the substance of the law, rather than its form. The province cannot do indirectly what it is precluded from doing directly: *Husky Oil*, at para. 39.

29 In sum, if the operation of the provincial law has the effect of making it impossible to comply with the federal law, or if it is technically possible to comply with both laws, but the operation of the provincial law still has the effect of frustrating Parliament's purpose, there is a conflict. Such a conflict results in the provincial law being inoperative, but only to the extent of the conflict with the federal law: *Western Bank*, at para. 69; *Rothmans*, at para. 11; *Mangat*, at para. 74. In practice, this means that the provincial law remains valid, but will be read down so as to not conflict with the federal law, though only for as long as the conflict exists: *Husky Oil*, at para. 81; E. Colvin, "Constitutional Law—Paramountcy—Duplication and Express Contradiction—Multiple Access Ltd. v. McCutcheon" (1983), 17 U.B.C.L. Rev. 347, at p. 348.

30 I now turn to the application of the doctrine to the facts of this appeal.

***B. Application***

*(1) The Legislative Schemes at Issue*

31 The first step of the analysis is to ensure that the impugned federal and provincial provisions are independently valid. Early in the proceedings, the parties recognized the validity of the relevant provisions of the *BIA* and the *TSA*. Before this Court, they again conceded the validity of both laws. The only question is whether their concurrent operation results in a conflict. This requires analyzing the legislative schemes at issue at the outset so as to reach a proper understanding of the provisions that are allegedly in conflict.

**(a) The Bankruptcy and Insolvency Act**

32 Parliament enacted the *BIA* pursuant to its jurisdiction over matters of bankruptcy and insolvency under s. 91(21) of the Constitution Act, 1867. The *BIA*, notably through the specific provisions discussed below, furthers two purposes: the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation (*Husky Oil*, at para. 7).

33 The first purpose of bankruptcy, the equitable distribution of assets, is achieved through a single proceeding model. Under this model, creditors of the bankrupt wishing to enforce a claim provable in bankruptcy must participate in one collective proceeding. This ensures that the assets of the bankrupt are distributed fairly amongst the creditors. As a general rule, all creditors rank equally and share rateably in the bankrupt's assets: s. 141 of the BIA; *Husky Oil*, at para. 9. In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379(S.C.C.), at para. 22, the majority of the Court, per Deschamps J., explained the underlying rationale for this model:

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

Avoiding inefficiencies and chaos, and favouring an orderly collective process, maximizes global recovery for all creditors: *Husky Oil*, at para. 7; R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 3.

34 For this model to be viable, creditors must not be allowed to enforce their provable claims individually, that is, outside the collective proceeding. Section 69.3 of the BIA thus provides for an automatic stay of proceedings, which is effective as of the first day of bankruptcy:

> **69.3** (1) Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

(See *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005(S.C.C.), at pp. 1015-16.)

35 Yet there are exceptions to the principle of equitable distribution. Section 136 of the BIA provides that some creditors will be paid in priority. These creditors are referred to as "preferred creditors". There are also creditors that are paid only after all ordinary creditors have been satisfied: ss. 137(1), 139 and 140.1 of the BIA. Furthermore, the automatic stay of proceedings does not prevent secured creditors from realizing their security interest: s. 69.3(2) of the BIA; *Husky Oil*, at para. 9. A court may also grant leave permitting a creditor to begin separate proceedings and enforce a claim: s. 69.4 of the BIA. These exceptions reflect the policy choices made by Parliament in furthering this purpose of bankruptcy.

36 The second purpose of the *BIA*, the financial rehabilitation of the debtor, is achieved through the discharge of the debtor's outstanding debts at the end of the bankruptcy: *Husky Oil*, at para. 7. Section 178(2) of the BIA provides:

> (2) Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.

From the perspective of the creditors, the discharge means they are unable to enforce their provable claims: *Schreyer v. Schreyer*, 2011 SCC 35, [2011] 2 S.C.R. 605(S.C.C.), at para. 21. This, in effect, gives the insolvent person a "fresh start", in that he or she is "freed from the burdens of pre-existing indebtedness": Wood, at p. 273; see also *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109(S.C.C.), at p. 120. This fresh start is not only designed for the well-being of the bankrupt debtor and his or her family; rehabilitation helps the discharged bankrupt to reintegrate into economic life so he or she can become a productive member of society: Wood, at pp. 274-75; L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. rev. (loose-leaf), at p. 6-283. In many cases of consumer bankruptcy, the debtor has very few or no assets to distribute to his or her creditors. In those cases, rehabilitation becomes the primary objective of bankruptcy: Wood, at p. 37.

37 Although it is an important purpose of the *BIA*, financial rehabilitation also has its limits. Section 178(1) of the BIA lists debts that are not released by discharge and that survive bankruptcy. Furthermore, s. 172 provides that an order of discharge may be denied, suspended, or granted subject to conditions. These provisions demonstrate Parliament's attempt to balance financial rehabilitation with other policy objectives, such as confidence in the credit system, that require certain debts to survive bankruptcy: Wood, at pp. 273 and 289.

38 Discharge is the main rehabilitative tool contained in the *BIA*, but it is not the only one. As Professor Wood, at p. 273, observes:

> The bankruptcy discharge is one of the primary mechanisms through which bankruptcy law attempts to provide for the economic rehabilitation of the debtor. However, it is not the only means by which bankruptcy law seeks to meet this objective. The exclusion of exempt property from distribution to creditors, the surplus income provisions, and mandatory credit counselling also are directed towards this goal.

39 Another means of rehabilitation is the automatic stay of proceedings contained in s. 69.3 of the BIA. The stay not only ensures that creditors are redirected into the collective proceeding described above, it also ensures that creditors are precluded from seizing property that is exempt from distribution to creditors. This is an important part of the bankrupt's financial rehabilitation:

> The rehabilitation of the bankrupt is not the result only of his discharge. It begins when he is put into bankruptcy with measures designed to give him the minimum needed for subsistence.
>
> (*Vachon v. Canada (Employment & Immigration Commission)*, [1985] 2 S.C.R. 417(S.C.C.), at p. 430.)

40 In many aspects, the *BIA* is a complete code governing bankruptcy. It sets out which claims are treated as provable claims and which assets are distributed to creditors, and how. It then sets out which claims are released on discharge and which claims survive bankruptcy. That said, the fact remains that the operation of the *BIA* depends upon the survival of various provincial rights: *Husky Oil*, at para. 85; Hall, at p. 155. In this regard, s. 72(1) of the BIA provides:

> **72.** (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

On the one hand, given the procedural nature of the *BIA*, the bankruptcy regime relies heavily on the continued existence of provincial substantive rights, and thus the continued operation of provincial laws: Wood, at pp. 7-8; *Husky Oil*, at para. 30. The ownership of certain assets and the existence of particular liabilities depend upon provincial law: P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 25-8. On the other hand, the *BIA* cannot operate without affecting property and civil rights. Section 72(1) confirms this by stating that, where there is a genuine inconsistency between provincial laws regarding property and civil rights and federal bankruptcy legislation, the *BIA* prevails: see *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123(S.C.C.), at para. 47.

41 In the context of this appeal, we are specifically concerned with an alleged conflict between, on the one hand, one provision of the *BIA*, namely s. 178, the purpose of which is to ensure the financial rehabilitation of the debtor, and, on the other hand, one provision (s. 102) of the provincial scheme, to which I will now turn.

**(b) The Alberta Traffic Safety Act**

42 The *TSA* is the provincial scheme with which the *BIA* is alleged to conflict. Pursuant to s. 92(13) of the Constitution Act, 1867, provincial legislatures have the power to legislate with regard to property and civil rights. The Court has long recognized that this power includes traffic regulation and the authority to set conditions for driver's licences and vehicle permits: *Ross v. Ontario (Registrar of Motor Vehicles)* (1973), [1975] 1 S.C.R. 5(S.C.C.), at pp. 13-14; O'Grady, at p. 810; *Prince Edward Island (Provincial Secretary) v. Egan*, [1941] S.C.R. 396(S.C.C.), at pp. 402 and 415; see also *Gonzalez v. Alberta (Driver Control Board)*, 2003 ABCA 256, 232 D.L.R. (4th) 237 (hereinafter Thomson), at para. 25. The *TSA* is a comprehensive legislative scheme for traffic regulation, "covering virtually all aspects of the regulation of highways and motor vehicles in Alberta", with the aim of ensuring road safety: *Thomson*, at para. 5; Alberta, Legislative Assembly, *Alberta Hansard*, 3rd Sess., 24th Leg., April 12, 1999, at p. 927.

43 Under s. 54(1) of the TSA, no one is allowed to drive or have a motor vehicle on a public road unless the vehicle is insured. Under s. 54(4), a person who contravenes s. 54(1) is liable to a fine or imprisonment. The Registrar of Motor Vehicle Services may also disqualify a person from driving and cancel his or her vehicle registration until that person shows proof of insurance: s. 54(5) and (7).

44 In the event that an uninsured driver causes an accident, Alberta has implemented a compensation program governed by the *MVACA*. A victim injured in the accident may sue the uninsured driver for damages. If the victim is successful but the uninsured driver does not pay, the victim may then apply to the Administrator under the *MVACA* for compensation in the amount of the unsatisfied judgment: s. 5(1). If authorized, the payment is drawn from the General Revenue Fund of the province: s. 5(2). The judgment is then assigned to the Administrator, who can take steps to enforce it against the judgment debtor. The Administrator is thus deemed to be the judgment creditor: s. 5(7).

45 Section 102 of the TSA, the provision at issue in this appeal, complements the *MVACA* program. It allows the Registrar to suspend the debtor's driver's licence and vehicle permits until the judgment debt is paid, up to a maximum amount of $200,000:

> **102(1)** If
>
> (a) a judgment for damages arising out of a motor vehicle accident is rendered against a person by a court in Alberta or in any other province or territory in Canada, and
>
> (b) that person fails, within 15 days from the day on which the judgment becomes final, to satisfy the judgment,
>
> the Registrar, subject to sections 103 and 104 and the regulations, may do one or both of the following:
>
> (c) disqualify the person from driving a motor vehicle in Alberta;
>
> (d) suspend the registration of any motor vehicle registered in that person's name.
>
> **(2)** When, under subsection (1), a person is disqualified from driving a motor vehicle in Alberta or the certificate of registration of that person's motor vehicle is suspended,
>
> (a) the disqualification or the suspension, as the case may be, remains in effect and shall not be removed, and
>
> (b) no motor vehicle shall be registered in that person's name,
>
> until the judgment is satisfied or discharged, otherwise than by a discharge in bankruptcy, to the extent of
>
> . . . . .
>
> (f) at least $200 000, exclusive of interest and costs, if the judgment arises out of a motor vehicle accident occurring on or after January 1, 1986.

46 Section 103 is also a relevant part of this scheme. It allows the judgment debtor to apply for the "privilege" of paying the outstanding judgment debt in instalments. The debtor may recover his or her driving privileges as long as the payments are being made:

> **103(1)** A judgment debtor to whom this Part applies may on notice to the judgment creditor apply to the court in which the trial judgment was obtained for the privilege of paying the judgment in instalments, and the court may, in its discretion, so order, fixing the amounts and times of payment of the instalments.
>
> **(2)** If the Minister responsible for the administration of the *Motor Vehicle Accident Claims Act* has made a payment with respect to a judgment pursuant to the *Motor Vehicle Accident Claims Act*, the judgment debtor
>
> (a) may apply to the Minister responsible for the administration of the Motor Vehicle Accident Claims Act for the privilege of paying the judgment in instalments, in which case that Minister may cause an agreement to be entered into with the debtor for payment by instalments, or
>
> (b) may apply to the court pursuant to subsection (1) *for the* privilege of paying the judgment to the Minister responsible for the administration of the *Motor Vehicle Accident Claims Act* in instalments, in which case the debtor must give notice of the application to the Administrator of the *Motor Vehicle Accident Claims Act*, who may appear personally or by counsel and be heard on the application.
>
> **(3)** Except in a case to which subsection (2) applies, a judgment debtor and the judgment creditor may enter into an agreement for the payment of the judgment in instalments.

> **(4)** While the judgment debtor is not in default in payment of the instalments, the judgment debtor is deemed not to be in default for the purposes of this Part in payment of the judgment, and the Minister in the Minister's absolute discretion may restore the operator's licence and the certificate of registration of the judgment debtor.
>
> **(5)** Notwithstanding subsection (4), if the Minister is satisfied that the judgment debtor has defaulted with respect to complying with the terms of the court order or of the agreement, the judgment debtor's operator's licence and registration shall again be suspended and remain suspended as provided in section 102.

It is worth mentioning that, in theory, ss. 102 and 103 of the TSA do not operate solely in favour of the province. They could also operate in favour of a third party. For instance, the Registrar could suspend the driver's privileges solely for the benefit of a victim of an accident who holds an unsatisfied judgment.

47 The purpose and effect of s. 102 are obvious when it is read in its context: it is meant to deprive the judgment debtor of driving privileges until the judgment arising from a motor vehicle accident is paid in full, or periodic payments in satisfaction of the judgment are being made under s. 103. It is, in substance, a debt collection mechanism. Since the parties conceded that the judgment debt in this appeal is a claim provable in bankruptcy, I would add that the purpose and effect of s. 102, in the context of this appeal, are to suspend a debtor's driving privileges until payment of a provable claim.

48 Alberta disputes this. It submits that s. 102 is not, in substance, a debt enforcement scheme. It contends that the provision merely imposes an additional monetary condition to obtain the privilege of driving. In the appellant's view, this condition mirrors the amount of the judgment debt because it reflects the actual regulatory cost of the driver's failure to comply with the insurance requirement. Alberta maintains that the "payment obligation is inherently regulatory in nature" and that repayment of the judgment debt "is merely incidental to the satisfaction of the regulatory requirement" (A.F., at para. 31). It insists that the purpose of the provision is to discourage people from driving without insurance.

49 I disagree. While it is plausible that s. 102 might discourage drivers from driving uninsured, this is neither its main purpose nor its main effect. For one, the deterrent effect of s. 102, if any, is not tied to the failure to maintain proper insurance. The deterrent effect materializes only if the uninsured driver causes an accident. The accident must also cause injury to a third party. In addition, the victim must seek damages and obtain a judgment. Yet this is still not sufficient. The uninsured driver must also be incapable of satisfying the judgment in question or refuse to do so. Clearly, it is the failure to pay the judgment debt that triggers s. 102, not the failure to be insured. Furthermore, failure to comply with the insurance requirement is already subject to a penalty under s. 54 of the TSA. In sharp contrast to s. 102, s. 54 imposes a monetary penalty (and, in case of default, imprisonment) for the mere failure to comply with the insurance requirement, without more.

50 The distinction Alberta attempts to make between a judgment debt and a regulatory charge is also irrelevant for two reasons. First, s. 102 is clearly aimed at the repayment of a judgment debt. Second, even if it were aimed at recovering the resulting regulatory charge, such a charge would nonetheless be a claim provable in bankruptcy, and as such, it would remain a debt subject to the bankruptcy process.

51 On the first point, the language of the provision is clear: its objective is the satisfaction of the judgment debt. Section 102 is triggered when the judgment debtor "fails... to satisfy the judgment": s. 102(1). It provides that driving privileges will be suspended "until the judgment is satisfied or discharged": s. 102(2). Section 103 is also informative; the suspension of driving privileges stops as soon as payments are being made. The suspension resumes, however, when the debtor defaults.

52 The letters received by the respondent are telling in this regard. On October 27, 2011, the Director, Driver Fitness and Monitoring, wrote this:

> This letter will serve as notification that due to your unsatisfied motor vehicle accident claim, your operator's licence and vehicle registration privileges will be suspended indefinitely ... .
>
> ... the suspension will remain in effect until the following condition(s) are met:

> • satisfy any outstanding Motor Vehicle Accident Claims Fund claim. [Emphasis added; A.R. at p. 48.]

On November 15, 2011, Motor Vehicle Accident Recoveries added this:

> ... I advise that your client, Joseph William Moloney, remains indebted for the judgment debt obtained against him. Section 102(2) of the Traffic Safety Act (copy attached) states that he remains indebted "until the judgment is satisfied or discharged, otherwise than by a discharge in bankruptcy".
>
> Accordingly, we would request that your client contact our office to make payment arrangements suitable to his circumstances. Failure to do so will result in the continued suspension of his driving privileges. [Emphasis added; A.R., at p. 49.]

These letters make no mention of the respondent's failure to comply with the insurance requirement, or of the accident for which he is responsible.

53 In addition, as I mentioned, s. 102 could be used in favour of a third party victim who obtains a judgment but chooses not to seek compensation from the Administrator under the *MVACA*. In such a case, there is no "regulatory cost", since no public funds are being spent. The only effect of s. 102 is to deprive the debtor of driving privileges until he or she pays the judgment creditor.

54 With respect to the second point, even if we were to accept the distinction advocated by Alberta between the judgment debt and the resulting regulatory charge, it has no practical implication. A regulatory charge remains a debt owed to the province, which s. 102 is meant to collect. Not only is it a debt, but it is, like the underlying judgment debt, a provable claim.

55 According to s. 121(1) of the BIA, a provable claim must meet three criteria: (1) there must be a debt, liability or obligation owed to a creditor, (2) which was incurred before the debtor became bankrupt, and (3) it must be possible to attach a monetary value to the debt, liability or obligation (*AbitibiBowater Inc., Re*, 2012 SCC 67, [2012] 3 S.C.R. 443(S.C.C.), at para. 26). Even if the judgment debt were characterized as a regulatory charge, it would meet these criteria. The regulatory charge would arise from a payment made to the victim of an accident caused by the respondent. The respondent's liability to the province arose prior to his assignment in bankruptcy, and it is clearly monetary in nature. As a result, the province's claim for the regulatory charge would be provable in bankruptcy and must be treated as part of the bankruptcy process: *AbitibiBowater*, at para. 40; *Vachon*, at p. 426; *Ontario (Minister of Finance) v. Clarke*, 2013 ONSC 1920, 115 O.R. (3d) 33(Ont. S.C.J.), at para. 52.

56 Therefore, whether one considers the province's claim as a judgment debt or as the resulting regulatory charge, it is still provable in bankruptcy. It follows that the effect of s. 102 is to allow a judgment creditor to deprive the debtor of his or her driving privileges until the debt is paid. In the end, the provision thus compels the payment of a provable claim. Driving is unlike other activities. For many, it is necessary to function meaningfully in society. As such, driving often cannot be seen as a genuine "choice": *R. v. White*, [1999] 2 S.C.R. 417(S.C.C.), at para. 55. The effect of the provincial scheme undoubtedly amounts to coercion in that regard.

57 Before leaving this provincial scheme to consider whether the enforcement mechanism conflicts with the *BIA*, I briefly discuss an argument raised solely by the intervener Superintendent of Bankruptcy on the validity of one component of s. 102(2) of the TSA. The impugned provision states that the suspension of driving privileges continues "until the judgment is satisfied or discharged, otherwise than by a discharge in bankruptcy". While the parties have conceded the validity of the provision, the Superintendent of Bankruptcy, who is also the appellant in the companion appeal, *407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)*, 2015 SCC 52(S.C.C.), argued before us that the words "otherwise than by a discharge in bankruptcy" are *ultra vires* the province and, as a result, severable. In his view, this "phrase is invalid since the Province attempts to explicitly render a discharge in bankruptcy ineffective as against a provincial debt that Parliament has not exempted from the effects of bankruptcy" (factum, at para. 11).

58 As stated previously, neither the parties nor the courts below disputed that s. 102, as a whole, is *intra vires* the province. The dominant purpose and effect of s. 102 are to suspend driving privileges until payment of a judgment debt. This enforcement

scheme is part of the provincial regulation of driving privileges in Alberta. There is no doubt that assuring the financial responsibility of drivers and regulating driving privileges fall within the province's jurisdiction regarding property and civil rights under s. 92(13) of the Constitution Act, 1867. Given this and the way the case has been argued and decided, this appeal is, in my view, properly disposed of by applying the doctrine of paramountcy and ascertaining whether a conflict exists between the *BIA* and the *TSA*.

59 Whether the provincial scheme has the effect of rendering a discharge in bankruptcy "ineffective as against a provincial debt" or negating the operability of a federal law as the Superintendent of Bankruptcy argues (factum, at paras. 11-12) is better resolved as a question of paramountcy. I would add that the words "otherwise than by a discharge in bankruptcy" are necessary only because the province lists the discharge in general, in addition to the satisfaction of the debt, as an event ending the suspension of the privilege. Had the legislation defined the satisfaction of the debt as the sole event capable of ending the suspension, the dominant feature of the provision would remain the same, although the issue of conflict with a discharge in bankruptcy would still arise.

*(2) The Conflict Between the BIA and the TSA*

**(a) Operational Conflict**

60 The Court of Appeal concluded that there was no operational conflict, although it used that term throughout its judgment in reference to conflict generally. It explained that the respondent could resist the payment by foregoing his driving privileges and choosing not to drive (para. 10). The reasons of the Court of Appeal, as well as the submissions of the parties, save for those of the Superintendent of Bankruptcy, relate almost exclusively to the second branch of the applicable test. I believe the Court of Appeal and the parties are mistaken on this point. I therefore respectfully disagree with my colleague Côté J., who holds in her concurring reasons that there is no operational conflict, since a bankrupt "can either opt not to drive or voluntarily pay the discharged debt" (para. 123). In a case like this one, the test for operational conflict cannot be limited to asking whether the respondent can comply with both laws by renouncing the protection afforded to him or her under the federal law or the privilege he or she is otherwise entitled to under the provincial law. In that regard, the debtor's response to the suspension of his or her driving privileges is not determinative. In analyzing the operational conflict at issue in this case, we cannot disregard the fact that whether the debtor pays or not, the province, as a creditor, is still compelling payment of a provable claim that has been released, which is in direct contradiction with s. 178(2) of the BIA:

> If [the respondent] pays the debt, then the provincial law will have required him to pay a debt that has been released by the federal law. If [he] does not pay the debt, then the provincial law will have punished him — by withholding his driver's licence — for failing to pay a debt that has been released by the federal law.
>
> (*Gorguis v. Saskatchewan Government Insurance*, 2011 SKQB 132, 372 Sask. R. 152 (Sask. Q.B.), at para. 25; sent back for rehearing by the Saskatchewan Court of Appeal, which did not address the court's comments on this point (2013 SKCA 32414 Sask. R. 5 (Sask. C.A.)).)

Thus, the laws at issue give inconsistent answers to the question whether there is an enforceable obligation: one law says yes and the other says no.

61 On the one hand, s. 178(2) of the BIA provides that "an order of discharge releases the bankrupt from all claims provable in bankruptcy". In my view, it is undisputed that a discharge under s. 178 of the BIA releases a debtor, thus preventing creditors from enforcing claims that are provable in bankruptcy. My colleague appears to suggest (at para. 96) that, since the actual words of the section say "nothing more" than that the bankrupt is discharged, or since the discharge merely releases provable claims, an interpretation to the effect that the release of such claims means that they cannot be enforced would "add words to the provision". With respect, this amounts to depriving the words of s. 178(2) of their obvious and ordinary meaning. In *Schreyer*, LeBel J. wrote that, "[a]s is clear from the words of s. 178(2) BIA, the discharge operates to release the bankrupt from all claims provable in bankruptcy". He added that, "[f]or creditors, the discharge means that they "cease to be able to enforce claims against the bankrupt that are provable in bankruptcy" (para. 21). I know of no authority that suggests that the words

"order of discharge" or "releases" in that context mean anything other than that the provable claim is unenforceable. To give the words used in s. 178(2) their proper meaning is not to interpret the provision broadly.

62 On the other hand, s. 102(2) of the TSA empowers the province to continue to pressure a debtor by withholding his or her driving privileges "until the judgment is satisfied or discharged, otherwise than by a discharge in bankruptcy". As I mentioned above in my analysis of the legislative schemes, the language of this provision is clear: it provides for the satisfaction of the judgment debt by excluding the impact of a discharge in bankruptcy.

63 One law consequently provides for the release of all claims provable in bankruptcy and prohibits creditors from enforcing them, while the other disregards this release and allows for the use of a debt enforcement mechanism on such a claim by precisely excluding a discharge in bankruptcy. This is a true incompatibility. Both laws cannot operate concurrently (*Sun Indalex*, at para. 60; *Lafarge*, at para. 82; *M & D Farm*, at para. 41; Multiple Access, at p. 191), "apply concurrently" (*Western Bank*, at para. 72) or "operate side by side without conflict" (*Marine Services*, at para. 76). The facts of this appeal indeed show an actual conflict in operation of the two provisions. This is a case where the provincial law says "yes" ("Alberta can enforce this provable claim"), while the federal law says "no" ("Alberta cannot enforce this provable claim"). The provincial law gives the province a right that the federal law denies, and maintains a liability from which the debtor has been released under the federal law. This conflict can hardly be characterized as "indirect" as my colleague suggests (paras. 92 and 128). Nor can I characterize as merely "implicit" the clear prohibition in s. 178(2) against enforcing provable claims that have been discharged. It is not in dispute that s. 178(2) is a prohibitive provision; considering the meaning of the words "order of discharge" and "releases", what the provision "exactly" prohibits is the enforcement of discharged provable claims. There is no other "possible ramification" in terms of what this section prohibits.

64 There was indeed much discussion about the effect of a discharge in the parties' submissions. To avoid a finding of conflict, Alberta submitted that in bankruptcy, the debt is not extinguished but merely "released". It asserted that the *BIA* precludes only the "civil enforcement" of the debt through "civil process"; it does not affect the province's ability to insist on licensing requirements.

65 In *Schreyer*, LeBel J. described the effect of discharge. While recognizing that the debt is not extinguished, he explained that a discharge prevents creditors from enforcing those claims that are provable in bankruptcy:

> ... every claim is swept into the bankruptcy and ... the bankrupt is released from all of them upon being discharged unless the law sets out a clear exclusion or exemption... .
>
> The only reservation I have with the decision of the Court of Appeal in the case at bar relates to its numerous statements that the operation of s. 178(2) *BIA* has the effect of "extinguishing" the equalization claim. With respect, this provision does not purport to extinguish claims that are provable in bankruptcy pursuant to s. 121 *BIA*, but "releases" the debtor from such claims: see, on this point, *Re Kryspin* (1983), 40 O.R. (2d) 424 (H.C.J.), at pp. 438-39; and *Ross, Re* (2003), 50 C.B.R. (4th) 274 (Ont. S.C.J.), at para. 15. As is clear from the words of s. 178(2) *BIA*, the discharge operates to release the bankrupt from all claims provable in bankruptcy. For creditors, the discharge means that they "cease to be able to enforce claims against the bankrupt that are provable in bankruptcy". [Emphasis added; paras 20-21.]
>
> (Citing Houlden, Morawetz and Sarra, at p. 6-283.)

66 This description is consistent with the term "releases" found in s. 178(2), which means "[l]iberation from an obligation, duty, or demand; the act of giving up a right or claim to the person against whom it could have been enforced": *Black's Law Dictionary* (10th ed. 2014), at p. 1480. As a result of s. 178(2), creditors are deemed to give up their right to enforce their provable claims. The verb "enforce", as used by LeBel J. and Houlden, Morawetz and Sarra, means "to compel obedience": *Black's Law Dictionary*, at p. 645. The non-extinguishment of the debt may be relevant in some cases, such as those involving the liability of a third party (see *Buchanan, Re*, 2007 NSCA 68, 255 N.S.R. (2d) 286 (N.S. C.A.); Miller, Re200127 C.B.R. (4th) 107(Ont. S.C.J.)). This is, however, of no practical relevance to this appeal. Section 178(2) is clear: a creditor cannot compel the debtor to pay a debt that was released on discharge.

67 In this appeal, the payment which the province seeks to recover is a provable claim. In substance, the purpose and effect of s. 102 are to compel payment of that provable claim. That claim was properly released, since neither the province's judgment debt, nor the resulting regulatory charge, is exempt from discharge under s. 178(1). As a provable claim is subject to s. 178(2), the province is precluded from compelling payment of the judgment debt.

68 Contrary to the appellant's contention, nothing suggests that s. 178(2) merely precludes civil enforcement of provable claims. Accepting the appellant's argument would amount to adding words to the provision that do not exist, and that the legislator did not include. While being expressly precluded from compelling payment of a discharged provable claim, the province could create an administrative scheme that had the effect of coercing a discharged debtor to pay a debt that has been released. The appellant's argument must be rejected. Pursuant to s. 178(2) of the BIA, creditors are precluded from compelling payment of a claim provable in bankruptcy, through either civil or administrative processes.

69 Neither can the question under the operational conflict branch of the paramountcy test be whether it is possible to refrain from applying the provincial law in order to avoid the alleged conflict with the federal law. To argue that the province is not required to use s. 102 in the context of bankruptcy, or that it can choose not to withhold the respondent's driving privileges, leads to a superficial application of the operational conflict test. To suggest that a conflict can be avoided by complying with the federal law to the exclusion of the provincial law cannot be a valid answer to the question whether there is "actual conflict in operation", as the majority of the Court put it in *Multiple Access*: see also *COPA*, at para. 64. To so conclude would render the first branch of the paramountcy test meaningless, since it is virtually always possible to avoid the application of a provincial law so as not to cause a conflict with a federal law. Furthermore, any provincial law that could survive the first branch under the latter argument would necessarily also survive the second branch. If it is possible to avoid operational conflict simply by declining to apply the provincial law, the same could be done to avoid any frustration of the federal purpose under the second branch.

70 In fact, this would be tantamount to rendering the provincial law inoperative to the extent of the conflict even before a conflict is found. Under the doctrine of paramountcy, this is precisely the remedy that courts grant once a conflict is found; it is not a tool courts can use to avoid finding a conflict. The remedy of not applying the provincial law cannot be determinative of whether a conflict exists in the first place. In this case, whether or not the province has discretion not to apply s. 102 is irrelevant: see *Lafarge*, at para. 75. The province chose to take advantage of the scheme. The question is whether it can do so while also complying with the *BIA*.

71 This view, with which my colleague disagrees, appears to me to be consistent with this Court's jurisprudence on operational conflict. For instance, in *M & D Farm*, the creditor held a mortgage on the debtors' family farm. After defaulting on the mortgage, the debtors obtained a stay of proceedings under the federal Farm Debt Review Act, R.C.S. 1985, c. 25 (2nd Supp.). While the stay was still in effect, the creditor sought, and was granted, leave under the provincial Family Farm Protection Act, C.C.S.M., c. F15, which authorized the immediate commencement of foreclosure proceedings. The question arose as to whether there was a conflict between the federal stay and the provincial leave. The Court concluded that there was an operational conflict (pp. 982-85), and this conclusion was later reaffirmed in *Lafarge*, at para. 82, and again in *Lemare Lake*, at para. 18. As I read *M & D Farm*, the fact that the debtors could choose to voluntarily pay the mortgage debt, as my colleague suggests, did not mean that there was no operational conflict. Nor was conflict avoided because the creditor could have chosen not to seek leave to commence foreclosure proceedings. There was an operational conflict because the provincial law expressly authorized the very proceedings that the federal stay precluded.

72 More recently, in *Sun Indalex*, Deschamps J., with Moldaver J. concurring, found that there was an operational conflict (the Court was unanimous on this point). On the one hand, there was an order made under the federal Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, which authorized an insolvent company to obtain debtor-in-possession ("DIP") financing and granted priority to the DIP lender. On the other hand, the provincial Personal Property Security Act, R.S.O. 1990, c. P.10, gave priority to the administrator of the company's employee pension plans: para. 60. Deschamps J. did not avoid the operational conflict by concluding, for instance, that the debtor could have chosen not to seek DIP financing in the first place.

73 My analysis does not "expan[d] the definition of conflict in the first branch" of the paramountcy test, nor does it "conflat[e]" its two branches, contrary to what my colleague indicates (paras. 93 and 106). In my view, this analysis instead applies the principles developed by this Court on federal paramountcy to the operational conflict situation at issue here, where the federal law includes a prohibition that the provincial law effectively disregards. I discuss the two legislative schemes separately from the application of the two branches of the paramountcy test. My analysis of the operational conflict focuses on the existence of an actual and direct conflict between the provisions at issue. The two branches are not "conflated" simply because, in a situation like the current one, the wording of s. 178(2) and the clear prohibition it contains happen to exemplify the goal behind the provision and one of the key objectives of the *BIA*, that is, the financial rehabilitation of the debtor. I consider that my colleague's remarks to the effect that impossibility of dual compliance is a "secondary consideration" in my discussion of operational conflict (para. 99) are misplaced as well. The classic statement of the test for operational conflict in *Multiple Access* that she cites with approval (para. 100) is precisely the one I am relying upon here. It is in light of that statement that I find there is no real possibility of dual compliance as understood by this Court. Indeed, the opposite conclusion would depend on a creditor refusing to apply (or a debtor refusing to comply with) the provincial law, or, alternatively, on a debtor renouncing (or a creditor refusing to comply with) the protection afforded by the federal law. To find a possibility of dual compliance with the conflicting laws at issue — on the basis of hypotheticals that call for "single" compliance, by any one of the actors involved, with one law but not with the other — would be inconsistent with this Court's precedents on federal paramountcy.

74 In this regard, this case is distinguishable from precedents like *Rothmans* and *COPA*, on which my colleague relies. Those cases both dealt with provincial laws that took a more restrictive approach to matters covered by permissive federal laws. In each of them, the relevant statutes were held not to create an operational conflict. In *COPA*, the federal Aeronautics Act, R.S.C. 1985, c. A-2, allowed private citizens to build airports, while the provincial *Act respecting the preservation of agricultural land and agricultural activities*, R.S.Q., c. P-41.1, prohibited such activities on agricultural land absent an administrative authorization: para. 8. In *Rothmans*, s. 30 of the federal Tobacco Act, S.C. 1997, c. 13, permitted the display of tobacco products at retail, while the provincial Tobacco Control Act, S.S. 2001, c. T-14.1, banned the advertising, display and promotion of tobacco products in places where persons under 18 years of age were allowed. *Rothmans* and *COPA* did not involve a direct contradiction between the two applicable laws as does the instant case. They merely involved one law that imposed stricter conditions in allowing activities that were also permitted by the government at the other level. In the case at bar, the question with respect to operational conflict is whether debts incurred while driving uninsured can be enforced even though the debtor has been discharged from bankruptcy. On this question, the two laws directly contradict each other.

75 I therefore conclude that s. 102 of the TSA allows the province, or a third party creditor, to enforce a provable claim that has been released. To that extent, it conflicts with s. 178(2) of the BIA. It is impossible for the province to apply s. 102 without contravening s. 178(2) and, as a result, for the respondent to simultaneously be liable to pay the judgment debt under the provincial scheme and be released from that same claim pursuant to s. 178(2): *Lafarge*, at para. 82; *M & D Farm*, at para. 41. Section 178 is a complete code in that it sets out which debts are released on discharge and which debts survive bankruptcy. In effect, s. 102 creates a new class of exempt debts that is not listed in s. 178(1). Hence, in the words used by my colleague in her reasons (paras. 95, 110 and 128), "the provincial law allows the very same thing" — the enforcement of a debt released under s. 178(2) of the BIA — that "the federal law prohibits". The result is an operational conflict between the provincial and federal provisions.

76 Although this conclusion makes it unnecessary to discuss the second branch of the test, I will nonetheless address it in order to respond to the province's arguments.

**(b) Frustration of Federal Purpose**

***(i) Financial Rehabilitation***

77 Like the lower courts, I find that the province's use of its administrative powers relating to driving privileges to burden the respondent until he repays a discharged debt frustrates the financial rehabilitation of the bankrupt. The effect of s. 102 directly contradicts and defeats the purpose of the discharge provided for in s. 178(2):

> The *BIA* permits an honest but unfortunate debtor to obtain a discharge from debts subject to reasonable conditions. The *Act* is designed to permit a bankrupt to receive, after a specified period a complete discharge of all his or her debts in order that he or she may be able to integrate into the business life of the country as a useful citizen free from the crushing burden of debts... .
>
> [Emphasis added.]
>
> (Houlden, Morawetz and Sarra, at p. 1-2.1)

As explained already, the language of s. 178(2) makes it clear that the purpose of this provision is to give effect to one of the goals underlying the *BIA* regime — the financial rehabilitation of the debtor — by releasing "the bankrupt from all claims provable in bankruptcy". In other words, s. 178(2) is aimed precisely at providing the bankrupt with a fresh start. The facts of this case establish that the province's use of s. 102 despite the respondent's discharge undermines this purpose.

78 The respondent was a truck driver. In 1996, after the accident, the province was assigned the judgment rendered against him in the amount of $194,875. In 2008, after attempting to pay the debt in instalments for about 12 years, he made an assignment in bankruptcy. At that time, the outstanding amount of the debt had increased to $195,823; it was, by far, the largest of the respondent's financial liabilities. In 12 years, the respondent had not been able to keep up with his interest payments. The crushing burden of the province's claim against him was the main reason for his bankruptcy. In 2012, at the time his application for discharge was heard, the respondent had only managed to pay the judgment debt down to $192,103.79. By the effect of s. 102, he was exiting bankruptcy while carrying the same financial burden that had caused his bankruptcy four years earlier. If s. 102 is allowed to operate despite the respondent's discharge, the respondent is not offered the opportunity to rehabilitate that Parliament intended to give him. This is particularly compelling in the respondent's case. As a truck driver, his ability to gain a livelihood is tied to his ability to drive. But more generally, inability to drive can constitute a significant impediment to any person's capacity to earn income: see Lucar, Re200132 C.B.R. (4th) 270(Ont. S.C.J.), at paras. 22-23.

79 In furthering financial rehabilitation, Parliament expressly selected which debts survive bankruptcy and which are discharged: s. 178(1) and (2). It did so having regard to competing policy objectives. This is a delicate exercise, because the more claims that survive bankruptcy, the more difficult it becomes for a debtor to rehabilitate: *AbitibiBowater*, at para. 35; *Schreyer*, at para. 19. In 1970, the Study Committee on Bankruptcy and Insolvency Legislation emphasized this concern:

> ... much of the rehabilitative effect of his discharge and release from debts is lost, when a bankrupt is left with substantial debts after his discharge. Indeed, in some cases, it may almost be regarded as a mockery of the bankruptcy system to take all of the sizable property of a debtor, distribute it among the creditors and then leave the debtor to cope with some of his largest creditors from whose debts he has not been released.
>
> (*Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970), at para. 3.2.085)

When operating in the context of bankruptcy, s. 102 undermines this balancing exercise and imperils the bankrupt's ability to rehabilitate. In effect, s. 102 creates a new class of debts that survive bankruptcy. As such, it leaves the debtor with a substantial financial liability that was not contemplated by Parliament. Had Parliament intended judgment debts arising from motor vehicle accidents, or the resulting regulatory charges, to survive bankruptcy, it would have stated so expressly in s. 178(1) of the BIA. It did not. Together, s. 178(1) and (2) are comprehensive. It is beyond the province's constitutional authority to interfere with Parliament's discretion in that regard.

80 Notwithstanding this, Alberta asserts that, like any creditor, the province is allowed to form a new binding contract with the discharged bankrupt for the repayment of the debt. In its view, the respondent's driving privileges can serve as fresh consideration for such a contract. I disagree. Like the Court of Appeal, I conclude that this alleged fresh consideration is neither genuine nor consistent with the purpose of s. 178(2).

81 As a general rule, a creditor cannot cause a debtor to revive an obligation from which the debtor was released, unless the creditor offers fresh consideration: Wood, at p. 301. Between private parties, it is arguable that a debtor may freely agree to revive a discharged debt in exchange for the creditor's provision of goods or services. The province, however, is unlike any private creditor. While a private creditor is under no obligation to provide goods or services, the province cannot withhold the respondent's driving privileges arbitrarily. Suspension of privileges by administrative bodies must be based on a legal rule: see *Roncarelli c. Duplessis*, [1959] S.C.R. 121 (S.C.C.), at pp. 141-42; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473(S.C.C.), at para. 59; *Secession Reference*, at para. 71; *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.), at para. 10. In the case at bar, the effect and purpose of s. 102 are to compel payment of a discharged debt, which conflicts with s. 178(2). As a result, s. 102 is, to that extent, inoperative and cannot ground the province's authority to withhold the respondent's privileges. If those privileges are being suspended on the sole basis that the respondent refuses to satisfy a judgment debt that was released in bankruptcy, the province is acting without authority. The province's promise to refrain from doing what it has no authority to do cannot constitute fresh consideration capable of supporting any contract. This includes a contract for the repayment of a discharged debt. More importantly, the respondent need not enter into such a contract in order to recover his driving privileges, because the province has no authority to withhold them.

82 Finally, Alberta's other assertion, to the effect that Parliament's power over bankruptcy and insolvency matters does not extend to the regulation of driving privileges, does not entail that the province can withhold those privileges on the basis of an unpaid released debt. In my view, the province is conflating the scope of Parliament's authority and the consequences of the conflict between the *BIA* and the *TSA*. The financial responsibility of drivers is a valid matter of provincial concern and jurisdiction, and the province can set the conditions for driving privileges with this consideration in mind. Nonetheless, when the province denies a person's driving privileges on the sole basis that he or she refuses to pay a debt that was discharged in bankruptcy, the province's condition conflicts with s. 178(2) of the BIA and is, to that extent, inoperative. To so conclude does not transfer the power to regulate driving privileges to Parliament. The obligation to grant those privileges flows from the provisions of the provincial law that remain operative.

83 The rehabilitative purpose of s. 178(2) is not meant to give debtors a fresh start in all aspects of their lives. Bankruptcy does not purport to erase all the consequences of a bankrupt's past conduct. However, by ensuring that all provable claims are treated as part of the bankruptcy regime, the *BIA* gives debtors an opportunity to rehabilitate themselves financially. While this does not amount to erasing all regulatory consequences of their past conduct, it is certainly meant to free them from the financial burden of past indebtedness.

***(ii) Equitable Distribution***

84 The Court of Appeal concluded that the *TSA* also disrupts the equitable distribution purpose of the *BIA*. In that court's view, the province's legislative scheme allows it to obtain more than the ordinary dividend paid under the bankruptcy regime, which is contrary to the objective of the *BIA* to "treat all creditors of the same class equally" (para. 50). For its part, the province asserts that s. 102 does not alter the priorities set out in the *BIA*, since payment for the privilege of driving does not draw on the estate of the bankrupt that is available to other creditors.

85 I disagree with this conclusion of the Court of Appeal. The purpose of s. 178, the only provision of the *BIA* that is at issue in this appeal, is to give the discharged bankrupt a fresh start. The section sets out the limits of this fresh start by excluding specific debts from being released by the order of discharge (s. 178(1)), and it provides for the consequences of that order by releasing the bankrupt from all other provable claims (s. 178(2)). Section 178 does not further the purpose of equitable distribution of assets. What the Court of Appeal points to are the consequences of survival of the judgment debt as a result of s. 102 of the TSA, despite the discharge contemplated in s. 178. This concerns the financial rehabilitation purpose of the *BIA* and nothing more.

86 This Court has repeatedly cautioned against giving "too broad a scope to paramountcy on the basis of frustration of federal purpose": *Lemare Lake*, at para. 23, quoting Marcotte, at para. 72; *Marine Services*, at para. 69; *Western Bank*, at para. 74. In the federal paramountcy analysis, it is therefore always essential to ascertain the exact purpose of the specific provision of the federal law that is at issue. The Court of Appeal does not cite any authority supporting the assertion that s. 178 has

purposes other than the debtor's financial rehabilitation. Although other provisions of the *BIA*, discussed earlier in these reasons and dealing mostly with the property of the bankrupt and the administration of the bankrupt's estate, are meant to ensure this equitable distribution purpose, those provisions are not at issue in the case at bar. At best, the assertion made by the Court of Appeal unduly broadens the *BIA*'s equitable distribution purpose and the related single proceeding model. This is contrary to the presumption of constitutionality according to which, "[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes": *Western Bank*, at para. 75, quoting *Law Society of B.C.*, at p. 356; *Marine Services*, at para. 69.

87 Professor Wood, at p. 3, explains as follows the rationale behind the collective proceeding through which equitable distribution is achieved:

> The race to grab assets in the absence of a collective insolvency regime does not provide an environment within which an efficient and orderly liquidation can occur. The process is inefficient because each creditor must separately attempt to enforce their claims against the debtor's assets, and this produces duplication in enforcement costs. The piecemeal selling off of assets also results in a much smaller recovery than if a single person were in control of the liquidation. Similarly, the race to seize assets does not produce an environment within which negotiations with creditors can easily occur. A reasonable creditor who is inclined to negotiate with the debtor will be unlikely to do so if other creditors are actively taking steps to make away with the debtor's realizable assets; instead, the creditor will feel compelled to join the wild dash to seize assets. Although some of the creditors (those who are able to strike first) are better off in such a scenario, the creditors as a group receive less than if a more orderly liquidation or negotiated arrangement had taken place.
>
> (See also *Husky Oil*, at para. 7.)

88 The single proceeding model is focused on ensuring the orderly distribution of assets and reducing inefficiencies, and ultimately on maximizing global recovery for creditors. If, after the bankrupt's discharge, that is, after the administration of the estate and the orderly distribution contemplated by the *BIA*, the province is allowed to compel a bankrupt to make payments outside the collective proceeding and to obtain property that would not, in any event, be distributed to the creditors as part of the bankruptcy process, I fail to see how the single proceeding model is disrupted. The assets to be distributed to creditors remain the same, and they are still allocated according to the bankruptcy scheme and any priorities it dictates. Whether or not s. 102 of the TSA operates after the discharge does not impact the orderly distribution to creditors, nor does it affect the pool of assets to be distributed to them. In this regard, the judgment debt is not "preferred" or given any kind of priority under the *BIA* scheme; it is quite simply unaffected by the bankruptcy process as a result of the provincial scheme in the same way as the other debts listed in s. 178(1) that are not released by the order of discharge. The operation of s. 102 does not cause any chaos or inefficiencies in the bankruptcy process. If anything, allowing s. 102 to operate increases global recovery for the other creditors while leaving the single proceeding intact.

89 Thus, although it is clear that the purpose of s. 178(2) is to ensure the debtor's financial rehabilitation and that s. 102 frustrates that purpose, I am not convinced that the operation of the provincial scheme in the context of this appeal interferes with the equitable distribution of assets, a purpose that is undoubtedly served by other provisions of the *BIA*, but not by s. 178.

**VI. Disposition**

90 In my view, the doctrine of paramountcy dictates that s. 102 of the TSA is inoperative to the extent that it conflicts with the *BIA*, and in particular s. 178(2). Therefore, the province cannot withhold the respondent's driving privileges on the basis of an unsatisfied but discharged judgment debt. I would dismiss the appeal with costs and answer the constitutional question as follows:

> Is s. 102(2) of the Alberta *Traffic Safety Act*, R.S.A. 2000, c. T-6, constitutionally inoperative by reason of the doctrine of federal paramountcy?

Answer: Yes, s. 102 of the Alberta *Traffic Safety Act* is inoperative to the extent that it is used to enforce a debt discharged in bankruptcy.

***Côté J.* (McLachlin C.J.C. concurring):**

91 I agree that what is at the core of this appeal is the frustration of a federal purpose. Therefore, I concur with Gascon J. insofar as he finds that s. 102 of the Alberta Traffic Safety Act, R.S.A. 2000, c. T-6 ("TSA"), frustrates the purpose of financial rehabilitation that underlies s. 178(2) of the federal Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA"), and that s. 102 is accordingly inoperative to the extent of the conflict by reason of the doctrine of federal paramountcy. However, I do not believe that there is an operational conflict to speak of in this appeal.

92 There is no doubt in my mind that s. 102 of the TSA allows Alberta to do indirectly what it is implicitly prohibited from doing under s. 178(2) of the BIA, but in light of the indirect nature of the conflict, this issue is properly dealt with on the basis of the second branch of the federal paramountcy test, not the first.

93 In my respectful view, Gascon J.'s analysis contrasts with the clear standard that has been adopted for the purpose of determining whether an operational conflict exists in the context of the federal paramountcy test: impossibility of dual compliance as a result of an express conflict. My colleague's approach conflates the two branches of the federal paramountcy test, or at a minimum blurs the difference between them and returns the jurisprudence to the state it was at before the second branch was recognized as a separate branch. And it has an additional serious adverse effect: by expanding the definition of conflict in the first branch, it increases the number of situations in which a federal law might be found to pre-empt a provincial law without an in-depth analysis of Parliament's intent.

94 To support his approach, my colleague relies on cases that were decided before "frustration of purpose" was recognized as a separate branch of the test. He also relies on subsequent decisions in which the two branches were confused. In my view, *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961S.C.C. ("M & D Farm"), and Burrardview Neighbourhood Assn. v. Vancouver (City)2007 SCC 23[2007] 2 S.C.R. 86 (S.C.C.) ("*Lafarge*"), cannot be found to represent a consistent and coherent approach to the interplay between the two branches.

95 In the case at bar, it is clear from the provisions themselves that as a result of how the two legislatures decided to exercise their respective powers, dual compliance is not impossible. The provincial and federal provisions at issue do not expressly conflict; they are different in terms of their contents and of the remedies that they provide. One of them does not permit what the other specifically prohibits.

96 Under s. 178 of the BIA, a bankrupt is discharged from all claims provable in bankruptcy. That section says nothing more. One must be careful, in light of the federal purpose of financial rehabilitation, not to add words to the provision.

97 Thus, s. 102 of the TSA does not revive an extinguished claim *per se*; if a debtor chooses not to drive, the province simply cannot enforce its claim. Rather, s. 102 allows the province to suspend a driver's licence, which gives it some leverage to compel payment of the debt *if the driver decides to drive*. The bankrupt is still discharged in the literal sense of the words of s. 178(2) of the BIA. This is not a situation of express conflict in which one law says "yes" while the other says "no". The two statutes answer different questions. In the end, the literal requirement of the federal statute is, strictly speaking, met. It therefore follows that the two acts can operate side by side without conflict. To conclude otherwise would be to disregard the distinct contents of the two provisions and the remedies that they provide.

98 This is why I am of the view that this appeal must be decided on the basis of the frustration of a federal purpose, an issue in respect of which the applicable standard is higher, and that requires an in-depth analysis of Parliament's intent.

**VII. Impossibility of Dual Compliance**

99 In my colleague's discussion of operational conflict, *impossibility* of dual compliance, instead of being at the forefront of the analysis, seems to be a secondary consideration. Yet it is the undisputed standard for determining whether an operational conflict exists, and one that very few cases will meet.

100 In the jurisprudence, impossibility of dual compliance has become synonymous with operational conflict: see e.g. P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 16-4 ("Impossibility of dual compliance"). This may largely be due to this Court's repeated emphasis on the definition of operational conflict articulated by Dickson J. (as he then was) in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.) ("*Multiple Access*"): "... there is actual conflict in operation ... where one enactment says 'yes' and the other says 'no'; 'the same citizens are being told to do inconsistent things'; compliance with one is defiance of the other" (p. 191 (emphasis added)).

101 In *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188 (S.C.C.) ("*Rothmans*"), Major J. stressed that *Multiple Access* is "often cited for the proposition that there is an inconsistency for the purposes of the doctrine if it is impossible to comply simultaneously with both provincial and federal enactments" (para. 11). Major J. also described an operational conflict as a situation in which the provincial law "mak[es] it impossible to comply" with the federal law (para. 14). Binnie and LeBel JJ. would subsequently state in *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.), that provincial and federal laws are incompatible where "it is impossible to comply with both laws" (para. 75). Impossibility of dual compliance continues to be the standard for conceptualizing operational conflict and determining whether one exists: see e.g. *Laferrière c. Québec (Juge de la Cour du Québec)*, 2010 SCC 39, [2010] 2 S.C.R. 536 (S.C.C.) ("*COPA*"), at para. 64.

102 The requirement of an "express contradiction", discussed in *114957 Canada Ltée (Spray-Tech, Société d'arrosage) c. Hudson (Ville)*, 2001 SCC 40, [2001] 2 S.C.R. 241 (S.C.C.) ("*Spraytech*"), at para. 34, is inseparable from impossibility of dual compliance as a clear expression of the prudent measure of restraint displayed in the line of cases in which the first branch of the federal paramountcy test was developed. It echoes the proposition that for the two laws to conflict, each one has to say exactly the opposite of what the other says (one law says "yes" and the other says "no"). A less direct conflict is simply not enough.

103 In *Canadian Western Bank*, Bastarache J. indicated that the only type of conflict capable of triggering the first branch is one that is "express" (para. 126). See also *Lafarge*, at para. 113. In *M & D Farm*, on which my colleague relies extensively, Binnie J., writing for the Court, acknowledged that the federal enactment will prevail only in the event of "an express contradiction" (para. 17). The Court had also previously used the expression "direct conflict" to characterize this requirement: *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59 (S.C.C.), at pp. 64-65. Peter W. Hogg states that the requirement is "a very tight restriction on the paramountcy doctrine, since cases where the provincial law expressly contradicts the federal law are few and far between": "Paramountcy and Tobacco" (2006), 34 *S.C.L.R.* (2d) 335, at p. 338 (emphasis added). In the absence of an express conflict, the two provisions are deemed to be capable of operating side by side. This idea also underlies the reasons of the majority in *COPA*, who found that there was no operational conflict, because the federal statute did not require the construction of an aerodrome, whereas the provincial law prohibited it (para. 65).

104 In light of the modern jurisprudence, this restrained approach to operational conflict is therefore inescapable. There are good reasons for maintaining such a strict standard for operational conflict. Iacobucci J. (dissenting, but not on this point) explained the rationale behind it in *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453(S.C.C.):

> In closing, although I find there to be no conflict between s. 133(1) and the *Bankruptcy Act*, I posit that, even if there were to be some element of conflict, this must be evaluated in light of the fact that the provincial legislation is *intra vires*. Legislation that is *intra vires* is permitted to have an incidental and ancillary effect on a federal sphere. I would emphasize again that this Court has traditionally declined to invoke the paramountcy doctrine in the absence of actual operational conflict. I am uncomfortable with the "water-tight" approach to federal bankruptcy legislation propounded by the respondents. To interpret the quartet as requiring the invalidation of provincial laws which have any effect on the bankruptcy process is to undermine the theory of co-operative federalism upon which (particularly post-war) Canada has been built. In *Deloitte Haskins [and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785], at pp. 807-8, Wilson J. recognized it to be

> appropriate to adopt as narrow a definition of operational conflict as possible in order to allow each level of government as much area of activity as possible within its respective sphere of authority. [Emphasis added; para. 162.]

Such a high standard is consistent with co-operative federalism and with the idea, as eloquently expressed by my colleague Abella J. for the majority in *NIL/TU,O Child & Family Services Society v. B.C.G.E.U.*, 2010 SCC 45, [2010] 2 S.C.R. 696(S.C.C.), that "[t]oday's constitutional landscape is painted with the brush of co-operative federalism", which requires that courts accept an overlap "between the exercise of federal and provincial competencies" as inevitable (para. 42). If, in practice, the wording of the statutes makes it possible to comply with both of them, then co-operative federalism requires this Court to find that the federal and provincial statutes are compatible, at least at the first stage of the analysis. If there is a doubt in this regard, the issue should be addressed at the second stage, since an interpretation of the federal and provincial legislation that results in a finding of compatibility should be favoured at the first stage.

105 This is where I cannot agree with my colleague. Rather than assessing the possibility of dual compliance and the existence or absence of an express operational conflict, Gascon J. begins by characterizing the effect of s. 102 of the TSA. In his view, that effect is to permit the enforcement of a discharged debt. He then finds that compelling the payment of such a debt is prohibited by s. 178(2) of the BIA, as its purpose is to give the bankrupt a fresh start. My colleague interprets s. 178(2) of the BIA broadly on the basis of Parliament's intent to foster the financial rehabilitation of the bankrupt, and this results in a conflict. In other words, rather than considering whether to comply with one statute is to defy the other, he considers whether the effects of the provincial statute seem to be incompatible with the federal prohibition. Instead of considering only the actual words of both provisions, he takes into account their purposes and their effects.

106 As I mentioned above, his analysis thus conflates the two branches of the federal paramountcy test, or at a minimum blurs the difference between them and returns the jurisprudence to the state it was at before the second branch was recognized as a separate branch.

107 With all due respect, as the Chief Justice stated in *COPA*, the two branches of the modern federal paramountcy test relate to "two different forms of conflict" (para. 64). See also *Newfoundland (Workplace Health, Safety & Compensation Commission) v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53 (S.C.C.) ("*Marine Services*"), at para. 68. While it is true that they overlap, it is not true that a finding of an operational conflict in the first branch will necessarily entail a finding of frustration of a federal purpose in the second branch. An overlap between the two forms of conflict does not mean the branches are necessarily redundant. The party that invokes the frustration of a federal purpose bears the burden of proof, and the standard of proof is high: *COPA*, at para. 66. The federal scheme may be drafted in a manner that does not match the record of Parliament's intent, but that results in an express conflict with a provincial law. If the frustration of a federal purpose can be used to find that an operational conflict exists, there is really no point in having two branches of the test. If the Court wishes to merge the two branches, it cannot do so without overruling *Rothmans*, *COPA* and *Marine Services* on this point.

108 The first branch of the federal paramountcy test is concerned with incompatibility *of the provisions*, that is, an incompatibility that is evident on the face of the provisions themselves. An analysis in this regard takes the federal statute as a starting point and focusses on its actual wording. This analysis requires an inquiry, based on the wording of the federal statute, into whether there is room for the provincial law to operate. In this context, the content of each of the laws and the remedies that they provide are of considerable importance.

109 For all these reasons, even a superficial possibility of dual compliance will suffice for a court to conclude that there is no operational conflict: *Law Society (British Columbia) v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113 (S.C.C.) ("*Mangat*"), at para. 72. By the same logic, a duplication of federal and provincial legislation will not on its own amount to operational conflict: Multiple Access, at p. 190, per Dickson J. for the majority. In addition, where federal legislation is broad and permissive, a restrictive provincial scheme will usually be deemed not to conflict with it, because it will be possible to comply with both of them by conforming to the more restrictive provincial law: *Bruyère c. Québec (Commission de la santé & de la sécurité du travail)*, 2011 SCC 60, [2011] 3 S.C.R. 635 (S.C.C.), at para. 20. Such was the case in *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121 (S.C.C.) ("*Bank of Montreal*"), *Spraytech*, *Rothmans*and *COPA*.

110 If the federal law is prohibitive, as in the case at bar, the question becomes what *exactly* it prohibits. If the provincial law allows the very same thing the federal law prohibits, there is an operational conflict. If it does not do so, the analysis shifts to the second branch.

111 My colleague contends, relying on *Marine Services*, that the modern approach to statutory interpretation applies to ambiguous federal statutes. According to him, the analysis regarding an express conflict cannot be limited to a literal reading of the statute. Parliament's intent can thus be used to find that an operational conflict exists where there would otherwise be none.

112 With all due respect, *Marine Services* does not stand for that proposition; rather, it reaffirms the idea that co-operative federalism supports an interpretation of the federal and provincial legislation that results in a finding of compatibility at the first stage of the test. In *Marine Services*, this Court resolved the ambiguity in the Marine Liability Act, S.C. 2001, c. 6, by finding that "[a]n interpretation recognizing the absence of conflict between the statutes is borne out by the broader context, the scheme and object of the *MLA* and Parliament's intent" (para. 79). Yet Gascon J. is doing the opposite, that is, concluding that an operational conflict exists even though there is an interpretation of the two laws that results in a finding of compatibility.

113 If permissive federal legislation is to be interpreted restrictively in order to avoid an operational conflict, I see no reason to generally treat ambiguous provisions differently. Following my colleague's approach, the frustration of federal purpose analysis can result in findings of two different forms of conflict. That is clearly not the conclusion this Court reached in *Bank of Montreal*. It should be noted that the federal provision at issue in that case could easily have been characterized as being ambiguous. Thus, a broader interpretation could have been adopted to the effect that Parliament's intent resulted in an operational conflict; instead, the Court considered it necessary to extend the federal paramountcy test by creating the frustration of purpose branch. Whereas Parliament's intent had originally been irrelevant to the federal paramountcy test, it would now be the touchstone of this new branch.

114 The Court has never really addressed the interrelation between the two branches. In many cases from both before and after *Rothmans*, *Canadian Western Bank* and *COPA*, it seems to me that the two branches have been confused, as the Court has concluded that there was an operational conflict in the context of the first branch while referring to the federal purpose.

115 For instance, Gonthier J., writing for the majority in *Husky Oil*, found that there was a "clear operational conflict in that ss. 133(1) and (3) in their operation together entail a reordering or subverting of the federal order of priorities under the *Bankruptcy Act*" (para. 87). As the Ontario Court of Appeal noted in its reasons in the companion case, *Moore, Re*, 2013 ONCA 769, 118 O.R. (3d) 161 (Ont. C.A.), the decision of the majority in *Husky Oil* is best understood as one involving frustration of federal purpose rather than operational conflict:

> Although not so described in the case, in my view, the majority in *Husky Oil* is best understood as a decision involving frustration of a federal purpose rather than an operational conflict. Firstly, the majority did not rely on *Multiple Access* but on *Hall*, a case which is now viewed as a frustration of purpose decision. Secondly, the majority relied on the effect of the provincial legislation and indirect conflict to ground its paramountcy analysis and not the strict operational conflict test found in *Multiple Access*. [para. 75]

116 In *Lafarge*, the majority did recognize the two branches of the federal paramountcy test, but stated the test incorrectly:

> We restated the requirements for federal paramountcy in our reasons in *Canadian Western Bank*. The party raising the issue must establish the existence of valid federal and provincial laws and the impossibility of their simultaneous application by reason of an operational conflict or because such application would frustrate the purpose of the enactment, as explained by our Court in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13, at paras. 11-14. (See also *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, 2001 SCC 67, at paras. 68-71; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121.) [para. 77]

117 The conflation of frustration of a purpose with impossibility of dual compliance is even more apparent at para. 75 of that case, where the majority stated that the two statutes "would create an operational conflict that would flout the federal purpose".

Interestingly, the majority did not refer to an operational conflict in terms of impossibility of dual compliance or a situation in which one enactment says "yes" and the other says "no". They merely applied *M & D Farm* and found that there was an operational conflict, just as my colleague proposes to do in the case at bar. In my opinion, *Lafarge* should also be understood as a decision involving the frustration of a federal purpose rather than an operational conflict.

118 Although *M & D Farm* was decided on the basis of an operational conflict, it is not helpful authority on the modern doctrine of federal paramountcy either, as Binnie J. made no distinction between the first and second branches of the federal paramountcy test. At the time that case was decided, the concept of frustration of purpose had been referred to in *Bank of Montreal*, but this Court had not yet explicitly recognized the two branches of the federal paramountcy test. Although the Court found in *M & D Farm* that there was an operational conflict, in doing so it relied on passages from *Bank of Montreal* in which La Forest J. had inquired into whether "requir[ing] the bank to defer to the provincial legislation is to displace the legislative intent of Parliament" (Bank of Montreal, at p. 153; see M & D Farm, at para. 41). I agree that there was in fact an operational conflict in *M & D Farm*, but for different reasons, as I will explain below.

119 Finally, in *Mangat*, the federal legislation (Immigration Act, R.S.C. 1985, c. I-2) permitted non-lawyers to appear on behalf of clients before the Immigration and Refugee Board (ss. 30 and 69(1)). The provincial legislation (Legal Profession Act, S.B.C. 1975, c. 25) prohibited non-lawyers from practising law. As defined in s. 1 of the Legal Profession Act, the expression "practice of law" included "appearing as counsel or advocate" in the expectation of a fee. Mr. Mangat was an immigration consultant. The Law Society of British Columbia applied for a permanent injunction to prevent him from practising law. The Court found the law to be inoperative, but used the term "operational conflict" in respect of both branches of the paramountcy test:

> In this case, there is an operational conflict as the provincial legislation prohibits non-lawyers to appear for a fee before a tribunal but the federal legislation authorizes non-lawyers to appear as counsel for a fee. At a superficial level, a person who seeks to comply with both enactments can succeed either by becoming a member in good standing of the Law Society of British Columbia or by not charging a fee. Complying with the stricter statute necessarily involves complying with the other statute. However, following the expanded interpretation given in cases like *M & D Farm* and *Bank of Montreal*, *supra*, dual compliance is impossible....
>
> This case should be distinguished from *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40. In that case, it was possible to comply with the federal, provincial, and municipal statutes or regulations without defeating Parliament's purpose. As previously shown, in this case, it is impossible to comply with the provincial statute without frustrating Parliament's purpose. [Emphasis added; paras. 72-73.]

120 In my view, the Court actually found in that case that there was no operational conflict (as that concept is understood today), as it noted in the above passage that the statutes at issue allowed dual compliance at a "superficial level"; the words "superficial level" corresponded to the operational conflict branch. And it then found that dual compliance was not possible on the basis of an "expanded interpretation", citing *M & D Farm* and *Bank of Montreal*; the words "expanded interpretation" referred to the frustration of purpose branch.

121 In light of the above cases, I find it difficult to conclude, as my colleague urges me to do, that the approach taken by this Court on this issue has been entirely consistent.

122 Although this Court's past decisions are not always helpful when it comes to drawing a distinction between the two branches, they do support three propositions: (1) that the applicable standard for the first branch is *impossibility* of dual compliance caused by an express conflict, (2) that this is a high standard that should be applied with restraint, and only in very few cases, and (3) that the two branches are distinct and address different forms of conflict.

123 Consequently, I find that the analysis at the first stage should really be as simple as the Alberta Court of Appeal put it, and it is no surprise to me that both parties made next to no submissions on the point. The determining question is whether the province's legislation provides a path on which dual compliance is possible. Because such a path exists in this case as a result of

the wording of the two provisions, dual compliance cannot be found to be impossible. Unlike in *M & D Farm*, the two statutes in the instant case have different contents and provide for different remedies. Since the bankrupt is under no compulsion in this regard, he or she can either opt not to drive or voluntarily pay the discharged debt, in which case there will be no operational conflict between the provincial and federal laws. The only thing Alberta can do is suspend a bankrupt's driver's licence.

124 It is important to note that although operational conflict and frustration of purpose are described as two "branches" of a single test, either one is sufficient to trigger the application of the doctrine of federal paramountcy. Where enactments are found to be in operational conflict, the inquiry can end there without further investigation into the purposes of the enactments. A high standard at the first stage merely means that in most cases, the purpose and effects of the legislation at issue will need to be analyzed at the second stage.

125 Requiring courts to deal with the issue in the second branch has many advantages. For the frustration of purpose analysis, the federal legislative intent with which the provincial law is alleged to be incompatible must be established by the party relying on it. Clear proof of intent is required. The party must first establish the purpose of the relevant federal statute and then prove that the provincial law is incompatible with or frustrates this purpose: *COPA*, at para. 66.

126 In the second branch, the court can proceed with a careful analysis of Parliament's intent and, if possible, interpret the federal law so as not to interfere with the provincial law: *Canadian Western Bank*, at para. 75. Before concluding that the provincial law is inoperative, the court can also consider whether the federal government supports the operation of that law. In *Rothmans*, this Court emphasized that in resolving federalism issues, a court must bear in mind the position of the government at the other level (para. 26). In that case, the federal government intervened in favour of the provincial law, arguing that it had been enacted for the same health-related purpose as the federal law. The Court found that there was no frustration of purpose.

127 Considering that the doctrine of federal paramountcy operates at the expense of provincial jurisdiction and reduces legislative overlap, these principles encourage governments at both levels to take the lead in defining the scope of their legislative powers. They facilitate intergovernmental dialogue and serve as safeguards of provincial autonomy. In my view, the approach I suggest is more consistent with the principle of co-operative federalism as applied in *Canadian Western Bank*. It also sets a clear precedent by reaffirming that a provincial law will rarely be found to be inoperative in the first branch of the analysis.

128 My colleague concludes that this approach would render the first branch of the federal paramountcy test meaningless; in his opinion, it is virtually always possible to avoid the application of a provincial law so as not to cause a conflict with a federal law. I disagree that the "impossibility" standard, if applied strictly, would render the first branch of the federal paramountcy test meaningless. If the provincial law *allows or requires* something that the federal law explicitly *prohibits*, or if the conflict is direct rather than indirect, there will be an operational conflict. But that is just not the case here. In fact, the effect of my colleague's approach is to render the *second* branch meaningless, since a frustration of federal purpose analysis can now be used to interpret federal statutes broadly in order to find that an operational conflict exists where there would otherwise be none.

129 Following my approach, one would still find that there was an operational conflict in *M & D Farm*, in which the federal law imposed an absolute stay of proceedings on the very procedures the provincial statute allowed to commence or to continue. In that case, the express requirement of the federal statute was in direct conflict with the provincial law. On the one hand, the federal Farm Debt Review Act, R.S.C. 1985, c. 25 (2nd Supp.), permitted a farmer to obtain a stay of a creditor's proceedings and required the creditor, before demanding payment, to give notice that it intended to commence foreclosure proceedings. On the other hand, under the provincial statute, the creditor could obtain an order authorizing the immediate commencement of such proceedings. Unlike in the case at bar, the two statutes had similar contents and provided for similar remedies: both dealt specifically with the process for realizing on farmers' debts, and both established procedures for commencing or continuing proceedings against farmers.

130 The approach I suggest would also result in a finding that there was an operational conflict in *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), in which the federal statute, the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, gave a court the power to order that a security or charge rank in priority *over the claim of any secured creditor of the company*, whereas the provincial statute created a priority in favour of the administrator of the company's employee pension plan. The

federal legislation was not only permissive, but granted the court a very specific power; the provincial legislature was left little leeway to interfere with this power. Because the provincial statute provided, on a mandatory basis, for a different order of priority, it was impossible to comply with both laws without rendering the court's power under the federal statute meaningless.

131 I would add that what is "virtually always possible", as my colleague puts it, at para. 69, is to find *some* conflict in the application of two laws. This is why the case law requires something more, namely impossibility of dual compliance and an express conflict. It is also why the focus is on the wording of the federal statute and not on its every possible ramification.

132 In the end, the issue in this case is whether the *effect* of the province withholding driving privileges in this manner produces a conflict with the purposes of the *BIA*, thereby accomplishing indirectly what the province cannot do directly. Thus, it is on the basis of the second branch of the federal paramountcy test, not the first, that this appeal must be decided.

133 I adopt my colleague's analysis and conclusion on this point. As the frustration of one federal purpose is sufficient to trigger the application of the doctrine of federal paramountcy, I need not address the second proposed ground for frustration of purpose, that of equitable distribution.

*Appeal dismissed.*

*Pourvoi rejeté.*

**End of Document**

# TAB 21

2000 BCSC 1443
British Columbia Supreme Court

Maple Homes Canada Ltd., Re

2000 CarswellBC 2017, 2000 BCSC 1443, 2000 B.C.T.C. 738, [2000] B.C.J. No. 1958, [2001] B.C.W.L.D. 172, 21 C.B.R. (4th) 87, 99 A.C.W.S. (3d) 909

# In the Matter of the Proposal of Maple Homes Canada Ltd.

Smith J.

Heard: September 11 and 12, 2000
Judgment: October 2, 2000
Docket: Vancouver 202788/00

Counsel: *John P. Sullivan*, for Maple Homes Canada Ltd.
*Jeffrey P. Scouten*, for Max Gomez
David Gray, Trustee, for himself

Subject: Civil Practice and Procedure; Insolvency; Torts

APPLICATION by bankrupt for approval of proposal; APPLICATION by creditor for exemption from stay of proceedings against bankrupt.

***Smith J.*:**

1 Maple Homes Canada Ltd. for eleven years has carried on a business of supplying distinctively Canadian building materials for the construction of homes outside Canada, particularly in Japan. It did not produce the materials itself but obtained them from suppliers in Canada and then arranged to have them loaded into containers and shipped to the overseas customer. It would charge a markup on the materials. At peak, in 1995, it employed 12 people and had annual sales of $8.6 million.

2 Maple Homes lodged an Intention to make a Proposal on May 10, 2000. The Trustee under that Proposal, David Gray of Campbell Saunders Ltd., reported on June 30, 2000 that the debtor had assets of an estimated value of $13,000 and liabilities of $664,758.14. He stated the opinion that the causes of insolvency of the debtor were the decline in the Asian market and the bankruptcy of several large customers of Maple Homes. He further stated the opinion that the conduct of the debtor is not subject to censure and that none of the facts mentioned in sections 143 and 147 (it is common ground that he meant to refer to those provisions whose new section numbers are 173 and 177) may be proved against the debtor.

3 The Trustee held a meeting of creditors at which a Special Resolution accepting the Proposal was passed, with 72.2% in favour in terms of the amounts voting.

4 The Trustee reported that in his opinion the debtor's Proposal is an advantageous one for the creditors because the unsecured creditors will receive a dividend in the range of 7 - 8.5%, whereas in bankruptcy the unsecured creditors will not receive a dividend.

5 The Proposal includes provisions that the debtor will liquidate its assets and pay the net proceeds of sale (after satisfaction of valid security interests) to the Trustee; cause Brad Grindler to sell his interest in a property on Pender Island and pay the net proceeds to the Trustee for the general benefit of unsecured creditors; cause Brad Grindler to pay to the Trustee from his future income the sum of $30,000 at the rate of not less than $500 per month; and cause Brad Grindler to waive any right he may have to a dividend under the Proposal. Paragraph 5 of the Proposal states:

> By accepting this Proposal, the unsecured creditors shall agree to accept the amounts paid and payable under paragraph 2, coupled with the waiver referred to in paragraph 4 above as payment in full for an assignment of their provable claims against the debtor under the Act, together with all rights of recovery they may have against Brad and Cathie Grindler in that regard. The assignment aforesaid shall be made to the debtor or to whomever it may direct.

6 Mr. Max Gomez voted against the Proposal. Mr. Gomez is a resident of Montera in Cantabria, Spain. He had agreed in July 1999 to purchase materials from Maple Homes for construction of a home. The total purchase price was $177,589. He paid that in two instalments, on July 8, 1999 and September 13, 1999. He received one shipment from Maple Homes in September 1999, worth $76,179.23. Therefore, he is owed roughly $100,000 by the debtor.

7 Before Mr. Gomez sent the first instalment, he received a fax from Mr. Grindler that informed him that the quote was being split up into three shipments, and stated:

> To get things moving, if all is fine with the First Shipment quotation, please sign page 2 of the quote where provided and fax it back to us. Once we confirm your deposit, we will place the orders. Then we will advise on the shipping.

Mr. Gomez signed the "quote" and returned it with his first instalment of $60,000 U.S. He requested that all invoices be made out to his family society, Operadora Cancun 1900, S.L. (I note here that counsel for Maple Homes argued that because of this the contract was really between Operadora Cancun and Maple Homes. Mr. Gomez in an affidavit deposed that Operadora Cancun is his personal and family tax society, which every family is entitled to have under the laws of Spain for tax benefits and the assignation and protection of personal assets. The "quote" was signed by Mr. Gomez, the payments came from him, and except for the one invoice, all other correspondence and dealings were with Mr. Gomez. Therefore, I am proceeding on the basis that the contract was between Maple Homes and Mr. Gomez and that he is the creditor and entitled to oppose approval of the proposal as he has done.)

8 The events that led to Maple Homes's insolvency began in the fall of 1999. As the Trustee stated, the decline in the Asian market and the bankruptcy of some large customers seem to have been the turning points. From 1999 sales of $300,383.92 in August and $210,117.53 in September, there was a dramatic decline to $62,519.13 in October, $73,272.40 in November, $60,097.66 in December, $24,713,28 in January 2000, $16,430.96 in February, with an improvement again in March, 2000 to $117,628.11. As a result, although Maple Homes had actually received payment in full from Mr. Gomez, it proved unable to pay the suppliers (which had begun to demand cash on delivery) and to provide the materials it had contracted to send to Spain. This was despite the efforts described by Mr. Grindler to keep the company afloat — laying off employees, ceasing to draw any salary, and borrowing money from family members to put into the company. Mr. Grindler summarizes in his affidavit:

> I worked exclusively for the Company from its start until the date of the Proposal, and have put an enormous amount of energy and effort into the Company. Until recently, Maple Homes was always a tremendous source of pride for me. As a result, however, it was very difficult for me this Spring to come to accept that Maples Homes could not make ends meet and could not meet its debts. I kept thinking that Maple Homes could turn things around and be a success again. As will be outlined below, I tried just about everything that I could think of, including reducing the number of Maple Homes' staff, borrowing from a family member, foregoing my own salary, seeking financing, and of course bidding on further work. In a particularly difficult period of time, I also sent some emails to Mr. Gomez which were untruthful, and which I deeply regret. During that period of time I was making every effort I could to assist Maple Homes to put together the money to pay the suppliers so that it could ship the products that Mr. Gomez had ordered, and I genuinely believed that Maple Homes would succeed in this regard. Unfortunately, however, that never proved to be possible, despite considerable effort.

9 In the early spring of 2000, Mr. Grindler began to respond to Mr. Gomez's inquiries with untruthful statements in emails and faxes. In some of these he created elaborate lies to explain the delay in the shipment of materials. It was not until April 12, 2000 that Mr. Grindler informed Mr. Gomez that the shipment was not on its way and could not be sent because of the lack of funds in Maple Homes.

10 Mr. Gomez deposes that he trusted Mr. Grindler and believed his representations that the funds Mr. Gomez provided to Maple Homes would be used for the specific purpose for which they were provided.

11 Maple Homes has applied for court approval of the Proposal, which application is opposed by Max Gomez. Mr. Gomez has applied for an order and declaration that sections 69 to 69.3 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, no longer operate in respect of himself. He has commenced an action against Bradley Michael Grindler and Cathie Mae Grindler for damages for breach of trust and for an accounting. He has not sued Maple Homes but wishes to be able to do so. In his affidavit he states that he is concerned that his ability to trace and recover his funds and prove the details of the fraud he alleges will be impaired by the passage of time if his right to pursue action against Maple Homes is stayed.

**ISSUES**

***A. Should the Proposal of Maple Homes Canada Ltd. be approved?***

***B. If the Proposal is approved, should Max Gomez be granted an exemption from the stay of proceedings pursuant to s. 69.4 of the Bankruptcy and Insolvency Act?***

**ANALYSIS**

***A. Should the Proposal of Maple Homes Canada Ltd. be approved?***

12 The relevant provisions of the *Bankruptcy and Insolvency Act* are:

> s.59 (1) The court shall, before approving the Proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, the person making the Proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.
>
> (2) Where the court is of the opinion that the terms of the Proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the Proposal, and the court may refuse to approve the Proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.
>
> (3) Where any of the facts mentioned in sections 173 and 177 are proved against the debtor, the court shall refuse to approve the Proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.
>
> s.173 (1) The facts referred to in section 172 are:
>
> ...
>
> (c) the bankrupt has continued to trade after becoming aware of being insolvent; ...

*1. Are the terms of the Proposal reasonable and calculated to benefit the general body of creditors pursuant to s. 59 of the Bankruptcy and Insolvency Act?*

13 The Trustee is recommending approval of the Proposal, pointing out that it will bring the unsecured creditors some return (a dividend of 7 - 8.5%) rather than no return. The Trustee estimated that if Mr. Grindler were petitioned into bankruptcy he would be required to make payments of $500 per month for between nine and twenty-one months (thus, a total of $4,500 - $10,500), rather than the total of $30,000 under the Proposal.

14 The principal of the company, Brad Grindler, is putting into the Proposal what appears to be his only remaining substantial asset, the family recreational property on Pender Island which is worth perhaps $40,000, in addition to $30,000 of his future income. Mr. Sullivan argued that the creditors will thus receive more under the Proposal than they would if they put both Maple

Homes and Mr. Grindler into bankruptcy. He urged that if the Proposal is rejected Maple Homes will automatically be bankrupt which would destroy the goodwill it has built up in the market over 11 years.

15 He referred to *Re Pateman* (1991), 5 C.B.R. (3d) 115 (Man. Q.B.) at p. 120 where Oliphant A.C.J.Q.B. wrote:

> The decision of the Newfoundland Supreme Court [In Bankruptcy] in *Irving Oil Ltd. v. Noseworthy* (1982), 42 C.B.R. (N.S.) 302, is authority for the proposition that where the majority of the creditors is in favour of the Proposal and it has not been demonstrated that public policy or good business morality or practice militate against it, the Proposal should be approved.

The Court in *Pateman* also noted that the onus is on the party seeking approval for the Proposal to establish that its terms are reasonable and for the benefit of the general body of creditors, that while the majority of creditors' views should be seriously considered, they are not binding, and that it is the duty of the court to be satisfied that creditors will be better off under the Proposal than in bankruptcy.

16 Mr. Scouten argued that in this respect the Proposal did not meet the standard necessary for approval. He pointed out that Mr. Gomez is one of the largest creditors and perhaps one of the few with claims against Mr. Grindler personally. Thus, he argued, the aspect of the Proposal that Maple Homes cited as a reason for approval (the contribution by Mr. Grindler personally) was actually a reason to reject the Proposal because it may put his major personal asset out of reach of his creditors.

17 Mr. Sullivan argued that approval of the Proposal is consistent with the two overriding objectives of the *Bankruptcy and Insolvency Act*: to ensure the equitable distribution of an insolvent's assets amongst its creditors *pari passu*, and to assist the financial rehabilitation of debtors. Mr. Scouten urged on the other hand that the objectives of the legislation also encompass requiring debtors to act responsibly with respect to their creditors. He pointed to the dishonest statements made by Mr. Grindler to Mr. Gomez and to the possibility that Maple Homes continued to trade after knowing it was insolvent. He also urged that the proposed dividend was very modest, amounting to $700 per $10,000 of claim, and thus only marginally better than bankruptcy.

18 The main ground for Mr. Gomez's position that the Proposal should not be approved was that a "fact mentioned" in s. 173(c) of the *Act* had been proved, namely that Maple Homes continued to trade while it knew it was insolvent. Mr. Scouten argued that at the latest by March 10, 2000, Mr. Grindler as principal of Maple Homes knew that it was insolvent. The definition of "insolvent person" under the *Bankruptcy and Insolvency Act* refers to a person:

> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due ...

Mr. Scouten pointed to the evidence that the sales of Maple Homes had been in serious decline since September of 1999, having plummeted to 10% of previous levels, that a large prospective order from a German customer had fallen through at the end of February, that the company's suppliers had put it on a "C.O.D." basis, that Mr. Grindler had ceased to draw a salary, had borrowed money from family to put into the company and had laid off employees, and that Mr. Gomez had been demanding shipment of the goods worth roughly $100,000 for which he had already paid. I note that for Maple Homes to have reached the state of $13,000 assets and $664,758.14 liabilities by the date of the Trustee's report in June 2000, it would have to have been in something approaching that state by early March. I also note that, as counsel for Maple Homes urged, the evidence suggests that Mr. Grindler adopted the tactic of lying to Mr. Gomez about his shipment out of desperation.

19 The law on this subject is summarized in Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada*, 3rd ed., at p. 6-92:

> Section 173(1)(c) makes it imperative that a debtor who is aware that he is insolvent should cease trading and either call a meeting of creditors or file an assignment in bankruptcy: *Re Lunenfeld* (1929), 10 C.B.R. 457 (Ont. S.C.). If a debtor

> continues in business, he has committed a fact under s. 173(1)(c). By continuing to trade, the debtor is continuing in business at the risk of his creditors if business does not improve, and a debtor has no right to do this: *Re Stainton, Ex parte Board of Trade* (1887), 4 Morr. 242 ... .
>
> For the court to find that a fact has been committed under s. 173(1)(c), it is essential to prove that the debtor was aware of his insolvency.

The *Stainton* case [*Re Stainton* (1887), 4 Morr. 242 (Eng. Q.B.)] illustrates that this principle applies even when the debtor has a *bona fide* belief that trade must soon revive. Cave J. wrote at p. 251:

> Now, a man, of course has a perfect right as long as he is solvent, to determine that he will go on with a business, although it may be a losing business. He may trust that before he becomes insolvent matters will change, and he will again be in a condition of prosperity. But the moment he becomes insolvent, then he is no longer going on at his own risk in case of failure; he is going on at the risk of his creditors, in case things do not mend as he hopes they will. In my judgment a man has no right to do that. The moment things have got to such a pitch that he cannot pay 20*s.* in the pound, but he nevertheless thinks that if he goes on he may be able to retrieve his position, in my opinion he ought to call his creditors together, and leave them who will have to bear the loss in case his calculations are wrong, to determine whether that course of going on shall be proceeded with or not.

20 Mr. Scouten submitted that this case provides an opportunity for the Court to make it clear that insolvent persons who are carrying on business at the risk of their creditors will not be allowed to do so without consequences for themselves.

21 Mr. Sullivan, however, suggested that the older authorities must be read with some caution since the more recent trend is to view bankruptcy legislation through a less penal, and more rehabilitative, lens. He argued that an overly strict interpretation of the provisions regarding doing business while insolvent is inconsistent with the objectives of the legislation, and pointed out that since a debtor cannot make a Proposal until it is insolvent, an overly strict view would leave only a very brief opportunity to make a Proposal. He cited *A. Marquette & fils Inc. v. Mercure* (1975), [1977] 1 S.C.R. 547 (S.C.C.) at p. 556 where the Court stated:

> Before going on to another point it is perhaps not inappropriate to recall that the *Bankruptcy Act*, while not business legislation in the strict sense, clearly has its origins in the business world. Interpretation of it must take these origins into account. it concerns relations among businessmen, and to interpret it using an overly narrow, legalistic approach is to misinterpret it. it seems to me that appellant is urging the Court to so interpret it.

22 He referred to *Re Moxam* (1978), 31 C.B.R. (N.S.) 151 (B.C. S.C.) in which Low, L.J.S.C. (as he then was) allowed an application for discharge, stating at p. 153:

> I do not find any evidence that Mr. Moxam continued to trade after knowing that he was insolvent. He merely made reasonable efforts to salvage a situation that involved increasing despair.

23 Mr. Scouten urged that the *Moxam* case is quite different on its facts. The debtor there was found to have been straightforward in his dealings with the creditors, which is not the case here. As well, he argued, in the case of Maple Homes, there was not a gradual decline, inevitable only with hindsight, but a tangible and definite occurrence — the loss of the large order from Germany at the beginning of March — after which Mr. Grindler must have known that Maple Homes was insolvent.

24 Indeed, he argued, Mr. Grindler had admitted this in his affidavit, where he swore:

> Until recently, Maple Homes was always a tremendous source of pride for me. As a result, however, it was very difficult for me this Spring to come to accept that Maple Homes could not make ends meet and could not meet its debts.

However, I do not find this constitutes the admission alleged because the word "Spring" may refer to a season that extends to the beginning of May, which is when Maple Homes gave notice of its intention to make a Proposal to its creditors.

25 Mr. Scouten's submissions, urging that persons in financial difficulty have an obligation to keep optimism in check and to be candid with their creditors, have force. Nevertheless, I have concluded that the evidence does not establish that this debtor continued to trade after it knew it was insolvent. The length of time for which the company had been in business, the concentrated efforts Mr. Grindler was making to solve the business's problems including continued bids on work, and the fact that a large order such as the one that fell through at the beginning of March could have permitted the company to continue, are consistent with good faith and reasonable efforts to carry on, rather than with knowledge that the business would fail. I am satisfied that, within a reasonable time of knowing that Maple Homes was insolvent, its principal, Mr. Grindler, gave notice of intention to make a Proposal and that a "fact" mentioned in s., 173(*c*) has not been proved.

26 Because I am also otherwise satisfied for the reasons put forward by the Trustee and by counsel for Maple Homes that the Proposal of Maple Homes is reasonable and calculated to benefit the general body of creditors, that Proposal is approved.

***B. Should Mr. Gomez be granted an exemption from the stay of proceedings pursuant to s. 69.4 of the Bankruptcy and Insolvency Act?***

27 The relevant provisions of the *Bankruptcy and Insolvency Act* are:

> 69 (1) Subject to subsections (2) and (3) and sections 69.4 and 69.5, on the filing of a notice of intention under section 50.4 by an insolvent person,
>
> (a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,
>
> ...
>
> until the filing of a Proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.
>
> 69.1(1) Subject to subsections (2) to (6) and sections 69.4 and 69.5, on the filing of a Proposal under subsection 62(1) in respect of an insolvent person,
>
> (a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged or the insolvent person becomes bankrupt; ...
>
> 69.3(1) Subject to subsection (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged.
>
> 69.31(1) Where a notice of intention under subsection 50.4(1) has been filed or a Proposal has been made by an insolvent corporation, no person may commence or continue any action against a director of the corporation on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the corporation where directors are under any law liable in their capacity as directors for the payment of such obligations, until the Proposal, if one has been filed, is approved by the court or the corporation becomes bankrupt.
>
> (2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the corporation's obligations or an action seeking injunctive relief against a director in relation to the corporation.
>
> ...
>
> 69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor

> or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
>
> (b) that it is equitable on other grounds to make such a declaration.
>
> s.178(1) An order of discharge does not release the bankrupt from ...
>
> (d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity ...

28 Some grounds on which courts will lift stays of proceedings were set out in *Re Advocate Mines Ltd.* (1984), 52 C.B.R. (N.S.) 277 (Ont. S.C.) at p. 278:

> The court may, however, remove the stay of proceedings prescribed by that section in appropriate cases and has done so in the following circumstances:
>
> 1. Actions against the bankrupt for a debt to which a discharge would not be a defence.
>
> 2. Actions in respect of a contingent or unliquidated debt, the proof of which and valuation has that degree of complexity which makes the summary procedure prescribed by s. 95(2) of the *Bankruptcy Act* inappropriate.
>
> 3. Actions in which the bankrupt is a necessary party for the complete adjudication of the matters at issue involving other parties.
>
> 4. Actions brought to establish judgment against the bankrupt to enable the plaintiff to recover under a contract of insurance or indemnity or under compensatory legislation.
>
> 5. Actions in Ontario which, at the date of bankruptcy, have progressed to a point where logic dictates that the action be permitted to continue to judgment.

29 It was common ground that the burden is on the applicant for a declaration under s. 69.4 to satisfy the court that one or more of those grounds is present and that the applicant is likely to be materially prejudiced or that it is equitable on other grounds to make such a declaration.

30 The authorities establish that it is not for the court to inquire into the merits of the action the applicant wishes to bring. In *Re Francisco* (1995), 32 C.B.R. (3d) 29 (Ont. Bktcy.) the court stated the position thus (at p. 34):

> Without intending to usurp the role of the trial judge to decide otherwise on the facts established before him, I am satisfied BPCO has pleaded sufficient allegations to bring its claim, at least arguably, within s. 178(1)(d).

Mr. Sullivan cited *Wychreschuk v. Sellors (Trustee of)* (1988), 71 C.B.R. (N.S.) 37 (Man. Q.B.), appeal dismissed (1989), 73 C.B.R. (N.S.) 267 (Man. C.A.) where Monnin J. observed that the granting of leave is a discretionary matter, and wrote at p. 39:

> In order for leave to be granted, an applicant must demonstrate to the court that there exist compelling reasons to permit an action either to commence or to proceed.

However, as Master Tokarek observed in *Bond, Re* (May 28, 1993), Doc. Vernon 9760/93 (B.C. Master), there is little available guidance as to what may be considered a "compelling reason".

31 In *Eron Financial Services Ltd. (Receiver of) v. Biller* (1999), 10 C.B.R. (4th) 252 (B.C. S.C.) the Receiver and Judicial Trustee of the plaintiffs wished to proceed with an action against the defendant before his Trustee in Bankruptcy had been

discharged. They wished to bring an action claiming fraud and seeking a declaration of trust. The court decided to permit the action to proceed, stating at p. 256:

> The facts of the case are similar to those in *J.B. Allen*, *supra*, where the Court relied upon the earlier decision in *Cravit, Re* (1984), 54 C.B.R. (N.S.) 214 (Ont. S.C.) where Master Ferron stated at p. 215:
>
> > ... in order to come to a conclusion that the plaintiffs should not be permitted to proceed I would have to conclude that the plaintiffs could either not succeed in the action in question or that if they succeeded they could not recover against the [bankrupt's] insurer.
> >
> > The function of the bankruptcy court is not to inquire into the merit of the action sought to be commenced or continued but rather to be assured that such an action, falling within the s. 49(1) [now s. 69.3] stay, should continue for the reasons which I detailed in *Re Advocate Mines Ltd.*
>
> The bankrupt, Mr. Biller, is a necessary party to the action as he was an officer and director of many, if not all of the plaintiff companies. Further, the claim is based upon a cause of action for which, if successful, will not be defeated by the bankruptcy. Lastly, the Judicial Trustee ought to be able to pursue the action against the other defendants, the bankrupt's wife and their holding company.

32 The parties referred me to a number of other authorities, including *Likins v. Francis* (1995), 33 C.B.R. (3d) 259 (Ont. Bktcy.); *Re Duvall* (1992), 11 C.B.R. (3d) 264 (B.C. S.C.); *Royal Bank v. Exner* (1993), 23 C.B.R. (3d) 274 (Alta. Q.B.); *Dutchak Estate v. Seidle* (1998), 176 Sask. R. 99 (Sask. Q.B.); *J. B. Allen & Co. v. D.E. Witmer Plumbing & Heating Ltd.* (1992), 12 C.B.R. (3d) 272 (Ont. Bktcy.); *Don Bodkin Leasing Ltd. v. Rayzak* (February 16, 1994), Doc. 92-CQ-23655 (Ont. Gen. Div.); and *Re Quality Carpets Ltd.* (1995), 36 C.B.R. (3d) 143 (B.C. S.C. [In Chambers]).

33 The principles that emerge from the jurisprudence may be summarized:

(1) The general scheme of bankruptcy proceedings is that civil actions are stayed against the insolvent person; exemptions are to be made only where there are "compelling reasons". This flows from one of the major purposes of the *Bankruptcy and Insolvency Act*, which is to permit the rehabilitation of the bankrupt unfettered by past debts.

(2) An applicant for exemption from the stay must show that there will be material prejudice to the applicant if the stay is continued or that it is equitable on other grounds to allow the exemption.

(3) The existence of one or more of the factors listed in *Advocate Mines Ltd.* will be an important consideration, but is not determinative.

(4) The court is not to attempt to determine the proposed claim on its merits.

(5) Rather, it must assess whether it is a claim of the nature that would survive discharge, whether it is a claim that could not succeed, and whether if it did succeed it could not result in recovery against the defendants.

34 The standard appears to be somewhat more stringent than that for permitting a cause of action to continue under a rule such as *Supreme Court Rules*, B.C. Reg. 221/90, Rule 19(24), where a proceeding may be struck as disclosing no reasonable claim or defence only if the pleading itself makes it plain and obvious there is none. Given the purpose of bankruptcy legislation and the fact that continuing an action is the exceptional situation, I think that generally there must be more than pleadings or proposed pleadings disclosing a claim. There must also be some evidence supporting the conclusion that there is a fair issue to be tried. However, to expect more than that would be inconsistent with the statutory scheme. The legislation contemplates that claims of fraud or breach of fiduciary duty may survive bankruptcy or insolvency, and it will seldom be possible to prove such cases on a balance of probabilities at an early stage and without discovery.

35 Should the exemption be granted in this case?

36 The first question is whether this would be an action falling within any of the grounds listed in *Advocate Mines Ltd.*, *supra*. The applicant's position is that it is an action against the bankrupt for a debt to which a discharge would not be a defence, and that the company Maple Homes is a necessary party in the action against Bradley and Cathie Grindler.

37 In claiming that the action is one for which discharge would not be a defence, the applicant here relies on s. 178(1)(d). He has issued a writ and statement of claim against Bradley Grindler and Cathie Grindler pleading that Maple Homes and Bradley Grindler, in using the funds Mr. Gomez provided for unauthorized purposes, and concealing that they had done so, committed a breach of trust. He also pleaded that Cathie Grindler was at all material times an active director and participant in Maple Homes and knowingly assisted in the misappropriation by Maple Homes and Bradley Grindler of the payments, the concealment of that misappropriation, and the continuing deceit upon the plaintiff. He further pleaded that the funds were used to pay third parties or to make payments to or for the benefit of the defendants, or to purchase assets now in the possession of the defendants or others, and seeks a tracing remedy in respect of the payments and assets. Maple Homes is not a party to the action.

38 After the close of the hearing, and upon further review of the matter, I requested further submissions from counsel as to the impact of paragraph 5 of the Proposal. It appeared that there might be some question about whether the legislation encompassed a stay of all claims against the Grindlers personally, even though such a stay seemed to be assumed in the provisions of paragraph 5 of the Proposal and in the submissions of counsel for Maple Homes. The response from counsel for Maple Homes clarified that its position is that if the Proposal is approved, Mr. Gomez will lose *all* of his claims (against both the company and Mr. and Mrs. Grindler) except for claims (if any) for non-dischargeable debts under s. 178(1) of the *Bankruptcy and Insolvency Act*.

39 On the other hand, Mr. Scouten argued on behalf of Mr. Gomez that although the Proposal, if approved, would bind Mr. Gomez such that he would require a declaration under s. 69.4 in order to pursue an action against Maple Homes, paragraph 5 of the Proposal, in purporting to cover "all rights of recovery" against the Grindlers personally, goes beyond what is permitted by s. 50(13) and (14) of the *Act*. Those sections provide:

> 50 (13) A Proposal made in respect of a corporation may include in its terms provision for the compromise of claims against directors of the corporation that arose before the commencement of proceedings under this Act and that relate to the obligations of the corporation where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> (14) A provision for the compromise of claims against directors may not include claims that:
>
> (a) relate to contractual rights of one or more creditors arising from contracts with one or more directors; or
>
> (b) are based on allegations of misrepresentation made by directors to creditors or of wrongful or oppressive conduct by directors.

40 Mr. Gomez's position is that the Proposal goes further than the *Act* permits in these ways:

> (1) the claims against Mr. Grindler arising from things done or said by him personally, and otherwise than by law by virtue of his capacity as a director, such as the claims in deceit, are not covered under s. 50(13);
>
> (2) Cathie Grindler has maintained that she was not a director of Maple Homes at the time of the payments made by Mr. Gomez and, if so, claims against her are not covered under s. 50(13); and
>
> (3) in part, Mr. Gomez's claims against Mr. Grindler are based on allegations of misrepresentation and wrongful conduct on the part of Mr. Grindler, which are not covered under s. 50(13).

41 Mr. Scouten argues that the Proposal is therefore bad on its face or, in the alternative, that if approved it can have no effect on the rights of Mr. Gomez to pursue claims against Bradley or Cathie Grindler since those claims either do not "relate to the obligations of the corporation where the directors are by law liable in their capacity as directors", or else (in Mr. Grindler's case) are based on allegations of "misrepresentation made by directors to creditors or of wrongful or oppressive conduct by

directors". He argues that the claims do not fall within s. 50(13) in that they do not relate, for example, to a director's liability at law for unpaid statutory remittances, wages or similar debts of the company for which a director is liable *qua* director. He argues that s. 50(13) does not allow a corporate Proposal to include a term compromising *all claims* against directors of the company; the section, properly read, only covers terms compromising claims for conventional "director's liabilities" arising out of the director's legal capacity as a director.

42 In response, Mr. Sullivan argues that the extent to which court approval of this Proposal would affect claims in the action against Bradley and Cathie Grindler will be a matter for the judge to decide in that action. He agrees that if the law does not allow a Proposal to affect a particular type of claim, then regardless of the provisions found within the Proposal, the Proposal cannot affect such claims.

43 I conclude that Mr. Scouten is correct; the Proposal of Maple Homes cannot compromise all claims against Bradley and Cathie Grindler, for the reasons he has put forward.

44 With respect to the application for a declaration permitting an action against Maple Homes, the argument on behalf of Mr. Gomez was that the debt arose out of a breach of trust. Mr. Gomez's position is that when he advanced the funds it was understood that they would be used to pay for the materials required to build his house. In his affidavit, Mr. Gomez deposes:

> Regarding paragraphs 16 through 20 of the Grindler Affidavit, when I met with Mr. Grindler in Vancouver, he specifically informed me that Maple Homes was not a manufacturer and he and Maple Homes would purchase for me and ship materials from different suppliers. I knew there would be a price mark-up for these services. Bradley Grindler took me to see a number of manufacturers/suppliers' show room locations and display facilities, including two display houses, while I was in Vancouver. At that time Mr. Grindler again confirmed the terms of our agreement: He told me "you select what you want and we will buy it for you". At these locations I then selected specific items which Bradley Grindler and Maple homes would purchase and ship to me. These included such items as the Jacuzzi, shower stalls, faucets, kitchen sink, the stairs ... and the mouldings for the walls and ceilings....
>
> Further Bradley Grindler took me and my wife for lunch and at that luncheon meeting, I specifically asked Mr. Grindler how I could be certain that if I paid him my money he would in fact purchase the house materials and ship them to me. He assured me he was a trustworthy person who had been in business for several years, operated a reputable company and I could trust him to buy and deliver all materials to me. I relied on those representations and I trusted that he would, for the price mark-up of Maple Homes, use my monies for the specific purpose of purchasing the materials, paying all suppliers and deliver the Materials to me.
>
> These statements, and Mr. Grindler's conduct in dealing with me throughout, left me with the clear understanding that Maple would be using the money that I sent to it to purchase and pay for the goods from his third party suppliers, and I understood this to be an important and central feature of the arrangement between us for the purchase and supply of products to me.

45 That evidence was not contradicted. Although it is conceded that the funds were kept in the Maple Homes general account, the records show that the funds were tracked separately in that account, as were funds deposited by other customers. Mr. Scouten argued that implicit in a "deposit" is a trust-like notion; a "deposit" does not necessarily create a trust, but shows that the money is to be used for a particular purpose. He relied on a series of cases beginning with *Barclays Bank Ltd. v. Quistclose Investments Ltd.* (1968), [1970] A.C. 567 (U.K. H.L.) in arguing that these arrangements gave rise to a relationship of a fiduciary character or trust in favour of the suppliers of the materials, and, secondly, if that trust failed, in favour of Mr. Gomez.

46 Mr. Sullivan argued, however, that it was the practice of Maple Homes with all of its customers to require payment in advance for their orders, and that although Mr. Gomez had specifically chosen certain materials, those materials could have come from Maple Homes's inventory just as much as from the suppliers under the terms of the contract, which was simply to provide the materials. Acknowledging the seriousness of Mr. Grindler's admitted dishonest statements to Mr. Gomez after the funds were gone, Mr. Sullivan pointed to Mr. Grindler's contrition and to his affidavit stating that he had continued to hope that

more orders would come in and he would be able to fulfil the contract. Mr. Sullivan argued that sometimes even honest people say things they regret, that it was a time of panic, and that the lies in that context do not make Mr. Grindler a "fraud artist".

47 The law with respect to "*Quistclose* trusts" is, as Mr. Scouten said, still under development. The *Quistclose Investments Ltd.* case itself involved a loan from Quistclose Investments to Rolls Razor Ltd., which was in financial difficulties. The loan was made on the agreed condition that it would be used to pay a dividend. The cheque was paid into a separate account opened for that purpose with the bank. The bank knew that the money was borrowed, and agreed with Rolls Razor Ltd. that the account would only be used for the purpose of paying the dividend. Before the dividend had been paid, Rolls Razor Ltd. went into voluntary liquidation. Quistclose brought an action claiming that the money had been held by Rolls Razor Ltd. on trust to pay the dividend; that trust having failed, there was then a resulting trust for Quistclose of which the bank had notice. Lord Wilberforce, with whom all other members of the Court agreed, held that the mutual intention of Quistclose and Rolls Razor, and the essence of their bargain, was that "the sum advanced should not become part of the assets of Rolls Razor Ltd., but should be used exclusively for payment of a particular class of its creditors, namely, those entitled to the dividend." He then stated at p. 580:

> That arrangements of this character for the payment of a person's creditors by a third person, give rise to a relationship of a fiduciary character or trust, in favour, as a primary trust, of the creditors, and secondarily, if the primary trust fails, of the third person, has been recognised in a series of cases over some 150 years.

These cases do not detract, the court said, from the principle that in the absence of some special arrangement creating a trust, payments of this kind are made upon the basis that they are to be included in the company's assets. Further, the court rejected the argument that if a transaction was one of loan, giving rise to a legal action of debt, this necessarily excluded the implication of any trust relationship. Lord Wiberforce wrote at p. 581-82:

> There is surely no difficulty in recognising the co-existence in one transaction of legal and equitable rights and remedies: when the money is advanced, the lender acquires an equitable right to see that it is applied for the primary designated purpose ...: when the purpose has been carried out (i.e., the debt paid) the lender has his remedy against the borrower in debt: if the primary purpose cannot be carried out, the question arises if a secondary purpose (i.e., repayment to the lender) has been agreed, expressly or by implication: if it has, the remedies of equity may be invoked to give effect to it, if it has not (and the money is intended to fall within the general fund of the debtor's assets) then there is the appropriate remedy for recovery of a loan. I can appreciate no reason why the flexible interplay of law and equity cannot let in these practical arrangements, and other variations if desired: it would be to the discredit of both systems if they could not. In the present case the intention to create a secondary trust for the benefit of the lender, to arise if the primary trust, to pay the dividend, could not be carried out, is clear and I can find no reason why the law should not give effect to it.

48 Mr. Scouten cited *Ling v. Chinavision Canada Corp.* (1992), 10 O.R. (3d) 79 (Ont. Gen. Div.) which applied the principle stated in *Quistclose Investments Ltd.*.

49 Mr. Sullivan, however, argued that the principle is limited to situations where there is an express agreement that the funds will be kept separate and will be used only for the specified purpose. The fundamental premise articulated in *Henry v. Hammond*, [1913] 2 K.B. 515 (Eng. K.B.) at p. 521, he argued, is solidly accepted:

> It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his cestui que trust. If on the other hand he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor.

He referred to *Bank of Montreal v. British Columbia (Milk Marketing Board)* (1994), 94 B.C.L.R. (2d) 281 (B.C. S.C.). There the Court held that the principle that where A gives money to B for the specific purpose of paying C, the money is impressed with a trust and may not be appropriated by him, is undoubted. Newbury J. observed, however, that in both the *Quistclose Investments Ltd.* case itself and in *Lowndes Lambert Group Ltd. v. Specialty Underwriting Services Ltd.* (1986), 11 B.C.L.R.

(2d) 308 (B.C. S.C.) which applied it, that it appeared that (1) the recipient of the funds was required, either by express terms or the course of dealings between the parties, to keep the money separate from its own funds; and (2) the funds were paid on express conditions of trust which the payees later tried to repudiate. The Court, having commented that the case at bar involved a claim that a trust should be implied from the course of dealings, concluded at p. 288:

> Faced with the clear authority of *Henry v. Hammond*, then, I must conclude that the absence of an obligation on McKinnon in the ordinary course to segregate funds received from the Board from its own funds is fatal to the inference that a trust existed in this case. Regardless of who was a conduit for the payment of funds to whom, and regardless of whether a direct liability existed between the receiving vendors and the defendant producers, such an obligation, express or implied, is "the essential thing" not proven here. It follows that the funds withheld from McKinnon by the Board constitute only a debt owing to the vendor, and that they must be distributed first to secured creditors and thereafter to other claimants in accordance with the *Bankruptcy Act*.

50 *Henry v. Hammond* has been cited and its principle followed a number of times in Canadian law. Mr. Sullivan cited, in addition to the above instance, *M.A. Hanna Co. v. Provincial Bank of Canada* (1934), [1935] S.C.R. 144 (S.C.C.); *Salo v. Royal Bank* (May 5, 1988), Doc. CA005921 (B.C. C.A.) and *Toronto-Dominion Bank v. Hayworth Equipment Sales Ltd.* (1985), 56 C.B.R. (N.S.) 82 (Alta. Q.B.).

51 Given that on its face the proposed action against Maple Homes and Bradley and Cathie Grindler is one that would survive discharge, I must ask whether it is one that could not succeed. There is evidence that the parties had discussions which left Mr. Gomez with the understanding that his funds would be used to purchase and ship the materials he had ordered for his house. Those funds were placed in the Maple Homes general account but were tracked separately. There is some authority that would support the proposed claim, if the evidence were fully developed in a way favourable to the claimant. I conclude that this action meets the required standard.

52 As well, I take into account that the action against Mr. and Mrs. Grindler can proceed despite the Proposal for the reasons set out above, and that action will involve the same events and raise many of the same issues as those in the proposed action.

53 Is there material prejudice if Mr. Gomez is required to wait? Is it equitable to grant the exemption? The allegations are serious ones, relating to breach of fiduciary duty. Mr. Gomez, in all good faith, trusted Maple Homes to use the money he provided for the purchase of materials for his home in Spain. Maple Homes, through Mr. Grindler, proceeded in a course of deception for several months, until it was far too late for Mr. Gomez to try to retrieve his funds. He may or may not succeed at trial in establishing that there was a trust-like relationship, but he is entitled to try. He will be prejudiced due to passage of time in producing his evidence if he is required to wait. In all of the circumstances it would be inequitable to deny his application.

54 Therefore, the exemption sought by Mr. Gomez will be granted.

**CONCLUSIONS**

1. The Proposal is approved. It meets the statutory requirements. It has not been established that the debtor continued to trade after it knew it was insolvent.

2. The application by Mr. Gomez for a declaration under s. 69.4 that sections 69 to 69.3 no longer apply to him, is granted. This is because the claim that he wishes to bring against Maple Homes for breach of trust meets the standard required under s. 69.4 in that it is the type of claim that would survive discharge, it could succeed, there would be prejudice to continue the stay and it is equitable to grant the exemption.

*Order accordingly.*

**End of Document**

# TAB 22

1984 CarswellOnt 156
Ontario Supreme Court, In Bankruptcy

Advocate Mines Ltd., Re

1984 CarswellOnt 156, [1984] O.J. No. 2330, 52 C.B.R. (N.S.) 277

# Re ADVOCATE MINES LIMITED

Ferron, Q.C., Reg.

Judgment: July 17, 1984
Docket: Toronto No. 31202288

Counsel: *M. Zigler*, for applicant, Gerald Oxford et al.
*C.H. Morawetz*, Q.C., for trustee.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

Application for leave under s. 49 to continue proceedings in ordinary courts in other province.

***Ferron, Q.C.*, Reg.:**

1 Section 49 of the Bankruptcy Act, R.S.C. 1970, c. B-3, is plain in its terms that no creditor with a claim provable in bankruptcy shall have any remedy against the property or the person of the bankrupt in respect of it, except in the manner directed by the Act.

2 The court may, however, remove the stay of proceedings prescribed by that section in appropriate cases and has done so in the following circumstances:

3 1. Actions against the bankrupt for a debt to which a discharge would not be a defence.

4 2. Actions in respect of a contingent or unliquidated debt, the proof of which and valuation has that degree of complexity which makes the summary procedure prescribed by s. 95(2) of the Bankruptcy Act inappropriate.

5 3. Actions in which the bankrupt is a necessary party for the complete adjudication of the matters at issue involving other parties.

6 4. Actions brought to establish judgment against the bankrupt to enable the plaintiff to recover under a contract of insurance or indemnity or under compensatory legislation.

7 5. Actions in Ontario which, at the date of bankruptcy, have progressed to a point where logic dictates that the action be permitted to continue to judgment.

8 The authority given by the court to an applicant creditor to commence or continue proceedings in the circumstances referred to in items 2 to 5 is invariably limited to restrict or prohibit execution of any judgment obtained against the bankrupt.

9 The proceedings in the Court of Appeal of Newfoundland had their genesis in a determination and assessment made by the Director of Labour Standards under the Labour Standards Act. If the applicant on this motion is successful in the Court of Appeal in maintaining the determination and assessment of the director as varied by the District Court Judge, Advocate Mines Limited will be guilty of an offence liable to a fine and to an order enforcing the court's determination as a judgment. I say that the company will be guilty of an offence because, since it is operating under a proposal, it cannot comply with any

determination made against it by the court without doing violence to the proposal. In this sense, the thrust of the proceedings is to defeat the proposal.

10 There is, in my opinion, no doubt that this is the type of proceeding to which s. 49(1) of the Bankruptcy Act applies and that by the terms of that section is stayed.

11 Three considerations militate against an order for leave to the applicant to proceed:

12 1. Any judgment obtained in the Newfoundland courts is not binding on the trustee, so that in that sense, the continuation of the proceedings in Newfoundland serves no purpose.

13 2. The proceedings are against the intent of the Act the effect of which would defeat the proposal which is binding upon the applicant.

14 3. Regardless of the outcome of the proceedings in Newfoundland, the very question now before the Court of Appeal of Newfoundland must be tried again in the Ontario bankruptcy court.

15 In January 1982 the applicant on his own behalf and on behalf of other employees of Advocate Mines Limited filed a proof of claim in the proposal in respect of the same claim which it seeks to establish in the courts of Newfoundland under the Labour Standards Act. That claim was filed after the director's determination for the amount which the director found was owing by the company to the employees by reason of the non-compliance with s. 53 of the Act.

16 That proof of claim was disallowed by the trustee and an appeal from that disallowance is now pending in the bankruptcy court.

17 To authorize the continuation of the proceedings in Newfoundland raises the danger of inconsistent findings in the parallel proceedings in the bankruptcy court.

18 It is clear that logic in the sense which I have heretofore used that word is not served in allowing the applicant to proceed.

19 The application is accordingly dismissed and leave under s. 49(1) is refused.

20 This is not a case for costs save and except the usual order with respect to the trustee's costs out of the assets of the estate.

*Application dismissed.*

# TAB 23

2019 BCSC 69
British Columbia Supreme Court

Burke v. Red Barn at Mattick's Ltd.

2019 CarswellBC 93, 2019 BCSC 69, 301 A.C.W.S. (3d) 476

**Brought under the Class Proceedings Act, R.S.B.C. 1996, c. 50**

Jennifer Burke and Mallory Colter (Plaintiffs) and Red Barn at Mattick's Ltd. and Matthew Schwabe (Defendants)

B.D. MacKenzie J., In Chambers

Heard: January 7, 2019
Judgment: January 22, 2019
Docket: Victoria S180545

Counsel: S. Hern, B.D. Ryan, for Plaintiffs
D.N. Lyon (agent), for C.M. Considine, Q.C., for Defendant, Matthew Schwabe
N.R. MacLean, for Defendant, Red Barn at Mattick's Ltd.

Subject: Civil Practice and Procedure; Insolvency; Public

APPLICATION by plaintiffs for declaration that would lift stay of proceedings and for disclosure.

***B.D. MacKenzie J., In Chambers*:**

1 This application stems from a proposed class action for breach of privacy involving the non-consensual capture of explicit images in a workplace washroom.

**Background**

2 During the plaintiffs' employment with the defendant Red Barn at Mattick's Ltd. ("Red Barn"), they and other members of the proposed class were surreptitiously recorded while changing and toileting. Resulting explicit images and identifying information about the plaintiffs and other members of the proposed class were then disseminated on a "revenge porn" website. In a notice of civil claim filed January 29, 2018, the plaintiffs allege that the defendant Matthew Schwabe, a former assistant manager at Red Barn, is responsible for this grievous and ongoing breach of their privacy and that of other proposed class members. The plaintiffs seek class certification, damages against both defendants, an injunction prohibiting Mr. Schwabe from possessing, viewing, or distributing images of the proposed class members, and various other remedies.

3 The plaintiffs became aware of the explicit images when the Saanich Police contacted them in February 2016. The plaintiff Jennifer Madill (née Burke) deposes that the Saanich Police showed her facial images of six other young women whose privacy had also been breached through non-consensual recording and image dissemination, and that she recognized five as Red Barn employees and one as Mr. Schwabe's former roommate. Ms. Madill deposes that she explained this connection to the Saanich Police. She further deposes that when the Saanich Police directed her to the website where the images had been posted so she could flag them for removal, she recognized the bathroom of the house where Mr. Schwabe resided as the location where the explicit images of his female roommate had been captured.

4 The affidavit evidence filed by the plaintiffs suggests Mr. Schwabe displayed a pattern of problematic behaviour towards women. Both plaintiffs depose that he made sexist remarks and inappropriate comments about women's bodies in the workplace. Another former Red Barn employee deposes that Mr. Schwabe exposed his penis to her during an early morning shift.

5 The plaintiff Mallory Colter deposes that in June 2016, the Saanich Police informed the plaintiffs they had arrested Mr. Schwabe for voyeurism and publication of intimate images without consent, seized electronics from his residence, and released him on a no-contact undertaking. In affidavits sworn in the fall of 2018, the plaintiffs depose that they understand a criminal investigation is ongoing. The affidavits indicate the plaintiffs have suffered psychological harm as a result of these events, including significant ongoing anxiety.

6 Mr. Schwabe has not filed any affidavit evidence to contradict the plaintiffs' evidence. He concedes that the police "executed" a search warrant at his residence in the summer of 2016, arrested him for voyeurism and publication of intimate images, and imposed a no-contact undertaking, but maintains he is not facing any criminal charges at this time.

7 Be that as it may, on April 24, 2018, three months after the plaintiffs filed their notice of civil claim, Mr. Schwabe filed for bankruptcy. His bankruptcy paperwork lists five liabilities — $0 debts to each of the plaintiffs and to their law firm, followed by two unsecured Scotiabank debts amounting to a total debt of $4,484.64 — and a monthly deficit of $50.72. Pursuant to s. 69.3 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (BIA), Mr. Schwabe's declaration of bankruptcy has resulted in a stay of the plaintiffs' claim and proposed class proceeding against him.

8 In this application, the plaintiffs seek a declaration that would lift that stay of proceedings. They also seek an order for disclosure of documents, recordings and images in the possession of the Saanich Police.

**Stay of Proceedings**

***Legal Principles***

9 Pursuant to s. 69.4 of the BIA, a creditor affected by a stay of proceedings under ss. 69 to 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor. The court has discretion to make such a declaration if satisfied that the creditor is likely to be materially prejudiced by a continued stay, or that it is equitable on other grounds to make such a declaration.

10 The plaintiffs rely on *Maple Homes Canada Ltd., Re*, 2000 BCSC 1443 (B.C. S.C.) *(Maple Homes)*, for the principles that apply to this type of application. In *Maple Homes*, Smith J. concluded that in addition to showing material prejudice or that it is equitable on other grounds to allow the exemption, there must be "compelling reasons" to depart from the *BIA*'s financial rehabilitation objectives (at para. 33).

11 Justice Smith also relied on *Advocate Mines Ltd., Re*, [1984] O.J. No. 2330 (Ont. S.C.), for "some grounds on which courts will lift stays of proceedings" (*Maple Homes* at para. 28). She appeared to accept the proposition that an applicant under s. 69.4 must "satisfy the court that one or more of these grounds is present" (at para. 29). The *Advocate Mines Ltd., Re* grounds include:

1. actions for a debt to which a discharge would not be a defence,

2. actions involving contingent or unliquidated debts that are too complex for trustee valuation under the *BIA*, and

3. actions where the bankrupt is a necessary party for complete adjudication of a matter involving others.

12 Despite the language of para. 29 of *Maple Homes*, Smith J. later characterized the presence of one or more of these grounds as non-determinative. However, she also identified the content of the first ground — whether the claim "would survive discharge" — as one of the prescribed inquiries the court should make on this type of application (at para. 33).

13 Taken together, these passages from *Maple Homes* seem to suggest that the presence of at least one of the *Advocate Mines Ltd., Re* grounds may be necessary — but not necessarily sufficient — to justify lifting a stay, and that the first ground is of particular significance.

14 *Maple Homes* also establishes that because continuing an action after a bankruptcy filing is an "exceptional situation", mere pleadings disclosing a claim are not sufficient to warrant an exemption from a stay. To justify an exemption, Smith J. found that there "must also be some evidence supporting the conclusion that there is a fair issue to be tried," a less stringent standard than proof on a balance of probabilities (at para. 34).

15 When applying the principles set out in *Maple Homes*, the court must not attempt to determine the proposed claim on its merits (at para. 33).

***Positions of the Parties***

16 The plaintiffs submit that there are compelling reasons for lifting the stay. They submit that their action against Mr. Schwabe satisfies the three *Advocate Mines Ltd., Re* grounds described above, and that they are likely to be materially prejudiced if the stay continues. They further submit that it is equitable to lift the stay on other grounds. They question the *bona fides* of Mr. Schwabe's bankruptcy proceedings and suggest that, given his modest claimed debt and minimal monthly deficit, he is merely using the *BIA* to avoid their proposed class action.

17 In response, Mr. Schwabe submits that the plaintiffs' evidence fails to meet the "some evidence" threshold set out in *Maple Homes*, saying that the plaintiffs' efforts to link him to the conduct at issue are speculative at best. He further submits that the application fails to disclose "compelling reasons" to justify an exemption from a stay. However, he has not particularized his objections.

18 Red Barn takes no position on this application.

**Analysis**

***Is there some evidence of a fair issue to be tried?***

19 The existence of "some evidence of a fair issue to be tried" (*Maple Homes* at para. 34) is a threshold requirement for lifting a stay of proceedings under s. 69.4 of the *Gaastra v. Tri-Link Consultants Inc.*, 2012 ABQB 271 (Alta. Q.B.) at para. 7). The threshold is a low one: a plaintiff "need not prove a *prima facie* case, only that there is a case to be met" (*Gaastra* at para. 9). The chambers judge in *Gaastra* held that "absent a full and transparent explanation" from the defendants, the plaintiffs' affidavit evidence met the applicable threshold (at para. 9). On appeal, the Alberta Court of Appeal held that even though the chambers record lacked "overt evidence" of the alleged wrong, the judge had not erred in finding that the plaintiff's evidence disclosed "sufficient suspicious circumstances" to show there was "some substance to the allegations" (2012 ABCA 262 (Alta. C.A.) at paras. 2-3).

20 Mr. Schwabe submits that the plaintiffs' affidavit evidence does not meet the threshold test because it fails to link him to the conduct at issue. He submits that the plaintiffs' evidence as to what the Saanich Police said about him is inadmissible hearsay in the context of what he claims is an application to overturn a final order. He further submits that Ms. Madill's affidavit fails to specify a basis for her knowledge of what Mr. Schwabe's bathroom looked like, and that her evidence regarding Mr. Schwabe's former roommate lacks detail and is therefore unreliable.

21 The plaintiffs dispute Mr. Schwabe's contention that this is an application to overturn a final order. They submit this is simply an interlocutory application to determine whether an action should proceed and does not deal with a final order. I agree with the plaintiffs on this point. As such, the references in the plaintiffs' affidavits to what the Saanich Police told them about the nature of the investigation are not inadmissible. However, even if that evidence was inadmissible hearsay, I would accept the plaintiffs' submission that their remaining evidence demonstrates a link between Mr. Schwabe and the conduct at issue that would be sufficient to meet the threshold test.

22 Moreover, on this application, Mr. Schwabe has not provided a "full and transparent explanation" to refute the plaintiffs' affidavit evidence. In the absence of such an explanation, the totality of the plaintiffs' evidence persuades me there is "some

substance to the allegations" and "some evidence supporting the conclusion that there is a fair issue to be tried." Accordingly, I am satisfied the plaintiffs meet the threshold test.

23 I will now consider whether there are compelling reasons to lift the stay, whether its continuation would be materially prejudicial to the plaintiffs, and whether it would be equitable on other grounds to lift the stay. I will do so with reference to the *Advocate Mines Ltd., Re* grounds, beginning with the first.

***Is this an action for a debt to which a discharge would not be a defence?***

24 The plaintiffs allege that Mr. Schwabe's conduct, if proven, would result in a debt to which a discharge would not be a defence because it would likely survive his bankruptcy under s. 178(1) of the BIA.

25 Section 178(1) provides that an order of discharge does not release a bankrupt from an enumerated list of debts or liabilities. The language of s. 178(1) does not necessarily "correspond to legal causes of action," rather, it provides "ways of characterizing existing liabilities so as to trigger the underlying policy rationale for allowing those liabilities to survive discharge from bankruptcy, regardless of the legal basis for that liability": *H.Y. Louie Co. v. Bowick*, 2015 BCCA 256 (B.C. C.A.) at para. 45. While the *BIA* as a whole is designed to give "honest unfortunates" a fresh start financially (*Sangha, Re*, 2004 BCSC 799 (B.C. S.C.) at para. 22), the tailored exemptions to that goal contained in s. 178(1) are designed to avoid releasing a bankrupt from responsibility for conduct that is criminal, quasi-criminal, or otherwise "unacceptable to society": *Simone v. Daley* (1999), 170 D.L.R. (4th) 215 (Ont. C.A.) at para. 30.

26 The plaintiffs seek to fit Mr. Schwabe's alleged conduct into one or both of the following s. 178(1) exemptions: "any award of damages by a court in civil proceedings in respect of ... bodily harm intentionally inflicted ..." (s. 178(1)(a.1)(i)) or "any debt or liability resulting from obtaining property or services by false pretences ..." (s. 178(1)(e)). They further submit that if I find one or both of these clauses would apply to a debt or liability resulting from a successful action against Mr. Schwabe, such a finding should provide a sufficient basis to justify lifting the stay.

27 Mr. Schwabe submits that on this issue, the plaintiffs "assert an interpretation of the relevant provisions which has no basis in any recognized rules of statutory interpretation," and have failed to provide case law to support their proposed interpretations of the terms "bodily harm" and "property." However, Mr. Schwabe declined to elaborate on these written submissions in oral argument.

***Section 178(1)(a.1)(i): Bodily Harm Intentionally Inflicted***

28 On this point, I must determine whether the non-consensual taking of explicit images of a person can constitute "bodily harm intentionally inflicted" such that a discharged bankrupt would not be released from an award of damages if such conduct was established.

29 Under this part of s. 178(1), the damage award to be exempted from discharge must stem from bodily harm that arose "from an act done with specific intent to injure (as opposed to an intentional act that incidentally results in injury)": *Dickerson v. 1610396 Ontario Inc.*, 2013 ONCA 653 (Ont. C.A.) at para. 18. The plaintiffs submit that "a surreptitiously recorded image of a person's body constitutes 'bodily harm intentionally inflicted'" in the circumstances of this case.

30 A recent Ontario case, *R. v. J.B.*, 2018 ONSC 4726 (Ont. S.C.J.), describes some of the harms that can flow from the "distribution of intimate images in a public forum without the consent of those depicted":

> [20] ... It is beyond question that the non-consensual distribution of such intimate images carries with it the risk of psychological hardship and embarrassment to the victims of such crimes. In notorious instances, those who have been the subject of such non-consensual publication of their intimate images on the internet have killed themselves. The inferred impact on victims accordingly is substantial, and the moral responsibility of such offenders generally will be high. Moreover, our courts recognize that distribution of such intimate images via the internet can result in the images being forever available...

31 In their affidavit evidence, the plaintiffs depose that they have suffered psychological harm as a result of the violation they have experienced. At the same time, I am satisfied that s. 2 of the Criminal Code, R.S.C. 1985, c. C-46, is a complete answer to the question of whether psychological harm falls under s. 178(1)(a.1)(i) of the BIA. Section 2 defines "bodily harm" as "any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature." In my view, this includes the significant emotional trauma and hurt described by both plaintiffs in their affidavits.

32 This view is supported by *Fitzpatrick, Re*, 2017 ONSC 2342 (Ont. S.C.J. [Commercial List]), in which Myers J. held that "bodily harm" includes psychological harm under both the *BIA* and the *Criminal Code*.

33 Being satisfied that the psychological harm suffered by the plaintiffs constitutes "bodily harm" for the purposes of s. 178(1)(a.1)(i), I turn to whether that harm was "intentionally inflicted" in the sense that the images were distributed with "specific intent to injure."

34 As the Ontario Court of Appeal held in *Dickerson* (at para. 32), whether one intends to cause bodily harm "can be proved directly or it can be reasonably inferred from the facts." In the present case, the plaintiffs submit that "the requisite intention ... to inflict psychological harm can be readily inferred from the facts": namely, posting explicit images with identifying information on a revenge porn website.

35 In my view, on the whole of the evidence it is reasonable to infer that whoever posted the images of the plaintiffs and other proposed class members intended to cause them psychological harm.

36 As a result, I am satisfied that the plaintiffs' claim against Mr. Schwabe is an action for a debt to which a discharge would not be a defence because, if successful, it would result in an award of damages for bodily harm intentionally inflicted.

***Section 178(1)(e): Obtaining Property by False Pretences***

37 The plaintiffs also contend that Mr. Schwabe's alleged capture of their images amounts to obtaining property by false pretences. They submit that their "images when they were in a state of undress ... were rightly their property and not [Mr. Schwabe's]" and that he, as assistant manager, "had care and custody of the premises ... and falsely allowed [them] to believe the washroom was a place of privacy when in fact it was not."

38 Intellectual property rights in photographs and video recordings are determined under the Copyright Act, R.S.C. 1985, c. C-42. Under s. 13(1), the author of a work — not its subject — normally becomes "the first owner of the copyright therein." Under s. 3, the owner of the copyright in a work has the sole right to produce, reproduce, or publish that work or any substantial part thereof, unless they authorize others to do so. Although the subjects of photographs and video recordings have privacy rights that may limit what a copyright-holder can do with works created without the subjects' consent (see *Aubry c. Éditions Vice Versa Inc.*, [1998] 1 S.C.R. 591 (S.C.C.)), those subjects do not own the intellectual property in those media. As a result, I am unable to agree with the plaintiffs' contention that the images at issue "were rightly their property."

39 However, the language of s. 178(1)(e) does not require the property at issue to have rightfully belonged to any particular party. In my view, recording the plaintiffs' bathroom activities allowed the author to obtain "property" that will bring the plaintiffs' claim against Mr. Schwabe within the ambit of s. 178(1)(e) if they can show that the property was obtained by false pretences.

40 False pretence often involves "deceitful statements": see *Ste. Rose & District Cattle Feeders Co-op v. Geisel*, 2010 MBCA 52 (Man. C.A.) at paras. 99-100. However, "non-disclosure of material facts through blameworthy or strategic silence" can also amount to false pretence: *Altera Moneta Corp. v. Highway King Transport Ltd.*, 2016 BCSC 771 (B.C. S.C.) at para. 32.

41 Following *Altera*, the plaintiffs submit that Mr. Schwabe obtained the explicit images at issue "through blameworthy or strategic silence" about the presence of a recording device in the Red Barn washroom. This silence, in their submission, amounts to a false pretence that brings their claim against Mr. Schwabe within the scope of s. 178(1)(e).

42 Given the totality of the circumstances, I accept that if Mr. Schwabe is the one who recorded the plaintiffs, he did so by silently perpetuating the false pretence that the washroom offered privacy in which to remove clothing for the purpose of toileting and changing. Had the plaintiffs known the recording device was there, it is reasonable to infer they would not have removed their clothing in the washroom without shielding themselves somehow, and there would have been no resulting explicit images.

43 I conclude that Mr. Schwabe's alleged conduct, if proven, would constitute obtaining property by false pretences for the purposes of s. 178(1)(e). As a result, I am satisfied that this subsection provides an additional basis for concluding that the plaintiffs' claim against Mr. Schwabe is an action for a debt to which a discharge would not be a defence.

***Other Considerations***

44 The plaintiffs submit that if their action is found to be a claim for a debt to which a discharge would not be a defence, that finding amounts to proof of material prejudice and provides a sufficient basis to justify lifting the stay, particularly as none of the other *Maple Homes* considerations weigh against that outcome.

45 In light of my findings above, I am satisfied that material prejudice is likely to result if the stay continues. As a result, the language of s. 69.4(a) of the BIA permits me to make the declaration the plaintiffs seek.

46 For the sake of completeness, I am also in agreement with the plaintiffs' submission that the other *Maple Homes* considerations support the lifting of the stay of proceedings. In my view, the second and third *Advocate Mines Ltd., Re* grounds are also made out. The summary valuation procedure under s. 135(1.1) of the BIA is an inappropriate mechanism to determine quantum of damages in a complex case of this nature. As well, the discovery obligations inherent in Mr. Schwabe's participation as a party to the plaintiffs' claim against Red Barn make such participation necessary for the complete adjudication of the plaintiffs' claim. See *Taylor Ventures Ltd., Re*, 2002 BCSC 82 (B.C. S.C. [In Chambers]) at para. 5.

47 Additionally, the very minor financial difficulty in which Mr. Schwabe found himself when he decided to file for bankruptcy three months after the plaintiffs filed their claim leads me to conclude that he is not an "honest unfortunate" who should be "rewarded ... by a release of liability" if he is found to be responsible for capturing and disseminating the explicit images at issue (*Simone* at para. 30). In my view, this would provide an equitable basis to lift the stay and allow the plaintiffs' claim against him to proceed.

48 In all of the circumstances, I find there are compelling reasons to lift the stay.

49 Pursuant to s. 69.4 of the BIA, I declare that ss. 69 to 69.31 do not operate with respect to the plaintiffs and the proposed class members as described in the notice of civil claim filed January 29, 2018, to bar the continuation of the action against Mr. Schwabe and others.

**Document Production**

50 The plaintiffs also seek an order for disclosure of documents, recordings and images in the possession of the Saanich Police under Rule 7-1(18) of the Supreme Court Civil Rules. Rule 7-1(18) provides:

> **Documents not in possession of party**
>
> (18) If a document is in the possession or control of a person who is not a party of record, the court, on an application under Rule 8-1 brought on notice to the person and the parties of record, may make an order for one or both of the following:
>
> (a) production, inspection and copying of the document;
>
> (b) preparation of a certified copy that may be used instead of the original.

***Positions of the Parties***

51 The plaintiffs submit that the documents, recordings and images held by the Saanich Police will tend to prove or disprove material facts, including "what recordings and images were made, when they were made, whose images were captured, and what Mr. Schwabe did with them." They rely on *Wong v. Antunes*, 2009 BCCA 278 (B.C. C.A.), for the proposition that police may consent to release documentation assembled in a criminal investigation for use in a civil case if the order requiring such release takes the form set out at para. 25 of that decision. The prescribed form of order is designed to "balance[s] the plaintiff's need to obtain information in the police file with the Crown's need to preserve the integrity of the criminal prosecution" and permit "full debate on the various privilege issues that may arise" (at para. 26).

52 Mr. Schwabe contests the plaintiff's application for document production on the basis that he has not had a "proper opportunity to challenge the legality of the search and seizure" through which the Saanich Police obtained some of the materials now sought by the plaintiffs. He cites *British Columbia (Director of Civil Forfeiture) v. Cronin*, 2016 BCSC 284 (B.C. S.C.), and *British Columbia (Director of Civil Forfeiture) v. Lloydsmith*, 2014 BCCA 72 (B.C. C.A.), for the proposition that the contents of a police file should not be disclosed to third parties in a civil matter until any related *Charter* issues have been addressed.

53 Mr. Schwabe further submits that the plaintiffs' application amounts to an "unwarranted 'fishing expeditio[n]'" (*Northwest Organics, Limited Partnership v. Roest*, 2017 BCSC 673 (B.C. S.C.) at para. 79) because it lacks a sufficient evidentiary basis.

54 Once again, Red Barn takes no position on this point. The Saanich Police also take no position, apart from requesting 60 days to comply with any order requiring document production. The plaintiffs make no objection to this request.

**Analysis**

55 The plaintiffs' proposed document production order follows the model our Court of Appeal set out in *Wong*. As such, it balances the plaintiffs' interests and the interests of the Saanich Police, and leaves space for "full debate" on privilege-related issues (at para. 26).

56 Although Mr. Schwabe says it would be inappropriate for me to grant the plaintiffs' application for document production until he has a "proper opportunity to challenge the legality of the search and seizure" in a separate *voir dire*, he has not adduced any evidence to suggest the Saanich Police's execution of the search warrant at his residence was unlawful. As the plaintiffs have pointed out, if that search genuinely raised *Charter* issues, one would expect Mr. Schwabe to have provided some affidavit evidence as to what happened. He has not done so.

57 Mr. Schwabe's authorities, *Cronin* and *Lloydsmith*, are civil forfeiture cases. His argument therefore rests on the contention that the prohibition on police file production in civil forfeiture cases until *Charter* adjudication has occurred also applies in other civil litigation proceedings. However, insofar as I am aware, no court has applied this aspect of either case outside the civil forfeiture context. The plaintiffs say the *in rem* proceedings in *Cronin* and *Lloydsmith* are readily distinguishable from the *in personam* proceedings here, and I am inclined to agree.

58 Mr. Schwabe would also have me dismiss the plaintiffs' application for document production as an unwarranted fishing expedition, relying on *Northwest Organics*. His submissions on this point appear to focus on what he says are the evidentiary deficiencies of the plaintiffs' case. However, I have already found that those supposed deficiencies are not as serious as Mr. Schwabe suggests.

59 In *Northwest Organics*, Weatherill J. overturned portions of a master's order that would have required a Member of the Legislative Assembly ("MLA") and her assistant to produce all "documents relating to oral conversations or written communications with, from or to any individuals" on a range of topics (at para. 20). He did so, in part, because there was "no evidence that the requested documents even exist[ed], let alone [were] in the possession or control of" the MLA or her assistant (at para. 80). As Weatherill J. explained,

> [81] It is apparent from the wording of Rule 7-1(18) that it was not intended to provide broad discovery of documents from non-parties, but rather a mechanism by which parties can access *specific* documents or classes of documents when it has been demonstrated that they are in the possession or control of a non-party and are relevant to an action...
>
> [Emphasis in original.]

60 In my view, the plaintiffs in this case are not engaged in an unwarranted fishing expedition. They are seeking an order to access a specific class of documents held by the Saanich Police, namely documents "relating to the surreptitious recording of people while they used the washroom at [Red Barn]," a matter they reasonably believe the Saanich Police to be investigating. On the basis of the plaintiffs' uncontroverted affidavit evidence, I am persuaded that some documents that meet this description not only exist, but are within the possession or control of the Saanich Police, and that those documents are undoubtedly relevant to the plaintiffs' action. Accordingly, the plaintiffs' proposed order falls within the intended scope of Rule 7-1(18).

61 In the absence of any evidence of a *Charter* issue or any clearly applicable case law to the contrary, I am satisfied that *Wong* permits me to grant the plaintiffs' application for document production.

62 I order production substantially in the form set out in Schedule A to the plaintiffs' Notice of Application. The Saanich Police will have 60 days to comply with this order.

*Application granted.*

**End of Document**

# TAB 24

2022 ONSC 7376
Ontario Superior Court of Justice

Can-Industrial Electric v. City of Toronto

2022 CarswellOnt 19800, 2022 ONSC 7376, 2022 A.C.W.S. 5734

# IN THE MATTER OF THE BANKRUPTCY OF CAN-INDUSTRIAL ELECTRIC INC. having a head office in the City of Toronto, in the Province of Ontario

Reg. Ilchenko

Heard: October 18, 2021; December 21, 2021
Judgment: April 13, 2022
Docket: 31-2644929

Counsel: Robert J. Drake, for Moving Creditor Rexel Canada Electric Inc.
Alan Page, for Trustee, Schwartz Levitsky Feldman Inc.
Mathew Kersten, for Bankrupt Can-Industrial Electric Inc.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Insolvency

Motion by creditor to lift stay of action pursuant to Bankruptcy and Insolvency Act.

***Reg. Ilchenko*:**

**The Procedural Context:**

1 This Motion by Rexel (the "*Motion*") under s.69.4 of the Bankruptcy and Insolvency Act, RSC 1985, c. B-3 (the "*BIA*") was initially brought as a motion in writing, but was adjourned to be a regular Bankruptcy Zoom motion as leave had not been obtained to have the motion proceed in writing on an urgent basis during COVID. Associate Justice Jean also required that the Motion be served on the Bankrupt in an Endorsement dated July 3, 2020, and the Motion was further adjourned by the endorsements of (now) Justice Mills.

2 Rexel and the Bankrupt responded to the Motion and appeared before me on my short Zoom Bankruptcy motions list on October 18, 2021.

3 The relief that Rexel is seeking in its Notice of Motion is:

> "An order lifting the stay as against the bankrupt, and leave to continue the action commenced by the Creditor in Toronto against the bankrupt, bearing court file no. CV-18-606927-0000 ("the Civil Action"),
>
> > (a) That the bankrupt committed a breach of trust within the meaning of Part II of the *Construction* Act; RSO 1990, c C.30 ("the *Construction Act*");"

4 One very important fact on this motion is that the Bankrupt in this case is that the Bankrupt Can-Industrial Electric Inc. is a corporation, and the leave being sought relates only to this Corporate Bankrupt, and not any individual bankrupt.

5 On the return date of October 18, 2021, Counsel for the Bankrupt appeared in its factum to be bringing an unconfirmed cross-motion to "...reverse or otherwise disregard the Trustee's consent to Rexel for an Order to lift the stay against the Bankrupt pursuant to section 37 of the Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3", although no Notice of Cross-Motion seeking this relief had been served by the Bankrupt.

6 Instead, counsel for the Bankrupt presented a document titled a "Bankruptcy Application", sporting an unsworn "Affidavit of Verification" asking for that relief, in violation of *Bankruptcy and Insolvency General Rules* 11 and 13, and quite possibly Bankruptcy and Insolvency General Rules 69-76.

7 In my endorsement from October 18, 2021 (attached at Schedule A to these reasons along with my other endorsements) I invited counsel for the Bankrupt to consider whether he would continue to attempt to obtain an Order under s.37 of the BIA to reverse the Trustee's consent to the leave motion brought by Rexel, or just deal with the issues on the Motion.

8 I also questioned how the Trustee could have been examined by counsel for the Bankrupt, a transcript having been filed, when the Trustee had provided no affidavit, and leave of the Court under the BIA to lift the stay had not been obtained. No acceptable answer was provided.

9 In addition, in its Factum the Bankrupt seemed to be making an argument on this Motion that "The case law makes clear that the trust provisions of the CA [the *Construction Act*] are inoperative when in conflict the BIA, specifically when intended to defeat the scheme of priorities as set out in the BIA." without having served a Notice of Constitutional Question on both the Federal and Provincial Crown as required under s.109 of the Courts of Justice Act, and citing case law in support of their constitutionality arguments that may have been superseded by the ruling of the Court of Appeal in *The Guarantee Company of North America v Royal Bank of Canada* (2019) ONCA 9. ("*GCNA*"). I invited counsel for the Bankrupt to consider whether he would continue with the constitutional Paramountcy argument.

10 Also, I invited counsel for the Bankrupt to reconsider his interpretation of the decision of Master Short in *Campoli Electric v Georgian Clairlea Inc.* (2017) ONSC 2784 ("*Campoli*") in the manner set out in his factum.

11 Having determined for the above reasons that the Motion could not continue that day without counsel for the Bankrupt having the opportunity to ponder whether he would be continuing with some of these arguments and requested relief, I ordered counsel for the Bankrupt to file a Fresh as Amended Factum (the "*Fresh as Amended Factum*"), and adjourned the hearing to December 21, 2021, also giving counsel for Rexel the opportunity to respond.

12 The Motion resumed on December 21, 2021 and the only issues argued in accordance with the Fresh as Amended Facta filed on the Motion were the issues relating to the Motion brought by Rexel to obtain leave under s.69.4 of the BIA. No relief under s.37 of the BIA to set aside the Trustee's consent on behalf of the Bankruptcy Estate to the Order was argued, and issues for which a Notice of Constitutional Question would need to be served under the provisions of s.109 of the Courts of Justice Act were also not argued.

13 At the completion of the Motion, I permitted counsel to file further written submissions by January 21, 2022, specifically relating to the decision of Kershman, J. in Yanic Dufresne Excavation Inc. v. Saint Joseph Developments Ltd. et al.2021 ONSC 6633 (CanLII) ("*Yanic Dufresne* ") that had been released shortly after the parties had filed their materials and had recently come to my attention.

14 All underlining for emphasis in quoted materials is added by me on this endorsement.

**Action sought to be continued and Evidence of the Plaintiff:**

15 Rexel commenced Action CV-18-606927-0000 (the "*Action*"), as against the Corporate Bankrupt, as well as various officers and directors of the Bankrupt, on October 15, 2018. The Bankrupt, as well as the Bankrupt's directors and officers, defended the action.

16 The Action alleges that the Bankrupt breached the trust provisions of the Construction Act, RSO 1990, c C.30 (the "Construction Act") and pursuant to Part II of the Construction Act, also claimed against the directors and officers of the Bankrupt personally for breach of trust.

17 The Bankrupt made an assignment for the general benefit of its creditors on May 13, 2020 (the "*Date of Bankruptcy*") and the Trustee was appointed as trustee of the Bankrupt's estate. The Bankrupt is the only defendant to the Action that is a bankrupt, for which a lift stay order is required. None of the other defendants to the Action, being Vincenzo, Fabrizio, Maria and Michele Gallucci (the "*Individual Defendants*") are bankrupt.

18 I have attached the Statement of Claim in the Action at Schedule "B" to my reasons (the "*Statement of Claim*"). In the Statement of Claim Rexel claims against all of the Defendants, including the corporate Bankrupt:

> "a Payment of the sum of $239,518.19 for damages for breach of the trust provisions of Part Il of the *Construction Act*, R.S.O. 1990 c.C3-30 (the "**Act**");

19 In the portions of the Statement of Claim relevant to this Motion Rexel alleges that:

> "3. The Defendant Can-Industrial Electric Inc. ("Can-Industrial") is a company duly incorporated pursuant to the laws of the Province of Ontario, having an office in the City of Toronto, in the said Province and carries on business, inter alia, as a contractor.
>
> 4. The Defendants Vincenzo Gallucci, Fabrizio Gallucci, Maria Gallucci and Michele F'. Gallucci also known as Mike I. Gallucci (hereinafter referred to as the "Trustees") are individuals residing in the Province of Ontario and were at all material times the directors, officers. and/or controlling minds of Can-Industrial.
>
> **Breaches of Trust**
>
> 11. In accordance with the terms of the Westburne and Nedco Agreements or in the alternative but not by way of waiver, in accordance with the prevenient agreements that the Plaintiff entered into with the Defendants or any of them, the Plaintiff agreed to supply the Materials with respect to various improvements in the Province of Ontario, including but not limited to Seasons Retirement St. Thomas, and Lion Head Plaza.
>
> 12. The Plaintiff states that its supply of Materials related to the said improvements and other improvements, as defined by the Act.
>
> 13. The Plaintiff states that the Defendants or any of them were, al all material times, either a contractor or subcontractor on the projects where the Materials supplied by the Plaintiff were used for the improvements being made upon the lands for said projects.
>
> 14. The Plaintiff fully completed its obligations under its Agreements with the Defendants or any of them and invoiced the Defendants in full, particulars of which are known to the Defendants or any of them. The amount claimed herein remains due, payable and owing to the Plaintiff.
>
> 15. The Defendants or any of them, despite repeated demands, have refused or neglected to pay the outstanding balance that is due and owing to the Plaintiff.
>
> 16. The Plaintiff states that the Defendants or any of them have been paid funds by the parties with whom they have contracted in relation to the said projects and the Plaintiff states that all monies paid to the Defendants or any of them with respect to the said projects constitute trust funds pursuant to section & of the Act.
>
> 17. The Plaintiff states that the funds received by the Defendants or any of them with respect to the said projects were not paid to the Plaintiff and that the Plaintiff states that the Trustees. as the controlling and operating minds of the Defendant, Can-Industrial. have participated in the conversion of the said trust funds or in the alternative, assented to or acquiesced in the conversion of the said trust funds and as a result of the same, are in breach of Section 13 of Act.

18. The Plaintiff states that the Trustees, at all material times, had effective control of Can-Industrial and its relevant activities and that they assented to or acquiesced in the appropriation and conversion of the said trust funds as set out above, which the Trustees knew or ought to have known amounted to a breach of trust by the Defendants or any of them.

19. Furthermore, or in the alternative, the Plaintiff states that the Defendants or any of them were common law trustees in respect of monies received from the improvements as any of Defendants were involved with one or more of the following and/or had actual or imputed knowledge of one or more of the following and/or acted recklessly in respect of one or more of the following:

a) charged with trust fands or in the alternative, funds paid from the improvements which were impressed with a trust for the benefit of the Plaintiff;

b) handled trust funds or in the alternative, funds paid from the improvements which were impressed with a trust for the benefit of the Plaintiff;

c) co-mingled the trust funds or in the alternative, funds paid from the improvements which were impressed with a trust for the benefit of the Plaintiff;

d) used trust funds or in the alternative, funds paid from the improvements which were impressed with a trust for the benefit of the Plaintiff to pay other debts, including Tradesmen's overhead expenses and salaries; knew or ought to have known that trust funds were due, payable and owing to the Plaintiff;

e) knew or ought to have known that trust funds were due, payable and owing to the Plaintiff:

f) failed to account for the receipt and/or payment of trust funds or in the alternative, funds paid from the improvements which were impressed with a trust for the benefit of the Plaintiff;

g) failed to preserve trust funds or in the alternative, funds paid from the improvements which were impressed with a trust for the benefit of the Plaintiff; and

h) knowingly and/or recklessly participated in the breach of trust, either as individuals or a general partnership in receipt and chargeable with trust property or as individuals or a general partnership who knowingly assisted in a dishonest design on the part of the general partnership trustee in respect of the improvements, commingling trust funds, failing to preserve the trust finds or using the trust funds for purposes other than for the benefit of the Plaintiff.

20. The Plaintiff pleads and relies upon the provisions of Part II of the *Construction Lien Act*.

**Debt Ought to Survive Bankruptcy**

29. The Plaintiff states that the Trustees have committed a breach of trust and that any Judgment obtained by the Plaintiff against the Defendants or any of them survives his or her bankruptcy and they shall not be released by his discharge as such liability falls within the provisions of section 178(4) of the *Bankruptcy and Insolvency Act* R.S.C. 1985 c. B-3 as amended, arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity."

**Evidence of the Plaintiff on the Motion**

20 The evidence on the Motion for Rexel was provided by Chantal Silk, a law clerk at the Law Firm for Rexel, in an affidavit affirmed on June 23, 2020 (the "*Silk Affidavit*") and a Supplementary Affidavit of Chantal Silk (the "*Supplementary Silk Affidavit*"). The Relevant portions of the Silk Affidavit are:

"5. Rexel commenced the Civil Action as against the Bankrupt, as well as the Bankrupt's directors and officers in respect of unpaid invoices for electrical equipment.

6. Among other things, Rexel claims as against the Bankrupt and its directors and officers for breach of trust under the *Construction Act*, RSO 1990 c C.30 ("the *Construction Act*"). Attached hereto and marked as Exhibits "B" and "C" are copies of the pleadings in the Civil Action.

7. In or around mid-May 2020, our office received notice of bankruptcy in respect of the Bankrupt, indicating that the Bankrupt had filed or was deemed to have filed an assignment on May 13, 2020. Attached hereto and marked as Exhibit "D" is a copy of the Notice of Bankruptcy and Statement of Affairs of the Bankrupt, dated May 13, 2020.

8. I note that Rexel (Nedco Div of Rexel Canada C/O GSNH) is listed as an unsecured creditor of the Bankrupt in the amount of $234,919.40.

9. I am advised by David Morawetz ("Mr. Morawetz"), lawyer with Goldman Sloan Nash & Haber LLP who has carriage of this matter, that Rexel needs an order lifting the stay against the Bankrupt so it can carry on with the Civil Action.

10. Mr. Morawetz advises me that the reason that this relief as against the Bankrupt is necessary, is because of how the trust provisions in Part II of the *Construction Act* operate.

11. Mr. Morawetz further advises me that section 8 of the *Construction Act* provides that all amounts received by a contractor or subcontractor constitute trust funds for the benefit of its subcontractor(s) who supplied materials or services to a construction project. The contractor or subcontractor who is in receipt of trust funds must pay its own subcontractors before using any of the trust funds for its own purposes.

12. Mr. Morawetz further advises me that the teeth of the trust provisions in Part II of the *Construction Act* lie in section 13, which provides, inter alia, that along with the contractor or subcontractor, every director and officer of a corporation, or other person who has effective control of the corporation, may also be liable for breach of trust.

13. In the Civil Action, Rexel claims to have supplied material to the Bankrupt, who was a subcontractor or contractor for various construction projects.

14. Rexel intends to obtain judgment against one or more of the individual defendants (i.e. the directors and officers of the Bankrupt) pursuant to section 13 of the *Construction Act*.

15. However, Mr. Morawetz advises me that this requires Rexel first establish

(a) That the Bankrupt owes it money; and

(b) That the Bankrupt committed a breach of the trust provisions in Part II of the Construction Act.

Without proving these two elements as against the Bankrupt, Rexel likely cannot establish liability as against any of the directors or officers of the Bankrupt.

16. Accordingly, if the stay is not lifted as against the Bankrupt, and Rexel is not permitted to continue the Civil Action as against the Bankrupt, Rexel will be prejudiced, as it likely will not be able to obtain judgment as against the directors and officers of the Bankrupt.

21 At Exhibit A to the Silk Affidavit is the Consent by the Trustee dated June 17, 2020 to the Order requested by the Plaintiff the relevant portions of which stated:

"1. THIS COURT ORDERS that the stay of proceedings, pursuant to section 69.3(1) of the *Bankruptcy and Insolvency Act*, RSC, 1985, c. B-3, is hereby lifted so as to permit Rexel to continue with the Civil Action as against the bankrupt, Can-Industrial Electric Inc.

2. THIS COURT FURTHER ORDERS that the Trustee be added as a party defendant to the Civil Action, and that if the Trustee does not defend the action, it shall not have any costs awarded against it, and that the Trustee is not required to attend examinations for discovery, participate in mediation, respond to any requests to admit, or attend pre-trial conferences, nor shall the Trustee be required to file an affidavit of documents, but shall make all documents in its possession available for inspection at the sole expense of the requesting party and not be liable for any costs whatsoever."

22 The Trustee signed an updated consent at Exhibit A to the Supplementary Silk Affidavit on September 20, 2020, which is identical in form to the original Consent, other than the date, but in response to the Zoom version of the Motion rather than the In-Writing version. I will collectively refer to this as the "*Trustee's Consent*".

23 Silk was not cross-examined on her affidavit.

**Bankrupt's Defence to Action and Evidence on Motion**

24 The Bankrupt defended the Action prior to the date of Bankruptcy, filing a Statement of Defence (the "*Defence*") dated December 3, 2018. The paragraphs of the Defence relevant to this Motion state:

"2. The Defendants admit the allegations in paragraph 4 of the Statement of Claim only to the extent that Vincenzo Gallucci ("Vincenzo"), Fabrizio Gallucci ("Fabrizio"), Michele F. Gallucci, also known as Mike F. Gallucci ("Michele"), are directors and officers of Can-Industrial Electric Inc. ("Can-Industrial"). With respect to the remainder of paragraph 4 of the Statement of Claim, the Defendants deny that any of the individual Defendants, Vincenzo, Fabrizio, Michele, and Maria Gallucci ("Maria") (collectively, the "Individual Defendants"), were controlling minds of Can-Industrial, or that Maria was at any material time a director or officer of Can-Industrial.

3. The Defendants deny all other allegations contained in the Statement of Claim, and put the Plaintiff to the strict proof thereof.

4. Can-Industrial is a corporation duly incorporated in the Province of Ontario and carries on business in the Province of Ontario.

5. Vincenzo is an individual residing in the Province of Ontario. Although he is a director and officer of Can-Industrial, in or about 2013, he ceased to be involved in the day to day operations of the company and has since worked as a contract project administrator on a full-time basis.

6. Fabrizio is an individual residing in the Province of Ontario. Although he is a director and officer of Can-Industrial, in or about 2013, he ceased to be involved in the day to day operations of the company and has since worked as a licensed insurance broker on a full-time basis.

7. Maria is an individual residing in the Province of Ontario. She is a part-time school teacher who has worked at the Toronto Catholic District School Board. In 2016, she began working part-time at Can-Industrial by assisting the company with administrative and secretarial work. To date, she has not generated any income in her part-time position at Can-Industrial.

8. Michele is an individual residing in the Province of Ontario. He is a director and officer of Can-Industrial.

9. Maria was not at any material time a director or officer of Can-Industrial, and the Individual Defendants were not at any material time a controlling mind nor had effective control of Can-Industrial.

10. The Defendants strictly deny any and all allegations of breach of contract, including, without limiting the generality of the foregoing, breach of the Westburne Agreement (as defined in the Statement of Claim), the Nedco Agreement (as defined in the Statement of Claim), or any alleged prevenient agreements (collectively, the "Alleged Agreements"), and put the Plaintiff to the strict proof thereof. The Defendants further deny that they owe the Plaintiff any sum of money or interest on any sum of money, and put the Plaintiff to the strict proof thereof.

11. The Defendants state that the Plaintiff is barred by the *Limitations Act*, 2002, SO 2002, c 24, Sch B, from bringing a claim against the Defendants arising from the alleged execution of any of the Alleged Agreements.

12. Further, the Individual Defendants did not contract with the Plaintiff, and there is no privity of contract between them and the Plaintiff. As a result, there is no basis in law to name these parties as Defendants to the action herein.

13. Further, the Defendants deny paragraphs 7 and 10 of the Statement of Claim, and put the Plaintiff to the strict proof thereof.

14. Further, the materials that the Plaintiff supplied pursuant to the Alleged Agreements were not of good or proper quality and were not suitable for the purposes for which they were intended. As a result, the Defendants are not indebted to the Plaintiff for any sum of money or interest on any sum of money, as alleged or at all.

**NO BREACH OF TRUST**

15. The Defendants strictly deny any and all allegations of breach of trust and put the Plaintiff to the strict proof thereof.

16. The materials that the Plaintiff supplied did not constitute an improvement within the meaning of the *Construction Act*, RSO 1990, c. C-30, particulars of which will be provided to the Plaintiff before Trial. Further, contrary to paragraph 16 of the Statement of Claim, the Defendants have not received payments with respect to projects that it received materials from the Plaintiff. As a result, the Defendants do not possess any monies that may constitute a trust fund within the meaning of the *Construction Act*, nor a constructive trust under the common law.

17. Further, the Defendants have not at any material time owed a fiduciary obligation to the Plaintiff, nor have they misappropriated any trust fund monies in any way.

18. Further, the Individual Defendants did not participate in, assent to or acquiesce in conduct that they knew or reasonably ought to have know **[sic]** would amount to breach of trust, if they or Can-Industrial possess monies that may constitute a trust fund, which is not admitted but expressly denied. As a result, the Individual Defendants are not liable under section 13 of the *Construction Act*.

19. The Defendants further state that the provisions of the *Bankruptcy and Insolvency Act*, RSC 1985 c B-3, as amended, are not applicable to the action herein. Any debt that the Defendants may owe to the Plaintiff, which is not admitted by expressly denied, cannot survive bankruptcy because there was no breach of trust, fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity.

**LOSSES, MITIGATION, SET-OFF AND LIMITATIONS ACT, 2002**

23. The Defendants state that the claims asserted by the Plaintiff are exaggerated, excessive, and too remote.

24. The Defendants further state that the Plaintiff has failed to invoice, invoiced improperly, or exaggerated the price and value of its materials.

25. The Defendants further state that the Plaintiff has failed to mitigate its alleged damages, which are not admitted, but rather specifically denied.

26. The Defendants rely on the doctrine of equitable and legal setoff in setting off the Defendants' damages, losses and costs sustained by them, as alleged herein.

27. The Defendants plead and rely on the provisions of the *Limitation Act*, 2002.

28. The Defendants ask that this action be dismissed with costs on a substantial indemnity basis, or in the alternative, a partial indemnity basis."

25 It does not appear that further pleadings were exchanged. It appears from the correspondence attached at Exhibit E to the Silk Affidavit, that the Plaintiff made requests for information under s.39 of the Construction Act on March 3, 2020, but they had apparently not been answered prior to the date of Bankruptcy. It appears that no discoveries were conducted prior to bankruptcy.

26 In the Affidavit of Michele Gallucci ("*Mike*") sworn on behalf the Bankrupt in response to the Motion (the "*Gallucci Affidavit*") the following evidence was provided relevant to this Motion:

> "7. In or around the fall of 2017 and early 2018, the Bankrupt was involved in many construction projects where it rendered services and required electrical supplies from Rexel and other suppliers.
>
> 8. Due to the nature of the busy construction schedule and volume of projects undertaken by the Bankrupt in fall of 2017 and at the beginning of 2018, electrical supplies received by the Bankrupt were not allocated to any single particular construction project.
>
> 9. Two projects undertaken during this time period were in relation to the construction of a retirement residence located in St. Thomas, Ontario (the "St. Thomas Project") and a commercial plaza development located in Brampton, Ontario (the "Lionhead Project").
>
> 10. The Bankrupt purchased the supplies from its suppliers to be used as needed so that it could meet construction timelines in relation to the various ongoing projects without delay.
>
> 11. Many of the materials supplied by Rexel to the Bankrupt were picked up by the Bankrupt at various Rexel locations.
>
> 12. Some of the materials were delivered to various jobsites where construction projects were ongoing, but the Bankrupt cannot determine how much of the material was used at the particular jobsite, if any, or if the materials supplied by Rexel were allocated to other construction projects not involving the St. Thomas Project and the Lionhead Project.
>
> 13. Between September 14, 2017 and July 5, 2018, Rexel rendered invoices to the Bankrupt for materials Rexel supplied to the Bankrupt.
>
> 14. Rexel indicates on certain invoices that the materials supplied relate to the Lionhead Project, despite Rexel not being in a position to know this to be the case.
>
> Attached hereto and marked as Exhibit "C" are copies of the Invoices where Rexel has indicated that they relate to the Lionhead Project.
>
> 15. Rexel indicates on other invoices that the materials supplied relate to the St. Thomas Project, despite Rexel not being in a position to know this to be the case either.
>
> Attached hereto and marked as Exhibit "D" are copies of the Invoices where Rexel has indicated that they relate to the St. Thomas Project.
>
> **No Breach of Trust**
>
> 16. The Bankrupt contracted with Kaneff Properties Limited ("Kaneff"), owner of the Lionhead project to supply electric services and supplies. The total value of the contract was $950,000.00.
>
> Attached hereto and marked as Exhibit "E" is a copy of the contract for the Lionhead Project.
>
> 17. The Bankrupt was only paid $688,500.00, not including HST, by Kaneff, for the Lionhead Project.

18. The Bankrupt paid expenditures in the amount of $768,230.98 and used said funds to pay suppliers and operating expenses of the Bankrupt for the Lionhead Project. Expenditures paid by the Bankrupt exceeded what the Bankrupt was paid by Kaneff by $79,730.98.

Attached hereto and marked as Exhibit "F" is a copy of a summary chart for the funds received by the Bankrupt and the funds expended to pay suppliers and operating expenses for the Lionhead Project.

19. The Bankrupt is still owed $188,200.00, plus HST, by Kaneff, for an outstanding invoice dated July 17, 2018, in the amount of $101,700.00 and holdbacks throughout the Lionhead Project totaling $86,500.00.

Attached hereto and marked as Exhibit "G" is a copy of the outstanding invoice dated July 17, 2018.

20. The Bankrupt contracted with Amico Design Build Inc. ("Amico"), owner of the St. Thomas Project to supply electric services and supplies. The total value of the contract was $1,750,000, plus HST.

Attached hereto and marked as Exhibit "H" is a copy of the contract for the St. Thomas Project.

21. The Bankrupt was only paid $1,275,063.75, not including HST, by Amico for the St. Thomas Project. 22. The Bankrupt paid expenditures of $1,302,304.78 and used said funds to pay suppliers and operating expenses of the Bankrupt for the St. Thomas Project. Expenditures paid by the Bankrupt exceeded what the Bankrupt was paid by Amico by $27,241.03.

Attached hereto and marked as Exhibit "I" is a copy of a summary chart for the funds received by the Bankrupt and the funds expended to pay suppliers and operating expenses for the St. Thomas Project.

**23. Between September 2, 2016 and July 2, 2020, the Bankrupt was loaned money from members of the Gallucci family in the total amount of $435,997.34. 24. The Bankrupt has only one general corporate bank account at HSBC bearing account number 562-152369-001 (the "Bank Account").**

**25. The Bankrupt did not keep separate accounts for each project, and all funds for various projects, loans and revenue sources were co-mingled in the Bank Account of the Bankrupt.**

Attached hereto and marked as Exhibit "J" are copies of the bank statements between July 31, 2017 to August 31, 2018 evidencing all funds and expenditures received or paid by the Bankrupt from the Bank Account.

**26. The Bankrupt is unable to ascertain whether funds paid to the Bankrupt by Kaneff, Amico, or monies loaned to the Bankrupt were used to pay suppliers and the operating expenses for the Lionhead Project and St. Thomas Project, respectively."**

**Bankruptcy of Can-Industrial Electric Inc.**

27. On May 13, 2020, the Bankrupt filed for bankruptcy because the Bankrupt had many outstanding invoices for which payment was due to the Bankrupt, including the project upon which Rexel refers to in its Statement of Claim, and it could no longer survive financially.

Attached hereto and marked as Exhibit "K" is a copy of the Notice of Bankruptcy and Statement of Affairs of the Bankrupt, dated May 13, 2020.

28. I am informed by my lawyers, Sutherland Law, and verily believe it to be true that as a result of the assignment in bankruptcy, the Civil Action was stayed as against the Bankrupt, by operation of Section 69 of the Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3 (the "*Bankruptcy and Insolvency Act*").

29. Rexel is listed as an unsecured creditor of the Bankrupt in the Notice of Bankruptcy and Statement of Affairs of the Bankrupt.

> 30. I am informed by my lawyers, Sutherland Law, and verily believe it to be true that by virtue of Rexel being named as a creditor of the Bankrupt, it can avail itself of the remedies for creditors pursuant to the *Bankruptcy and Insolvency Act*, including filing a proof of claim and that lifting the stay is not necessary and will not prejudice Rexel's ability to participate as a creditor."

27 Mike was not cross-examined on the Gallucci Affidavit.

**HSBC Bank Account**

28 In argument, counsel for the Bankrupt made much of having made "full disclosure" of the transactions relating to the Bankrupt's HSBC bank account number 562-152369-001 (the "*Bank Account*"). As testified to in the Gallucci Affidavit:

> "25. The Bankrupt did not keep separate accounts for each project, and all funds for various projects, loans and revenue sources were co-mingled in the Bank Account of the Bankrupt.
>
> Attached hereto and marked as **Exhibit "J"** are copies of the bank statements between July 31, 2017 to August 31, 2018 evidencing all funds and expenditures received or paid by the Bankrupt from the Bank Account."

29 The time period for the "full disclosure" of the transactions relating to the HSBC Bank Account in Exhibit J to the Gallucci Affidavit appears to arise from the following statement in the Gallucci Affidavit:

> **"The Lionhead and St. Thomas Projects**
>
> 13. Between September 14, 2017 and July 5, 2018, Rexel rendered invoices to the Bankrupt for materials Rexel supplied to the Bankrupt."

**Possible Payments to non-suppliers from Bank Account**

30 Exhibit J to the Gallucci Affidavit runs from B-1-274 to B-1-379 in Caselines, a total of 105 pages containing dozens of Bank Statements (the "*Bank Statements*"), many redacted, listing hundreds of transactions, mostly without indications of what these payments were for, and dozens of copies of cheques (the "*Cheques*"). No summary of the transactions was provided.

31 Upon review of Exhibit J, I note that payments were made as indicated in the Bank Statements and Cheques to the following entities where it is possible that they may not be suppliers to an "improvement", and thus not trust beneficiaries under the provisions of the *Construction Act*, but I can make no factual findings on this issue without further detail, and as this would go towards a determination of the merits of this dispute:

> Monthly minimum payments to AMEX
>
> Great West Life Insurance
>
> Royal & Sun Alliance Insurance
>
> Payments to Metro Toronto Condominium Corporation 903 (appears to have the same address as the Bankrupt Corporation)
>
> President's Choice Mastercard
>
> Michaele Gallucci, the Affiant
>
> Maria Gallucci
>
> Toronto Tax
>
> "Petty Cash" for regular $1,600 amounts

Receiver General, Canada Revenue Agency

Vincenzo and Silvana Reale

BMO Bank of Montreal

Bank of Montreal Line of Credit

CIBC VISA

CIBC Personal Line of Credit

TD VISA

RBC Royal Bank Credit Card Payment

WSIB

Treasurer City of Toronto

HSBC Line of Credit

York Region Condominium Corporation #illegible

Cherry Tire & Auto Centre Limited

Canadian Tire Corporation Limited

Enbridge

Toronto Hydro

(collectively, the "**Possible Non-Supplier Payees**")

**Creditors of the Bankrupt on Statement of Affairs sworn by Gallucci**

32 The sworn Statement of Affairs of the Bankrupt (the "*Statement of Affairs*") attached at Exhibit K of the Gallucci Affidavit, declares unsecured claims against the Bankrupt in the total amount of $1,392,385.06. Mike signed the sworn Statement of Affairs on behalf of the Bankrupt.

33 Interestingly there are no secured claims, including for HSBC. HSBC is listed as an unsecured creditor for $46,395.85. It is not explained in the materials before me whether HSBC was at some point a secured creditor and had realized on the assets of the Bankrupt prior to bankruptcy through receivership, or whether it is only an unsecured creditor.

34 For many of the monthly Bank Statements under Exhibit J to the Gallucci Affidavit, there appears to be a negative balance in the Bank Account, and on the final bank statement there is a $103,169 shortfall in the account as at August 31, 2018. There is no evidence before me what occurred after that date with respect to the balance in the Bank Account.

35 I also note that none of the Possible Non-Supplier Payees I identified above who appear to have received payments from the Bankrupt as described in the Bank Statements and Cheques, are listed on the sworn Statement of Affairs, although there was a 22 month gap between the last bank statement provided by the Bankrupt, and the date of bankruptcy.

**Construction contracts entered into by the Bankrupt for the Lionhead and St. Thomas Project**

36 At Exhibits E and H to the Gallucci Affidavit are the contracts entered into by the Bankrupt. In each case they are detailed construction contracts.

37 The Lionhead project contract at Exhibit E is entitled "CCDC2 Stipulated Price Contract 2008" where Kaneff Properties Limited is described as the "Owner" and Can-Industrial Electric Inc. is described as the "Contractor" for "Work" described as "Site Servicing Electrical Work Labour and Materials" (the "*Lionhead Project*").

38 The St. Thomas project contract at Exhibit H to the Gallucci Affidavit is a contract between Amico Design Build Inc. as "General Contractor/Construction Manager" and the Bankrupt as "Subcontractor/Supplier" and states that "Unless amended herein, the terms and conditions outlined in Standard Construction Document CCA1-2008 shall apply to this purchase order unless noted otherwise" (the "*St. Thomas Project*")

39 In the Gallucci Affidavit Mike states that with respect to these two projects:

> "9. Two projects undertaken during this time period were in relation to the construction of a retirement residence located in St. Thomas, Ontario (the "St. Thomas Project") and a commercial plaza development located in Brampton, Ontario (the "Lionhead Project").
>
> 10. The Bankrupt purchased the supplies from its suppliers to be used as needed so that it could meet construction timelines in relation to the various ongoing projects without delay.
>
> 11. Many of the materials supplied by Rexel to the Bankrupt were picked up by the Bankrupt at various Rexel locations"

40 The Gallucci Affidavit attaches at Exhibits C & D 88 pages of invoices that Mike states that Rexel submitted to the Bankrupt for the Lionhead Project and St. Thomas Project. Mike states:

> "13. Between September 14, 2017 and July 5, 2018, Rexel rendered invoices to the Bankrupt for materials Rexel supplied to the Bankrupt.
>
> 14. Rexel indicates on certain invoices that the materials supplied relate to the Lionhead Project, despite Rexel not being in a position to know this to be the case.
>
> Attached hereto and marked as Exhibit "C" are copies of the Invoices where Rexel has indicated that they relate to the Lionhead Project.
>
> 15. Rexel indicates on other invoices that the materials supplied relate to the St. Thomas Project, despite Rexel not being in a position to know this to be the case either.
>
> Attached hereto and marked as Exhibit "D" are copies of the Invoices where Rexel has indicated that they relate to the St. Thomas Project."

41 In the Claim Rexel alleges:

> "11. In accordance with the terms of the Westburne and Nedco Agreements or in the alternative but not by way of waiver, in accordance with the prevenient agreements that the Plaintiff entered into with the Defendants or any of them, the Plaintiff agreed to supply the Materials with respect to various improvements in the Province of Ontario, including but not limited to Seasons Retirement St. Thomas, and Lion Head Plaza.
>
> 12. The Plaintiff states that its supply of Materials related to the said improvements and other improvements, as defined by the Act.

13. The Plaintiff states that the Defendants or any of them were, at all material times, either a contractor or subcontractor on the projects where the Materials supplied by the Plaintiff were used for the improvements being made upon the lands for said projects."

**III) LAW AND ARGUMENT**

***A. Legislation:***

42 The provisions of s.69.4 of the BIA read:

69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

***B. Jurisprudence regarding application of s.69.4:***

43 The Court has considered all materials and arguments raised by all parties on this Motion. Any failure by the court to refer to specific arguments and materials raised does not reflect that the Court has not considered those arguments.

44 The lifting of a stay under section 69.4 is at the discretion of the Court. The test for lifting of the stay is set out in Ma, Re(2001), 143 O.A.C. 52 (C.A.), at paras. 2-3("*Re Ma* "):

"2 In our view there is no requirement to establish a *prima facie* case and no inconsistency in the case law. We do not agree that *Bowles v. Barber* imposes a *prima facie* case requirement. More importantly, that requirement is not imposed by the statute. Under s. 69.4 the court may make a declaration lifting the automatic stay if it is satisfied (a) that the creditor is "likely to be materially prejudiced by [its] continued operation" or (b) "that it is equitable on other grounds to make such a declaration." The approach to be taken on s. 69.4 application was considered by Adams J. in *Re Francisco* (1995), 1995 CanLII 2018 ONSC 4425 (CanLII) - Page 4 - 7371 (ON SC), 32 C.B.R. (3d) 29 at 29-30 (Ont. Gen. Div.), a decision affirmed by this court (1996), 1996 CanLII 10233 (ON CA), 40 C.B.R. (3d) 77 (Ont. C.A.):

"In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, exist for relieving against the otherwise automatic stay of proceedings."

As this passage makes clear, lifting the automatic stay is far from a routine matter. There is an onus on the applicant to establish a basis for the order within the meaning of s. 69.4. As stated in *Re Francisco*, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*" to relieve against the automatic stay. While the test is not whether there is a *prima facie* case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are "sound reasons" for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay."

45 In Re Mathur, 2018 ONSC 4425, (" Wilton-Siegel J., after quoting the above passage from *Re Ma* states:

"[16] It is agreed that *Ma* sets a low threshold — a plaintiff must show no more than some chance of success. This is often expressed as a question of whether the plaintiff has pleaded facts that, if believed, would establish a claim. However, the

> onus on a plaintiff will depend, in part, on the extent to which a defendant adduces evidences that an action is frivolous, vexatious or has little chance of success. In such event, a court may need to have regard at least to the nature and strength of the plaintiff's evidence bearing on the merits of the action: see *Global Royalties Ltd. v. Brook*, 2016 ONCA 50, 344 O.A.C. 49, per Strathy C.J.O."

46 In *Re Francisco*, cited in *Re Ma* , Adams J. cited the tests in Re Advocate Mines (1984), 52 C.B.R. (N.S.) 277 (Ont. S.C.) ("*Re Advocate Mines* ") as providing examples where a Court can exercise its discretion under s.69.4:

> "In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, exist for relieving against the otherwise automatic stay of proceedings".

Stating:

> "[12] It should be understood that *Re Advocate Mines Ltd.*, supra, is not an exhaustive codification of the policy underlying the *Bankruptcy and Insolvency Act.* It is but one thoughtful decision attempting to articulate the type of grounds which may provoke the exercise of a judicial discretion. To view *Advocate Mines* as a limiting or exhaustive instrument is an error in principle. Moreover, I am satisfied the action in question is one in respect of which a discharge may not be a defence and, further, that the action had progressed to a point where logic dictated the action be permitted to continue to judgment."

47 In *Re Advocate Mines*, Registrar Ferron stated:

> "Section 49 of the *Bankruptcy Act*, R.S.C. 1970, c. B-3, is plain in its terms that no creditor with a claim provable in bankruptcy shall have any remedy against the property or the person of the bankrupt in respect of it, except in the manner directed by the Act.
>
> The court may, however, remove the stay of proceedings prescribed by that section in appropriate cases and has done so in the following circumstances:
>
> 1. Actions against the bankrupt for a debt to which a discharge would not be a defence.
>
> 2. Actions in respect of a contingent or unliquidated debt, the proof of which and valuation has that degree of complexity which makes the summary procedure prescribed by s. 95(2) of the *Bankruptcy Act* inappropriate.
>
> 3. Actions in which the bankrupt is a necessary party for the complete adjudication of the matters at issue involving other parties.
>
> 4. Actions brought to establish judgment against the bankrupt to enable the plaintiff to recover under a contract of insurance or indemnity or under compensatory legislation.
>
> 5. Actions in Ontario which, at the date of bankruptcy, have progressed to a point where logic dictates that the action be permitted to continue to judgment."

48 The Bankrupt also cited in its Fresh as Amended Factum the decision of Re Sangha, 2016 CarswellBC 2770 (“ which similarly lists the categories listed by Registrar Ferron in *Re Advocate Mines*, quoting the following passage:

> "[33] The principles that emerge from the jurisprudence may be summarized:
>
> (1) The general scheme of bankruptcy proceedings is that civil actions are stayed against the insolvent person; exemptions are to be made only where there are "compelling reasons". This flows from one of the major purposes of the *Bankruptcy and Insolvency Act*, which is to permit the rehabilitation of the bankrupt unfettered by past debts.

(2) An applicant for exemption from the stay must show that there will be material prejudice to the applicant if the stay is continued or that it is equitable on other grounds to allow the exemption.

(3) The existence of one or more of the factors listed in *Re Advocate Mines* will be an important consideration but is not determinative.

(4) The court is not to attempt to determine the proposed claim on its merits.

(5) Rather, it must assess whether it is a claim of the nature that would survive discharge, whether it is a claim that could not succeed, and whether if it did succeed it could not result in recovery against the defendants."

49 The Bankrupt also cited Stone Sapphire Ltd. v. Transglobal Communications Group Inc.,2008 ABQB 398 (CanLII) 67, which in itself is citing Re Advocate Mines:

"67. As held in *Stone Sapphire Ltd. v. Transglobal Communications Group Inc.*, courts will generally consider lifting a stay when the action is:

(a) is one that would survive the BIA proceedings;

(b) the matter is an unliquidated debt that is so complex that the summary process under the BIA is inappropriate;

(c) if the insolvent person's involvement is necessary in respect of other parties;

(d) if the action is necessary to recover under an available policy of insurance; or

(e) that the action has progressed to a point where logic dictates that the action continue to judgment."

50 As all of these tests are similarly stated, there does not appear to be disagreement between the parties as to specific wording of the various tests under s.69.4 and parties confirmed so at the hearing.

***C. Breach of Trust under the Construction Act is an "Action against the bankrupt for a debt to which a discharge would not be a defence"***

51 The Court of Appeal in Commdoor Aluminum v. Solar Sunrooms Inc., 2004 CanLII 465 (ON CA) ("*Commdoor*") found that a breach of trust under the *Construction Act* is a type of "Action against the bankrupt for a debt to which a discharge would not be a defence" under s.178(1)(d) of the BIA stating:

"[1] The appellant concedes that for the purposes of s. 178(1)(d) of the *Bankruptcy and Insolvency Act* that the appellant DeMarco was acting in a fiduciary capacity. He agrees that his failure to account for the trust money in issue was due to his incompetence and negligence and not any wrongdoing or misconduct within the meaning of s. 178(1)(d). We disagree.

[2] The trial judge found as a fact that the appellant had failed to adequately discharge his onus as a trustee to account for the relevant trust funds. That finding, which is supported by the evidence, is sufficient to trigger s. 178(1)(d). (See *Simone v. Daley* (1999) 1999 CanLII 3208 (ON CA), 43 O.R. (3rd) 511 at 529."

52 This test is specifically cited in *Re Yanic Dufresne* by Kershman, J. that I asked counsel to specifically deal with, and that I will deal with specifically below.

53 From the finding of the Court of Appeal in *Commdoor*, a claim that a Trustee under the *Construction Act* had failed to adequately discharge his onus as a trustee to account for the relevant trust funds, supported by the evidence, is sufficient to trigger s. 178(1)(d) of the BIA, thus being an "Action against the bankrupt for a debt to which a discharge would not be a defence".

54 The issue in this case is whether a finding can be "supported by the evidence", sufficient for the purposes of the *Re Ma/ Re Advocate Mines/Re Sangha* tests, as legally that kind of claim under the *Construction Act* has been found in *Commdoor* to fit within these tests.

55 The Bankrupt opposes the leave on the basis that on their application of the law to the fact in this case there is no breach of trust by the Bankrupt, and therefore s.178(1)(d) is not triggered. I will deal with the arguments of the Bankrupt on this issue in detail below, but will deal with the other aspects of the *Re Ma/Re Advocate Mines/Re Sangha* tests first.

***D. Test for "Material Prejudice" under s.69.4 and Re Ma:***

56 In Ieluzzi (Re), 2012 ONSC 3447 (CanLII) ("*Ieluzzi*") Morawetz, J., as he then was, stated:

> "[8] The controlling authority is *Ma (Re)* 2001 CanLII 24076 (ON CA), 24 C.B.R. (4th) 68 (Ont. C.A.):
>
> > In considering an application for leave, the function of a bankruptcy court is not to enquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3, exist for relieving against the otherwise automatic stay of proceeding.
>
> [9] *Ma* went on to note that the onus is on the applicant to establish a basis for the order within the meaning of s. 69.4. (See also *Bandiera (Re)*, 2012 ONSC 2211 and *CIBC Mortgages Inc. v. Touchie* 2011 NSSC 228 (CanLII), 2011, 305 N.S.R. (2nd) 228 (N.S.S.C.)
>
> [10] The moving creditor need only plead specific facts which show that there are sound reasons to lift the stay, such as a set of facts which, if believed, would fall within the ambit of subsection 178 (1) (d).
>
> [12] It is sufficient, for the purposes of the disposition of this appeal, to focus on the first part of s. 178 (1) (d). AFCI has alleged that the debt or liability has arisen out of Advantage and Mr. Ieluzzi receiving the sale proceeds on AFCI's behalf while acting in a fiduciary capacity and that Advantage and Mr. Ieluzzi misappropriated and/or converted AFCI's funds to their own use. Further, by failing to hold the proceeds in trust for AFCI, Advantage and Mr. Ieluzzi have breached fiduciary duties to AFCI.
>
> [13] In my view, the basic elements set out in s. 178 (1) (d) have been alleged by AFCI such that, if the claim succeeds, there is the very real possibility that a court will make a finding that the debt is such that it survives any discharge from bankruptcy. The basic elements have been pleaded, namely, misappropriation or defalcation where acting in a fiduciary capacity. Acting in a fiduciary capacity connotes an element of trust. It is not necessary to examine, in detail, the second part of s. 178 (1) (d) as it pertains to the Province of Quebec. Simply put, a party can act as a trustee and, by definition, can also be acting in a fiduciary capacity. I see no reversible error in this part of the Registrar's decision."

57 On the issue of whether "(c) if the insolvent person's involvement is necessary in respect of other parties" for the purposes of the *Re Advocate Mines* and *Re Sangha* tests, and the determination of "material prejudice" and that it is "... equitable on other grounds to make such a declaration" under s.69.4(b), Rexel cites the decision of Penny, J. in Global Royalties Limited v David Brook, 2015 ONSC 6277 (":

> "[24] Morawetz J. noted, in connection with the decision in *Re Ma*, that, "the moving creditor need only plead specific facts which show that there are sound reasons to lift the stay, such as a set of facts which, if believed, would fall within the ambit of s. 178(1)(d)." See *Ieluzzi (Re)*, 2012 O.J. No. 2763.
>
> [25] Here, the plaintiffs have alleged that Brook committed fraud, misappropriated money and assets and obtained property by fraudulent misrepresentation. The plaintiff complains that none of these allegations have been proved. That, however, is clearly not the test.

[26] While the pleading lacks a certain amount of particularity, this is not a pleadings motion. The bottom line of the pleading is that allegations are made of fraudulent conduct which, if proved, could result in an award of monetary damages which would not be released on discharge.

[27] Having to wait until discharge, when a release may well not be available to the defendant anyway, represents material prejudice to the plaintiffs.

[28] The plaintiffs also allege that Brook, as a former employee, owed fiduciary duties and conspired with other former employees to breach those duties, divert customers and assets and misappropriate property of the plaintiffs. There are multiple parties (none of the other defendants are in bankruptcy proceedings) and multiple causes of action. There are few if any written agreements. It is clear that the issues in this action are complex and will require documentary and oral discovery and are likely to involve numerous procedural steps. Is also clear that credibility issues will be paramount on many important material facts. In this circumstance, the issues pleaded against Mr. Brook are unlikely to be amenable to resolution through a summary claims procedure under s. 135 of the BIA. Depriving the plaintiffs of fundamental procedural tools under the Rules and trial practice would constitute a form of material prejudice, *Sher (Re)*, 1999 CanLII15015 (Ont. S.C.) at para. 59.

[29] Based on the allegations in the statement of claim, Brooks is a central figure in the events giving rise to the causes of action pleaded against all defendants. It would make little sense to have one procedure to deal with the other eight defendants and another, entirely different procedure, to deal with Brooks. The conclusion of Ground J. in *Royal Bank of Canada v. Societe Generale (Canada)*, [2003] O.J. No. 5139is equally applicable here:

> the evidence of the Bankrupts will be crucial in the action to establish the factual framework surrounding the various transactions which are alleged to be part and parcel of the fraudulent scheme and, accordingly, there cannot be a completed adjudication of the issues in the action among the other parties without the production of documents in the possession of, and the discovery of, [an, I would note, the evidence of] the Bankrupts."

58 Penny, J.'s decision was appealed, and leave to appeal was rejected by the Court of Appeal (2016 ONCA 50) which stated on the issue of the test for leave under s.69.4 of the BIA, per Strathy, C.J.O.:

"[35] In my view, it has been settled law in this province, for at least 20 years, that on a motion to lift the stay the bankruptcy court is not required to look into the merits of the action: see *Re Francisco* (1995), 1995 CanLII 7371 (ON SC), 32 C.B.R. (3d) 29 (Ont. Gen. Div.), at para. 1, aff'd (1996), 1996 CanLII 10233 (ON CA), 40 C.B.R. (3d) 77 (C.A.), referred to with approval in *Re Ma*. As this court noted in *Re Ma*, at para. 3, this does not mean that the merits of the action can never be relevant. If, for example, the defendant wishes to argue that the action is frivolous, vexatious, or otherwise has little prospect of success, it may well adduce evidence to that effect."

59 Rexel also cites the similar decision of Ground, J. in *Koval (Bankruptcy), Re*, 2003 CanLII 20584("*Koval*") stating:

"[5] Section 69.4 of the *BIA* provides that the court may make a declaration that the stay of proceedings under the *BIA* no longer operates in respect of the claims of persons affected by the stay if the court is satisfied:

> (a) that the creditor or person making the claim is likely to be materially prejudiced by the continued operation of the stay, or
>
> (b) that it is equitable on other grounds to make such a declaration.

[6] The jurisdiction in this area establishes that material prejudice will be found and that the stay will be lifted in circumstances where the claims against the Bankrupt are for debts which would not be released by an order of discharge or where the Bankrupt is a necessary party for the completed adjudication of the matters in an action involving the other parties.

[7] In the case at bar, the claims made against the Bankrupts all arise out of the alleged fraudulent scheme perpetrated by the Bankrupts and accordingly, none of such claims would be released by an order of discharge. In addition, it is abundantly clear that the evidence of the Bankrupts will be crucial in the action to establish the factual framework surrounding the various transactions which are alleged to be part and parcel of the fraudulent scheme and, accordingly, there cannot be a completed adjudication of the issues in the action as among the other parties without the production of documents in the possession of, and the discovery of, the Bankrupts."

60 In this case Rexel specifically states in its statement of Claim:

"16. The Plaintiff states that the Defendants or any of them have been paid funds by the parties with whom they have contracted in relation to the said projects and the Plaintiff states that all monies paid to the Defendants or any of them with respect to the said projects constitute trust funds pursuant to section 8 of the Act.

17. The Plaintiff states that the funds received by the Defendants or any of them with respect to the said projects were not paid to the Plaintiff and that the Plaintiff states that the Trustees. as the controlling and operating minds of the Defendant, Can-Industrial. have participated in the conversion of the said trust funds or in the alternative, assented to or acquiesced in the conversion of the said trust funds and as a result of the same, are in breach of Section 13 of Act.

29. The Plaintiff states that the Trustees have committed a breach of trust and that any Judgment obtained by the Plaintiff against the Defendants or any of them survives his or her bankruptcy and they shall not be released by his discharge as such liability falls within the provisions of section 178(4) of the *Bankruptcy and Insolvency Act* R.S.C. 1985 c. B-3 as amended, arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity."

61 In the Silk Affidavit it is stated that:

"6. Among other things, Rexel claims as against the Bankrupt and its directors and officers for breach of trust under the *Construction Act*, RSO 1990 c C.30 ("the *Construction Act*"). Attached hereto and marked as Exhibits "B" and "C" are copies of the pleadings in the Civil Action.

. . .

14. Rexel intends to obtain judgment against one or more of the individual defendants (i.e. the directors and officers of the Bankrupt) pursuant to section 13 of the Construction Act.

15. However, Mr. Morawetz advises me that this requires Rexel first establish

(a) That the Bankrupt owes it money; and

(b) That the Bankrupt committed a breach of the trust provisions in Part II of the Construction Act.

Without proving these two elements as against the Bankrupt, Rexel likely cannot establish liability as against any of the directors or officers of the Bankrupt.

16. Accordingly, if the stay is not lifted as against the Bankrupt, and Rexel is not permitted to continue the Civil Action as against the Bankrupt, Rexel will be prejudiced, as it likely will not be able to obtain judgment as against the directors and officers of the Bankrupt."

62 Having read the pleadings and affidavit evidence provided on this Motion by Rexel, and the admissions made under oath in the Gallucci Affidavit that:

"25. The Bankrupt did not keep separate accounts for each project, and all funds for various projects, loans and revenue sources were co-mingled in the Bank Account of the Bankrupt.

. . .

> 26. The Bankrupt is unable to ascertain whether funds paid to the Bankrupt by Kaneff, Amico, or monies loaned to the Bankrupt were used to pay suppliers and the operating expenses for the Lionhead Project and St. Thomas Project, respectively."

I find that, if Rexel can establish for the purposes of this Motion:

> "that if the claim succeeds, there is the very real possibility that a court will make a finding that the debt is such that it survives any discharge from bankruptcy.",

(which I will deal with below), on the reasoning of Ground, J. in *Koval* it is:

> "...abundantly clear that the evidence of the Bankrupts will be crucial in the action to establish the factual framework surrounding the various transactions which are alleged to be part ... and, accordingly, there cannot be a completed adjudication of the issues in the action as among the other parties without the production of documents in the possession of, and the discovery of, the Bankrupts."

in the Action, as Rexel must:

> "...first establish (a) That the Bankrupt owes it money; and (b) That the Bankrupt committed a breach of the trust provisions in Part II of the *Construction Act*."

as stated in the Silk Affidavit.

63 To do otherwise would be, in the words of Penny, J. in *Global Royalties*:

> "Depriving the plaintiffs of fundamental procedural tools under the Rules and trial practice would constitute a form of material prejudice."

64 Therefore, if Rexel can establish the central issue for the purposes of this Motion that that if the Claim succeeds, there is the very real possibility that a court will make a finding that the debt owing by the Bankrupt to Rexel arises from breach of trust under the *Construction Act*, and under *Commdoor* would survive any discharge from bankruptcy, then there would be material prejudice to Rexel by the continued operation of the Stay, and it would be equitable to make a declaration that the stay of proceedings under the BIA no longer operates, so that there could be a complete adjudication of the issues in the Action among the other parties through the production of documents in the possession of, and the discovery of the evidence of the Bankrupt.

65 But as noted that determination is dependent on the determination of whether, for the purposes of this motion, there exist "sound reasons" to lift the stay, such as a set of facts which, if believed, would fall within the ambit of subsection 178 (1) (d) of the BIA, which the Bankrupt vociferously opposes.

***E. Did the Bankrupt's conduct breach the Trust provisions of the Construction Act:***

66 At the outset I must note that as stated by the Court of Appeal in *Re Ma* , citing *Re Francisco*, and as supported by Strathy, C.J.O in refusing leave to appeal in *Global Royalties*:

> "...the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, exist for relieving against the otherwise automatic stay of proceedings"

67 However, in order to ensure that "sound reasons consistent with the scheme of the" BIA exist for relieving against the stay, I must consider the submissions of Rexel and the Bankrupt with respect to the claim of Rexel that the Bankrupt breach its trust obligations under the *Construction Act*. Under the Strathy C.J.O. test in *Global Royalties* and Wilton-Siegel, J. in *Mathur*, the

jurisprudence indicates that *Re Ma* sets a low threshold — a plaintiff must show no more than some chance of success, which is often expressed as a question of whether the plaintiff has pleaded facts that, if believed, would establish a claim.

68 The jurisprudence establishes that if the Bankrupt in this case wishes to argue that the action is frivolous, vexatious, or otherwise has little prospect of success, the Bankrupt must adduce evidence to that effect.

69 From the materials before me, the Bankrupt did not oppose leave being granted on the basis of the claim of Rexel was frivolous or vexatious, but rather that the claim of Rexel had little prospect of success.

*1) Statutory Trust under the Construction Act*

70 The *Construction Act* currently reads:

> **8** (1) All amounts,
>
> (a) owing to a contractor or subcontractor, whether or not due or payable; or
>
> (b) received by a contractor or subcontractor,
>
> on account of the contract or subcontract price of an improvement constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor. R.S.O. 1990, c. C.30, s. 8 (1); 2017, c. 24, s. 66
>
> **Obligations as trustee**
>
> (2) The contractor or subcontractor is the trustee of the trust fund created by subsection (1) and the contractor or subcontractor shall not appropriate or convert any part of the fund to the contractor's or subcontractor's own use or to any use inconsistent with the trust until all subcontractors and other persons who supply services or materials to the improvement are paid all amounts related to the improvement owed to them by the contractor or subcontractor. R.S.O. 1990, c. C.30, s. 8 (2); 2017, c. 24, s. 66.
>
> **Contractor's, subcontractor's duties re trust funds**
>
> **8.1** (1) Every person who is a trustee under section 8 shall comply with the following requirements respecting the trust funds of which he or she is trustee:
>
> 1. The trust funds shall be deposited into a bank account in the trustee's name. If there is more than one trustee of the trust funds, the funds shall be deposited into a bank account in all of the trustees' names.
>
> 2. The trustee shall maintain written records respecting the trust funds, detailing the amounts that are received into and paid out of the funds, any transfers made for the purposes of the trust, and any other prescribed information.
>
> 3. If the person is a trustee of more than one trust under section 8, the trust funds may be deposited together into a single bank account, as long as the trustee maintains the records required under paragraph 2 separately in respect of each trust. 2017, c. 24, s. 8.
>
> **Multiple trust funds in single account**
>
> (2) Trust funds from separate trusts that are deposited together into a single bank account in accordance with subsection (1) are deemed to be traceable, and the depositing of trust funds in accordance with that subsection does not constitute a breach of trust. 2017, c. 24, s. 8.
>
> **Liability for breach of trust**

***By corporation***

**13** (1) In addition to the persons who are otherwise liable in an action for breach of trust under this Part,

(a) every director or officer of a corporation; and

(b) any person, including an employee or agent of the corporation, who has effective control of a corporation or its relevant activities,

who assents to, or acquiesces in, conduct that he or she knows or reasonably ought to know amounts to breach of trust by the corporation is liable for the breach of trust. R.S.O. 1990, c. C.30, s. 13 (1).

**Effective control of corporation**

(2) The question of whether a person has effective control of a corporation or its relevant activities is one of fact and in determining this the court may disregard the form of any transaction and the separate corporate existence of any participant. R.S.O. 1990, c. C.30, s. 13 (2).

**Joint and several liability**

(3) Where more than one person is found liable or has admitted liability for a particular breach of trust under this Part, those persons are jointly and severally liable. R.S.O. 1990, c. C.30, s. 13 (3).

**Contribution**

(4) A person who is found liable, or who has admitted liability, for a particular breach of a trust under this Part is entitled to recover contribution from any other person also liable for the breach in such amount as will result in equal contribution by all parties liable for the breach unless the court considers such apportionment would not be fair and, in that case, the court may direct such contribution or indemnity as the court considers appropriate in the circumstances. R.S.O. 1990, c. C.30, s. 13 (4).

71 At the time of the contracts and invoices being rendered for the Lionhead Project and the St. Thomas Project, the Construction Act s.8.1 was not in effect, coming into effect on July 1, 2018. The construction projects at issue in the Action began prior to July 1, 2018, so the version of the Act which is applicable is the version as it read on June 29, 2018 as per the provisions of section 87.3(1) of the Construction Act.

72 Therefore, the wording of s.8 and 13 at issue on the Motion remains identical, but the amended s.8.1 is not in effect, which:

a) statutorily mandates that the trustee maintain written records respecting the trust funds, detailing:

1) the amounts that are received into and paid out of the funds,

2) any transfers made for the purposes of the trust, and

3) any other prescribed information; and

b) that Trust funds from separate trusts that are deposited together into a single bank account in accordance with subsection 8.1(1) are deemed to be traceable, and the depositing of trust funds in accordance with that subsection does not constitute a breach of trust, by that reason alone due to the deemed traceability.

73 Counsel for the Bankrupt did not raise the issue of the amendment of the *Construction Act* as being an issue on the Motion.

*2) Argument of the Bankrupt on existence of Trust under Construction Act*

74 Instead, the Bankrupt raised a novel argument why Rexel has little prospect of success on the Action. As noted at paragraph 66 of the Bankrupts Fresh as Amended Factum:

> 66. The courts have held that it is "difficult to find sound reasons for lifting [a] stay" where it is apparent that the proposed action has "little prospect of success".

75 The argument raised by the Bankrupt is rather intricate, so I will reproduce its argument in full from the Fresh as Amended Factum, to avoid misstating the Bankrupt's argument:

> **"Trust Has Lost Certainty of Subject Matter**
>
> 70. There are two kinds of trusts, common law trusts and statutory trusts such as those contained in Part II of the Construction Act. In order for a common law trust to come into existence, three certainties must exist, namely:
>
> (a) certainty of intention; (b) certainty of objects; and (c) certainty of subject matter.
>
> 71. The Ontario Court of Appeal confirmed in *The Guarantee Company of North America v. Royal Bank of Canada* ("Guarantee Co.") that provincial statutory trusts can and will survive bankruptcy where they exhibit the elements of a common law trust.
>
> 72. In *Guarantee Co.*, the Court of Appeal held that statutory provisions can provide the three certainties of trusts, and the Court of Appeal affirmed the proposition that "commingling alone will not destroy the element of certainty of subject matter under the general principles of trust law". In doing so, the Court of Appeal affirmed that "[c]ommingling of trust money with other money can destroy the element of certainty of subject matter, but only where commingling makes it impossible to identify or trace the trust property". In other words, "only when commingling is accompanied by conversion and tracing becomes impossible that the required element of certainty of subject matter is lost".
>
> 73. The Court of Appeal in Guarantee Co. confirmed the direction from the Supreme Court of Canada in *British Columbia v. Henfrey Samson Belair Ltd.*, that property ceases to be identifiable in the following circumstances: The tax money is mingled with other money in the hands of the merchant and converted to other property so that it cannot be traced. At this point it is no longer a trust under general principles of law ... [If] the money has been converted to other property and cannot be traced, there is "no property ... held in trust" under [the predecessor provision to s. 67(1)(a) of the BIA].
>
> 74. Put differently, the Ontario Court of Appeal in *Guarantee Co.* affirmed its prior proposition in *Graphicshoppe, Re* that the conversion of trust funds into property that cannot be traced becomes fatal to the application of s. 67(1) of the BIA. In other words, once funds are deposited in the bankrupt's general account and converted into other property, the are no longer considered traceable and therefore cannot be excluded from the bankrupt party's property under s. 67(1)(a) of the BIA.
>
> 75. The Supreme Court of Canada has previously held in *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia* that it is possible to trace money into bank accounts as long as it is able to identify the funds, and that funds are identifiable if it can be established that the money deposited in the account was the product of, or substitute for, the original thing.
>
> 76. In *BMP*, the Supreme Court of Canada clarified as below:
>
> > [75] Tracing is an identification process. The common law rule is that the claimant must demonstrate that the assets being sought in the hands of the recipient are either the very assets in which the claimant asserts a proprietary right or a substitute for them ...
> >
> > [79] According to the Court of Appeal in *Agip*, tracing at law is permitted where a person has received money rightfully claimed by the claimant .... If Lord Ellenborough C.J.'s comment in *Taylor v. Plumer* (1815), 3 M. & S. 562, 34 E.R. 721, is read in its entirety, it is clear that tracing is impossible only when the means of ascertainment fail: It makes no difference in reason or law into what other form, different from the original, the change may have been made,

> whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods of the principal, as in *Scott v. Surman*, Willes, 400, or into other merchandize, as in *Whitecomb v. Jacob*, Salk. 160, for the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description. The difficulty which arises in such a case is a difficulty of fact and not of law, and the dictum that money has no ear-mark must be understood in the same way; i.e. as predicated only of an undivided and undistinguishable mass of current money.
>
> [Emphasis from original quote]

*BMP*'s above-excerpted paragraphs are consistent with *Guarantee Co., Henfrey and Graphicshoppe* on the law of and possibility of tracing in the present circumstance.

77. The CA does not define conversion, and for the purposes of its breach of trust provision(s), the CA prohibits the conversion of any alleged trust funds for the trustee's "own use or ... any use inconsistent with the trust." As the Court of Appeal for Ontario affirmed in *Dietrich Steel Ltd. v. Shar-Dee Towers (1987) Ltd.*, "[w]hether or not [a use of trust funds] constitutes appropriation or conversion "to the contractor's own use' is a question of law".

78. The Bankrupt submits that in the present case, the funds received by the Bankrupt in respect of the St. Thomas Project and the Lionhead Project have been commingled and converted so as to make tracing impossible, such that the certainty of subject matter required to find a trust has been lost:

> (a) The funds were commingled in the Bankrupt's main bank account;
>
> (b) The Bankrupt did not keep written records respecting the funds;
>
> (c) The Bankrupt converted portions of these funds to pay out subcontractors and suppliers, which conversion is not inconsistent with the purposes of the alleged trust in any event;
>
> (d) Due to the commingling and subsequent conversion, the funds disbursed by the Bankrupt to subcontractors and suppliers for separate projects cannot be identified and traced with certainty as being the product of or substitute for funds specifically intended for that specific project;
>
> (e) Identification and tracing with certainty is not possible just because the Bankrupt's has produced its bank account records, as found at Exhibit J to the Gallucci Affidavit. The issued cheques have no memo notation that would make the purpose of the issued cheque amount clear, similar to *Law Society of Ontario v. Crowe*, in which instance the Law Society Tribunal Hearing Division found that "cheques did not always contain sufficient information to allow tracing";
>
> (f) Identification and tracing cannot be made certain from the Bankrupt's recollection due to the length of time that has passed since the alleged trust funds were converted and disbursed by the Bankrupt; and
>
> (g) The funds received and disbursed by the Bankrupt cannot be ascertained as the product of or substitute for the amounts owed to the Bankrupt as they have been mixed in a general mass of funds with the same description.

79. The Bankrupt submits that the certainty of subject matter has not been met as the Bankrupt had funds that were co-mingled from multiple construction projects, and from funds that were lent to the Bankrupt from private lenders. The Bankrupt submits that funds in the bank of the account are no longer traceable, have been converted into property of the Bankrupt, and no longer retain their character as trust funds as deemed by the CA. As a result, Rexel has failed to satisfy the three certainties to create a valid trust at common law.

80. In order for the trust provisions of the CA to be operative, the attributes of a valid common law trust must be present. The Bankrupt relies on the above submission(s) that Rexel has not met the three certainties required to establish a common law trust, and thus, no breach of trust can be proven for the purposes of lifting the stay.

81. The Bankrupt also relies on the recent case of *Carillion Canada Holdings Inc. (Re)*, in which the Ontario Court of Appeal found that the money alleged as subject matter of a construction lien trust was not identifiable because it had been "irreconcilably commingled and converted by seven different companies in two countries". The Bankrupt submits that similar to *Carillion Canada*, the alleged trust funds have been irreconcilably commingled and converted by the Bankrupt and the recipient(s) of the Bankrupt's monetary disbursements, and accordingly, "[a] finding that the trust property was not identifiable due to commingling and conversion dispose[s] of the tracing argument."

**No Sound Reasons for Lifting the Stay and Little Prospect of Success - Claim does not Survive Bankruptcy**

82. The Bankrupt submits that Rexel fails to show that its claim is one that will survive bankruptcy in any event.

83. The Bankrupt submits that *Campoli Electric Ltd. v. Georgian Clairlea Inc.* ("*Campoli Electric*") is highly instructional and should be followed with respect to the interaction between breach of trust claims under the CA, and section 178 of the BIA, which prescribes the types of claims that survive bankruptcy.

84. The facts and legal analysis applied *Campoli Electric Ltd* are analogous to the case at bar. In *Campoli Electric*, a motion was brought before Master Short to the lift the stay of a bankrupt corporation for alleged breach of trust claims pursuant to sections 8 and 13 of the CA.

85. Section 178(1)(d) of the BIA states:

> 178 (1) An order of discharge does not release the bankrupt from:
>
> > (d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others;

86. Master Short held in *Campoli Electric* that for a lift to be granted, the court is required to "evaluate whether there are any continuing claims that are possible of success having given consideration to the entire factual, and statutory background" Master Short noted further that s. 69.4(b) of the BIA "imports a proper overall consideration of equitable elements in considering whether or not to lift the stay". Pursuant to his evaluation, Master Short did not lift the stay in *Campoli Electric* because he found that

> "... the moving parties have failed to establish any misapplication of funds for which the [bankrupt] are responsible, Viewed as a whole, the evidence the plaintiffs filed was contradictory and lacked documentary support. It certainly did not carry sufficient weight to support their assertions that money was received in relation to the project was received by anyone who was not within the protected entities that were entitled to be paid without a breach of trust liability arising."

87. Master Short further affirmed the guidance of the Ontario Court of Appeal in *Ma* that "[t] here is an onus on the applicant to establish a basis for the order within the meaning of s. 69.4".

88. Master Short found in *Campoli Electric* that the moving parties could not show that the bankrupts were guilty of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary duty, which the moving parties were obliged to show. Master Short affirmed that for a debt under s. 13 of the CA is to survive bankruptcy pursuant to s. 178(1)(d) of the BIA, an element of dishonesty, wrongdoing, or misconduct on the part of the debtor sufficient to exclude the debtor from the relief granted by the BIA.

89. The CA does not require a pro rata distribution amongst all entitled creditors, such that as long as the funds go to a proper recipient who is covered by the protections of the sections, there is no breach of the statutory trust, and thus no potential personal exposure.

90. The Bankrupt did not breach the trust provisions of the CA as the monies received with respect to the St. Thomas Project and the Lionhead Project were dispersed to pay subcontractors and suppliers.

91. Further, Rexel did not contest the Bankrupt's evidence that was provided in this Motion and is deemed to have accepted the facts stated in the Affidavit of Michele F. Gallucci as true. Therefore, Rexel is unable to prove that there was fraud, embezzlement, misappropriation, or defalcation by the Bankrupt or its directors.

92. As affirmed in *Campoli Electric*, the words in s. 178(1)(d) "while acting in a fiduciary capacity" refer to the whole of the clause and not only to "misappropriation or defalcation". In order for a creditor to bring its claim within s. 178(1)(d), it is necessary for the creditor to prove that the debtor was acting in a fiduciary capacity. The breach of a fiduciary duty does not, however, of itself lead to the survival of a debt or liability following a discharge; there must, in addition, be fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity.

93. In order for a breach of fiduciary duty by a bankrupt to constitute 'misappropriation or defalcation" within the meaning of s. 178(1)(d) so as to give rise to a judgment debt that survives the bankrupt's discharge, there must be some improper dealing with property entrusted to the fiduciary and some element of moral turpitude in the sense of dishonesty, wrongdoing or misconduct.

94. The Bankrupt submits that Rexel has not met its onus to establish a basis for a lifting of the stay of the Bankrupt's bankruptcy-Rexel cannot prove that the Bankrupt was guilty of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary duty, and Rexel has provided neither "sound reasons, [n]or equitable grounds" for the lift of the stay against the Bankrupt in this present motion.

95. As Master Short affirmed in *Campoli Electric*, "there is little point in getting leave to continue this action if the court finds that this is not a case where the judgment should survive bankruptcy". The Bankrupt submits that the same principle applies here to militate against the lift of the stay sought by Rexel."

76 In the Additional Written submissions, the Bankrupt stated the following on this issue:

**"Yanic Is Distinguishable From The Present Case**

9 *Yanic* is highly distinguishable from the present case. In the present instance, the Bankrupt does not and has not admitted any liability, breach of trust or existence of fiduciary obligation and/or relationship to Rexel Canada Electric Inc. (the "Creditor") and neither has the court made any findings of same. There is no evidence before this court that the individual defendants in the present instance have any specialized training in or professional and/or statutory responsibilities to manage or maintain trust accounts that would make them highly conversant at same, nor are the individual defendants party to this motion. Three of the individual defendants, Vincenzo Galluci [sic], Fabricio Galluci [sic] and Maria Galluci [sic], have not even been involved in the day-to-day operations of the Bankrupt for some time now. The Bankrupt has also provided evidence of not receiving sufficient monies in respect of the projects relevant to this litigation.

10. Unlike *Yanic*, the Creditor in this case has not been able to identify any expenditures from the Bankrupt's bank records for a purpose inconsistent with the *Construction Act*, R.S.O. 1990, c. C.30 (the "CA"), Put differently, there is no evidence that the Bankrupt or any of the individual defendants used funds impressed with a trust for a purpose inconsistent with projects allegedly contracted for.

11. The Creditor has not been able to produce any evidence of any of the examples of fraud endorsed in *Yanic*, and the Bankrupt has not failed to account for the alleged trust funds received. Such accounting requires the Bankrupt "to justify any expenditure from the trust funds", which the Bankrupt has via provision of its bank account statements, and the Creditor has not identified any funds as unjustifiably spent on an impermissible item. The Creditor has neither sought nor elicited any evidence that any of the alleged trust fund monies were applied contrary to trust obligations under the CA, or to provide a personal benefit to the Bankrupt.

12. The Bankrupt respectfully submits that the Creditor has not discharged its burden to show "improper dealing ... [and] some element of moral turpitude in the sense of dishonesty, wrongdoing or misconduct" on the part of the Bankrupt, and has not even attempted to do so on this motion. The Creditor relies exclusively on the bankruptcy Trustee's consent in their materials. In this case, while the Bankrupt takes the position that the trust funds were commingled and converted and incapable of tracing, the Bankrupt maintains that the funds were used for a purpose consistent with the CA.

13. The CA's trust obligations do not require a pro rata distribution amongst all entitled creditors, and "[s]o long as the funds go to a proper recipient, who is covered by the protections the sections, there is no breach of the statutory trust, and thus no potential personal exposure."

14. The uncontradicted evidence on this motion is that the recipients of funds were all proper recipients pursuant tot [sic] the CA and the Bankrupt was paid less than it received in respect of the projects.

15. In *Yanic*, the CLA applied, whereas the CA applies presently. The CA provides that trustees must deposit all trust funds into an account in their name, must keep written records detailing the amounts received into, and paid out of, the trust funds, and that a trustee handling more than one trust fund may deposit them into one single account on the condition that the trustee maintain separate written records in respect of each trust. The Bankrupt submits that it has provided bank accounts and cheques are the fullest written records detailing the amounts relevant to this litigation, and the Creditor has not alleged any deficiencies with the Bankrupt's accounting with respect to these amounts."

77 At the hearing I specifically asked counsel for the Bankrupt whether the Bankrupt was actually admitting factually to commingling and converting the funds in the Bank Account as the factual basis for the argument that this commingling and conversion vitiated the statutory trust under the *Construction Act*, thus removing liability from the Bankrupt and the other Individual Defendants to the Action from the allegations of breach of the statutory trust made by Rexel, because the commingling and conversion eliminated the statutory trust, and counsel answered in the affirmative.

*3) Position of Rexel*

78 Not surprisingly Rexel disagrees with this argument. Again, due to the intricacy of the Bankrupt's argument, I have reproduced in full the responding arguments of Rexel in its Factum on this issue:

21. The Civil Action is for, inter alia, unpaid invoices and for breach of trust under Part II of the *Construction Act*.

22. Part II of the *Construction Act* sets out a scheme that all funds paid in connection with a construction project are impressed with a trust for the benefit of those persons lower down the construction pyramid who supply materials and services to a construction project.

23. Therefore, monies paid by an owner to a contractor are impressed with a trust for the benefit of the contractor's subcontractors. Similarly, monies paid by a contractor to a subcontractor are impressed with a trust for the subcontractor's subcontractors. This continues on down the line.

24. Thus, when Can-Industrial was paid in respect of a construction project, the monies which Can-Industrial received were impressed with a trust for the benefit of Can-Industrial's subtrades (i.e. Rexel and any other of Can-Industrial's subtrades).

25. The teeth to Part II of the *Construction Act* is that the person who receives the money, in this case Can-Industrial, is liable for breach of trust if it misappropriates trust funds, and the individual(s) who have effective control of the person that receives the money may be held personally liable for breach of trust. In other words, Part II of the *Construction Act* provides for a statutorily imposed piercing of the corporate veil.

26. The obvious intent of the legislation is to prevent an unscrupulous contractor or subcontractor from receiving funds on a construction project, using the funds for something other than paying its subcontractors, go bankrupt, and then let the individual(s) who control the contractor/subcontractor walk away Scott-Free.

27. In *Airex Inc. v. Ben Air System Inc.*, the Court of Appeal for Ontario succinctly summarizes the operation of the relevant sections of Part II of the *Construction Act*:

> [6] Section 8 of the Act provides that monies received on account of a contract for an improvement constitute a trust fund for the benefit of subcontractors and other persons who supply services or material for the improvement (collectively "subcontractors") and prohibits use of any such funds for a purpose inconsistent with the trust until all such persons have been paid in full.
>
> [7] Section 10 of the Act discharges the recipient of trust funds from its trust obligations to the extent of payments to subcontractors. Section 11 of the Act permits the recipient of trust funds to reimburse itself from the trust funds for payments to subcontractors from monies not subject to the trust.
>
> [8] Section 13 of the Act makes directors, officers and persons in effective control of a corporation personally liable for a breach of s. 8 where they assent to or acquiesce in conduct they know, or ought reasonably to know amounts to a breach of trust by the corporation.
>
> [emphasis added]

28. Once a plaintiff establishes that:

> i) it was a subcontractor on a project;
>
> ii) the contractor/subcontractor with whom it contracted owes it money; and
>
> iii) the contractor/subcontractor with whom it contracted received money,

the onus then shifts to the contractor/subcontractor who received the money to account for what it did with the money.

29. In other words, to succeed in a breach of trust claim under the *Construction Act* against the corporate defendant and the individual(s) who have effective control of the corporate defendant, a plaintiff must first establish the liability of the corporate defendant in contract law and for breach of trust pursuant to section 8 of the Construction Act. Once that occurs, the plaintiff may then establish liability for breach of trust as against those individual(s) with effective control of the corporate defendant pursuant to section 13.

30. While a claim for breach of trust under the Construction Act does not necessarily survive bankruptcy in every case, such claims frequently (and usually) do."

79 In its Additional Written Submissions Rexel states with respect to this issue:

"1. Paragraphs 70-81 of the bankrupt's factum argue that the bankrupt received, comingled, and converted trust funds due and owing to Rexel, such that the certainty of subject matter has been lost. As a result, the bankrupt argues, there can be no statutory trust, and therefore no breach of trust. This argument conflates the proprietary remedy of a tracing order with a finding of breach of trust. The fact that the bankrupt's wrongdoing has stymied Rexel's ability to trace trust funds does not dismiss the breach of trust caused by such comingling. The argument is circular.

2. The question in *Henfrey Samson*, and the following line of cases cited in the bankrupt's factum (including *GCNA*, *Urbancorp*, and *Carillion*), dealt with how creditors could make proprietary statutory trust claims that would remove the bankrupt's assets from the orderly scheme of distribution set out in the BIA. These cases held that specific assets impressed with a trust could be removed from the bankrupt's estate if the three common law certainties necessary for a trust were present. But, *Henfrey Samson* and the other cases do not support the contention that conversion of trust funds abrogates any other claims the beneficiary may have for breach of trust. In fact, *Henfrey Samson* suggests the opposite:

> "If the money collected for tax is identifiable or traceable, then the true state of affairs conforms with the ordinary meaning of "trust" and the money is exempt from distribution to creditors by reason of s. 47(a). If, on the other hand, the money has been converted to other property and cannot be traced, there is no "property held ... in trust" under s. 47(a). The Province has a claim secured only by a charge or lien, and s. 107(1)(j) applies."

That is, that while the Province of British Columbia could not trace provincial sales tax to make a proprietary claim, the comingling and conversion of those funds did not destroy the Province's claim to make them against the bankrupt's estate, furnished with other statutory security.

3. That the ability to trace is a remedy that flows from a breach of trust and is not a condition precedent to find a breach. In *Reichmann v. Vered*, Justice Cameron outlined:

> "Tracing flows out of breach of a trust or other fiduciary relationship. On breach of a fiduciary duty, the defaulting party may not attain any personal gain from the relationship not anticipated by the arrangement itself. The defaulting party is considered a trustee of the wrongful appropriation for the benefit of the wronged claimant. The court has the discretion to require that the defaulting party must account to the beneficiary for the product of the breach. Tracing is based on the retention by the claimant of a beneficial interest in property. It is a process by which a beneficial owner of property traces what has happened to that property, identifies the persons who have handled or received it, and justifies his claim that the property, or the property into which it has been converted, can be regarded as belonging to him....
>
> The beneficiary is entitled, at his option, either to assert his beneficial ownership of the proceeds or to bring personal claim against the trustee for breach of trust. If the traceable proceeds are worth more than the original asset, the beneficiary will assert his beneficial ownership and obtain the profit for himself...."

4. The Supreme Court of Canada in *Citadel General Assurance Co.* has already made clear that comingling trust funds with other funds does not destroy the trust relationship. That case dealt with whether a relationship of trust existed between the agent and the insurer pursuant to a statutory trust - s. 124(1) of the *Alberta Insurance Act*, and whether the agent's banks were constructive trustees. The Court found that Drive On (the insurance agent) was clearly in a trust relationship and committed breach of trust when funds were not remitted to Citadel (the insurer). Moreover, "the fact that the trust funds in Drive On's account were commingled with other funds does not undermine the relationship of trust between the parties." As such, there is no merit to the bankrupt's argument that the comingling of trust funds voids the trust relationship.

5. The submission that wholly converting trust funds so that their trust character is entirely lost also goes against the plain wording and meaning of the *Construction Act*. Subsection 8(2) of the *Construction Act* explicitly forbids the conversion of trust funds until subcontractors are paid "all amounts owed to them". It makes no sense that a trustee prohibited from converting trust funds could avoid liability for breach of trust by doing the very thing the *Construction Act* forbids.

6. Indeed, the bankrupt's argument that it comingled trust funds from different projects so that "funds disbursed by the Bankrupt to subcontractors and suppliers for various projects cannot be identified and traced with certainty as being the product of or substitute for funds specifically intended for that specific project" amounts to an admission of breach of trust. A trustee "is accountable for the trust funds and must properly justify any expenditure from the trust funds. If there is no evidence to demonstrate that the conditions of s. 11 are met or otherwise to prove that all recipients of trust funds were beneficiaries, then [the trustee] has failed to discharge its onus and will be found liable for breach of trust." The bankrupt admittedly has no evidence, and the finding of a breach of trust must follow.

7. In the seminal case of *St. Mary's Cement Corp. v. Construc Ltd.*, Justice Molloy set out the obligations of *Construction Act* trustees to protect and identify trust funds, and held that the failure to do so (as admitted in this case) results in a breach of trust:

> "In my view, the language of s. 8(2) of the Act which sets out the obligations of the trustee is mandatory. It provides that the trustee shall not use the trust funds for any purpose inconsistent with the trust until all trades and suppliers are

paid all amounts owed to them. Section 8(1) specifically provides that the trust fund is held for the benefit of persons who supplied goods and services to the improvement and who are owed money. In my view, it is the clear intention of the statute that trust funds be used only to pay the claims of beneficiaries until such time as all of them have been paid in full. If the trust funds held in respect of one project are used to pay suppliers on a different project or to pay other expenses of the contractor, the contractor has violated the Act and is in breach of trust. Although there is no specific requirement in the Act that trust funds be segregated in a special bank account, a contractor who deposits trust funds into a general business bank account and intermingles them with funds from other sources does so at its peril.

The defendants argue that if the total amount paid to trades and suppliers on a project is equal to or greater than the trust moneys received by the contractor, there is no breach of the Act and no breach of trust. In my opinion, this interpretation is not consistent with the clear language and the intent of the Act. The Act not only creates a specific project-related trust fund, but also specifically directs the trustee to hold those moneys and to pay them only to the beneficiaries until there are no unpaid claims from those beneficiaries. In my opinion, the Act contemplates a separate trust fund for every project in which the contractor is involved and separate accounting for every trust fund. It is only by separately accounting for the moneys held in trust that a contractor can ensure that trust moneys are not in fact applied to other purposes. The fact that the Act does not expressly require that trust funds be kept separate from the general accounts of the contractor is not determinative of whether a failure to do so constitutes a breach of trust. A trustee has an obligation to protect the trust funds. Allowing trust funds to be intermingled with other moneys and used for general purposes is inconsistent with the trustee's duty to maintain proper control of the trust funds: see *Air Canada v. M&L Travel Ltd.* (1991), 1991 CanLII 7332 (ON CA), 2 O.R. (3d) 184 at p. 205, 77 D.L.R. (4th) 536 at p. 556, 26 A.C.W.S. (3d) 674 (C.A.), affirmed 1993 CanLII 33 (SCC), [1993] 3 S.C.R. 787 at pp. 826-27, 108 D.L.R. (4th) 592 at pp. 618-19, 10

8. As to the applicability of Kershman J. *in Yanic Dufresne Excavation Inc. v. Saint Joseph Developments Ltd, et al.*, Rexel submits that its holding is more applicable than the bankrupt's suggestion of *Campoli Electric Ltd. v Georgian Clairlea Inc*. In that case, Associate Justice Short was dealing with a complicated fact situation which is distinguishable from the present case. The overarching features of his decision dismissing the motion to lift the stay of proceeding were that the moving parties had settled and released their breach of trust claims, and in any event were statute-barred under the *Limitations Act*, 2002 from asserting such a claim. Indeed, on appeal, the Divisional Court held that it was only necessary to consider the limitation period ground, and confirmed that the stays should not be lifted because they had no chance of success in the circumstances. This case is different both on the facts, and on the necessary legal analysis, which makes Associate Justice Short's decision a helpful summary of the law, which is what Kershman J. cites it for.

9. On the other hand, *Yanic Dufresne* is a closer analogue to the present case. It features a conditionally-discharged bankrupt that comingled trust funds, 15 and failed in the burden of showing that the *Construction Lien Act* trust funds were used properly.16 Both of these are present in this case, and Kershman J. found that the "non-compliance with the trust obligation for the trust funds" was improper and had an element of "moral turpitude in the sense of wrongdoing or misconduct" necessary to lift the stay of proceedings.

17 These findings are appropriately made based on the provisions of the *Construction Act*, and the holding of the *St. Mary's Cement Corp.* case listed above. They should also be applicable to this case, with a similar remedy: lifting the stay of proceedings against the bankrupt."

*4) Analysis*

80 Again, I am constrained by the jurisprudence from ruling on the merits of the dispute, and I may only determine whether there are "sound reasons for lifting [a] stay" in the circumstances where the Bankrupt has raised an intricate legal and factual dispute to prove that "it is apparent that the proposed action has little prospect of success".

81 I must deal with that argument for the purpose of making the determination under the *Re Ma/Re Advocate Mines/Re Sangha* tests. I cannot make determinations regarding the actual liability of the Bankrupt and the other Defendants to the Action.

82 The citing by Rexel of the reasons of Molloy, J. in *St. Mary's* Cement Corp. v. Construc Ltd., 1997 CanLII 12114 (ON SC) is important as this is a leading case on the issue of the determination of liability for breach of the trust under the under the *Construction Act* (then the Construction Lien Act). To put the quote from St. Mary's utilized by Rexel in its materials in proper context, it is instructive to provide the further reasons of Molloy, J. that led to the section quoted.

83 Molloy, J. stated following with respect to the payment of overhead expenses from funds impressed with a Trust:

> "I am in full agreement with this line of cases. There is no justification for a contractor paying for any portion of its overhead expenses out of trust funds. Payment out of trust funds for items such as payroll, insurance, rent, membership fees, interest payments on loans, legal and accounting expenses, advertising, entertainment expenses and the like are improper and constitute a breach of the trust provisions of the Act.
>
> In addition to the 60 items acknowledged by Mr. Paniccia to be improper, there are a number of other payments to which I take exception. I would disallow the following:
>
> $1,049.88 — paid to Dominion of Canada Insurance for liability insurance on the project (Cheque No. 130)
>
> $800.00 — paid for a "little get-together for the Prism bunch" (Cheque No. 148)
>
> $1,000.00 — legal fees for a construction lien claim (Cheque No. 210)
>
> $5,118.12 — paid for insurance policy on the project (Cheque No. 220)
>
> $497.56 — paid to Sunoco for gas used by Construc employees (Cheque No. 305)
>
> $2,097.59 — paid to Bell Canada for telephone bills stated by Mr. Paniccia to be for a phone at the Prism Powder site
>
> (Cheque Nos. 36, 89, 96, 97, 99, 241, 255, 273, 276). I consider these items to be overhead of Construc to be treated in the same manner as the telephone bills for Construc's head office, three of which were included originally but were among the 60 agreed deletions.
>
> TOTAL: — $10,563.15
>
> In my opinion, these items fall into the category of general business expenses of Construc and are not properly payable out of trust funds. In addition to these items, I also would not permit the payment of salaries to clerical and office staff employed by Construc out of trust funds, regardless of whether the work was performed at the job-site office or at the regular Construc office. However, as there are numerous such payment and as the total of these amounts will not affect the result in this case, I have not gone through the exercise of adding them up."

84 Molloy, J. states generally with respect to the operation of the Trust provisions of the *Construction Act* (then the Construction Lien Act):

> "The trust provisions of the *Construction Lien Act* provide additional protection for trades and suppliers on construction projects beyond the protection provided by the right to file liens against the property. Essentially, the Act requires that a contractor or subcontractor who receives money on account of its contract on a project must use those moneys first to pay those who provided services or materials on the project. A failure to do so will constitute a breach of trust for which, in certain circumstances, the directors, officers or controlling minds of a corporate contractor may be personally liable. The trust obligation is created by s. 8(1) of the Act which provides:
>
> 8(1) All amounts,
>
> . . . . .

> (b) received by a contractor or subcontractor on account of the contract or subcontract price of an improvement constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor.

The obligations of the contractor as trustee are set out in s. 8(2) of the Act:

> 8(2) The contractor or subcontractor is the trustee of the trust fund created by subsection (1) and the contractor or subcontractor shall not appropriate or convert any part of the fund to the contractor's or subcontractor's own use or to any use inconsistent with the trust until all subcontractors and other persons who supply services or materials to the improvement are paid all amounts related to the improvement owed to them by the contractor or subcontractor.

There are certain statutory exceptions which apply to reduce the trust obligations if payments to trades or suppliers have been made from moneys other than those subject to a trust. To the extent that the trustee makes payments to beneficiaries out of non-trust funds, he may reimburse himself out of the trust moneys.

Likewise, if the trustee uses borrowed money to pay trades and suppliers, the loan may be repaid out of the trust moneys. The relevant provisions of the Act for the purpose of this action are s. 11(1) and (2) which state:

> 11(1) Subject to Part IV, a trustee who pays in whole or in part for the supply of services or materials to an improvement out of money that is not subject to a trust under this Part may retain from trust funds an amount equal to that paid by the trustee without being in breach of the trust.
>
> (2) Subject to Part IV, where a trustee pays in whole or in part for the supply of services or materials to an improvement out of money that is loaned to the trustee, trust funds may be applied to discharge the loan to the extent that the lender's money was so used by the trustee and the application of trust money does not constitute a breach of trust.

The leading and oft-quoted statement as to the intent of the trust provisions of the Act is that of Rand J. in *Minneapolis-Honeywell Regulator Co. v. Empire Brass Co.*, 1955 CanLII 40 (SCC), [1955] S.C.R. 694 at p. 696, [1955] 3 D.L.R. 561 at p. 562:

> The Act is designed to give security to persons doing work or furnishing materials in making an improvement on land. Speaking generally, the earlier sections give to such persons a lien on the land, but that is limited to the amount of money owing by the owner to the contractor under the contract when notice of the lien is given to him; only thereafter does he pay the contractor at any risk.

For obvious reasons this is but a partial security; too often the contract price has been paid in full and the security of the land is gone. It is to meet that situation that s. 19 has been added. The contractor and subcontractor are made trustees of the contract moneys and the trust continues while employees, materialmen or others remain unpaid.

(Emphasis added)

The duty of the trustee to preserve the trust fund for the benefit of workers and suppliers is a continuous one and does not cease until all work has been completed and all workers and suppliers have been paid amounts owing by the trustee. As held by Saunders J. in *Andrea Schmidt Construction Ltd. v. Glatt* (1979), 1980 CanLII 1711 (ON CA), 25 O.R. (2d) 567 at p. 573, 104 D.L.R. (3d) 130 (H.C.J.):

> It seems to me that the trustee is not free to divert trust funds for non-trust purposes merely because there are no current unpaid claims of beneficiaries. It is only when the work has been completed and materials have been supplied on the respective contracts and in each case paid for that the obligations of the trustee are satisfied and he is then free to appropriate or convert funds for other purposes.

It is common ground that there is an initial onus on the plaintiff to prove the existence of a trust under s. 8 of the Act. In order to discharge that onus in this case, the plaintiff would need to show that Construc received moneys on account

of its contract price for a particular project, that the plaintiff supplied materials on that project and that Construc owes money to the plaintiff for those materials. If all of these elements are clearly proven on the evidence, the trust provisions of s. 8 come into play.

Mr. Shafir, counsel for the plaintiff, submits that the onus is on the defendants to show that they have complied with their obligations as trustee of those moneys by establishing that any payments made out of trust funds moneys were to beneficiaries of the trust or were within the exceptions provided for in the Act, the relevant provisions in this case being s. 11(1) and (2). I agree. This onus must surely be on the defendants. Construc, as trustee, is accountable for the trust funds and must properly justify any expenditure from the trust funds. If there is no evidence to demonstrate that the conditions of s. 11 are met or otherwise to prove that all recipients of trust funds were beneficiaries, then Construc has failed to discharge its onus and will be found liable for breach of trust: *Clarkson Co. v. Canadian Bank of Commerce*, 1966 CanLII 9 (SCC), [1966] S.C.R. 513 at p. 521, 57 D.L.R. (2d) 193 at p. 201."

85 Molloy, J. also states the following with respect to the accounting standard expected of a trustee:

"Construc was unable to produce at trial a detailed accounting showing the receipt and disbursement of funds on a project-by project basis. Construc had two corporate bank accounts through which moneys flowed in a seemingly haphazard or random manner. Both accounts were operated as general corporate accounts. When payments were received on a project, they were deposited in one of the accounts. Payments were made to trades and suppliers out of both accounts without any regard to which account had received deposits in respect of which that particular individual had supplied goods or services. Regular overhead and other business expenses were paid out of both accounts without any apparent rational basis for which account was used. Occasionally, funds would be transferred from one account to another, but again there was no apparent rational basis for this. In addition to legitimate business expenses, Construc also made payments out of these accounts for expenses which were clearly Mr. Paniccia's personal responsibility and unrelated to the business. One obvious example was the payment of fees for Mr. Paniccia's child to attend a Montessori school. There were others. Sometimes there would be payments made into the accounts from Mr. or Mrs. Paniccia personally. However, it was not possible to determine on the state of the financial records whether these payments were made as reimbursement of personal expenses paid on their behalf by Construc or as loans by them to the company or for some other reason."

86 Molloy, J. also states the following regarding the commingling of funds by a trustee:

"Accordingly, I conclude on the evidence that Construc operated two bank accounts into which it deposited both trust moneys and moneys from other sources. Payments were made out of those two accounts to all sorts of creditors of the defendants, including to trades and suppliers who would have been beneficiaries to various of those trust funds. However, all of the funds were commingled and it is not possible to determine whether the trust moneys with respect to the Grovedale project (or any other project) were to pay only the beneficiaries of the trust or if they were also used to pay trades on other projects and other general business and personal expenses of the defendants. All that can be shown on a project-by-project basis is the amount and source of moneys received which would constitute a trust fund and the amount, but not the source, of moneys paid to beneficiaries of the trust fund."

87 Molloy, J. also states the following regarding use of trust funds and breaches of trust:

"In my view, the language of s. 8(2) of the Act which sets out the obligations of the trustee is mandatory. It provides that the trustee shall not use the trust funds for any purpose inconsistent with the trust until all trades and suppliers are paid all amounts owed to them. Section 8(1) specifically provides that the trust fund is held for the benefit of persons who supplied goods and services to the improvement and who are owed money. In my view, it is the clear intention of the statute that trust funds be used only to pay the claims of beneficiaries until such time as all of them have been paid in full: see *Andrea Schmidt Construction Ltd. v. Glatt*, supra. If the trust funds held in respect of one project are used to pay suppliers on a different project or to pay other expenses of the contractor, the contractor has violated the Act and is in breach of trust. Although there is no specific requirement in the Act that trust funds be segregated in a special bank

> account, a contractor who deposits trust funds into a general business bank account and intermingles them with funds from other sources does so at its peril.
>
> The defendants argue that if the total amount paid to trades and suppliers on a project is equal to or greater than the trust moneys received by the contractor, there is no breach of the Act and no breach of trust. In my opinion, this interpretation is not consistent with the clear language and the intent of the Act. The Act not only creates a specific project-related trust fund, but also specifically directs the trustee to hold those moneys and to pay them only to the beneficiaries until there are no unpaid claims from those beneficiaries. In my opinion, the Act contemplates a separate trust fund for every project in which the contractor is involved and separate accounting for every trust fund. It is only by separately accounting for the moneys held in trust that a contractor can ensure that trust moneys are not in fact applied to other purposes. The fact that the Act does not expressly require that trust funds be kept separate from the general accounts of the contractor is not determinative of whether a failure to do so constitutes a breach of trust. A trustee has an obligation to protect the trust funds. Allowing trust funds to be intermingled with other moneys and used for general purposes is inconsistent with the trustee's duty to maintain proper control of the trust funds: see *Air Canada v. M&L Travel Ltd.* (1991), 1991 CanLII 7332 (ON CA), 2 O.R. (3d) 184 at p. 205, 77 D.L.R. (4th) 536 at p. 556, 26 A.C.W.S. (3d) 674 (C.A.), affirmed 1993 CanLII 33 (SCC), [1993] 3 S.C.R. 787 at pp. 826-27, 108 D.L.R. (4th) 592 at pp. 618-19.
>
> "Accordingly, in my opinion, the manner in which Construc dealt with the trust funds was a breach of its obligations as trustee and a breach of the trust provisions of the Act."

88 Molloy, J.'s reasoning has been cited with approval as a leading authority for the test for determining a breach of the Construction Act (and the *Construction Lien Act*) more than 48 times since 1997, including by the Divisional Court and Court of Appeal, most recently on March 18, 2022 by Gibson, J. in Nieltech v. Wasero, 2022 ONSC 1724 (CanLII), and also by Kershman, J. in *Yanic Dufresne* . It is still good law in Ontario and I am bound by it.

89 I have quoted all of the specific tests set out in *St. Mary's* because if the argument that the Bankrupt sets out in its Fresh as Amended Factum and Additional Written submissions is correct, then *St. Mary's* and all of the jurisprudence that has followed it must not be correct.

90 Specifically, *St. Mary's* interprets the wording of s.8 of the Construction Lien Act, identical in wording to the version of the *Construction Act* in effect at times relevant to this Motion, to find that:

> 1) the language of s. 8(2) of the Construction Act setting out the obligations of the trustee is mandatory and provides that the trustee shall not use the trust funds for any purpose inconsistent with the trust until all trades and suppliers are paid all amounts owed to them;
>
> 2) Section 8(1) specifically provides that the trust fund is held for the benefit of persons who supplied goods and services to the improvement and who are owed money;
>
> 3) it is the clear intention of the *Construction Act* that trust funds be used only to pay the claims of beneficiaries until such time as all of them have been paid in full;
>
> 4) a trustee under the *Construction Act* that allowed trust funds to be intermingled with other moneys and used for general purposes is inconsistent with the trustee's duty to maintain proper control of the trust funds and a breach of its obligations as trustee and a breach of the trust provisions of the *Construction Act*;
>
> 5) If the trust funds held in respect of one project are used to pay suppliers on a different project or to pay other expenses of the contractor, the contractor has violated the *Construction Act* and is in breach of trust.
>
> 6) Although there is no specific requirement in the *Construction Act* that trust funds be segregated in a special bank account, a contractor who deposits trust funds into a general business bank account and intermingles them with funds from other sources does so at its peril.

7) the onus is on the defendants to show that they have complied with their obligations as trustee of those moneys by establishing that any payments made out of trust funds moneys were to beneficiaries of the trust or were within the exceptions provided for in the *Construction Act*, the relevant provisions in this case being s. 11(1) and (2);

8) the onus is on the defendants, as trustees, to be accountable for the trust funds and the defendants must properly justify any expenditure from the trust funds.

9) If the trustee provides no evidence to demonstrate that the conditions of s. 11 are met or otherwise to prove that all recipients of trust funds were beneficiaries, then the defendants fail to discharge their onus and will be found liable for breach of trust;

10) There is no justification for a contractor paying for any portion of its overhead expenses out of trust funds.

11) Payment out of trust funds for items such as payroll, insurance, rent, membership fees, interest payments on loans, legal and accounting expenses, advertising, entertainment expenses and the like are improper and constitute a breach of the trust provisions of the *Construction Act*;

91 For the purposes of applying the *Re Ma/Re Advocate Mines/Re Sangha* tests, and not for the purposes of determining the merits of this dispute, in applying the *St. Mary's* test to the materials and evidence before me provided by Rexel, in the pleadings of the parties in the Action and particularly in the Gallucci Affidavit filed by the Bankrupt it appears that:

1) the Bankrupt entered into contracts with Kaneff for the Lionhead Project and Amico for the St. Thomas Project (Exhibits E and H to Gallucci Affidavit);

2) in each case it appears that these were construction projects where the Bankrupt was providing electrical contracting services;

3) Rexel rendered invoices to the Bankrupt for material supplied to the Bankrupt that Rexel alleges were supplied to the Lionhead Project and the St. Thomas Project, which the Bankrupt disputes, indicating that Rexel has provided no proof of supply to those projects in particular stating that some of the materials supplied by Rexel were delivered to various jobsites where construction projects were ongoing, but the Bankrupt cannot determine how much of the material was used at the particular jobsite, if any, or if the materials supplied by Rexel were allocated to other construction projects not involving the St. Thomas Project and the Lionhead Project. (Exhibits C and D to Gallucci Affidavit and paragraph 12 to the Gallucci Affidavit);

4) Kaneff and Amico made partial payment to the Bankrupt on these projects, but the Bankrupt alleges not payment in full of the contract price;

5) The Bankrupt maintained the one Bank Account at HSBC that these payments were deposited by the Bankrupt into;

6) The Bankrupt made payments to suppliers on each of the Lionhead Project and the St. Thomas Project out of the Bank Account, including Rexel, and the Bank Statements and Cheques alleged to relate to this period for the Bank Account were attached at Exhibit J to the Gallucci Affidavit;

7) Rexel was not paid in full for the invoices it submitted and an amount of $137,089.71 was declared by the Bankrupt in the Statement of Affairs sworn by Mike in the Bankruptcy, at Exhibit K to the Gallucci Affidavit, with total unsecured claims declared of $1,392,386;

8) The assets declared by the Bankrupt on the sworn Statement of Affairs were zero;

9) Rexel in its Statement of Claim claims that the amount of $239,518.19, and sets out the basis for their claim against the Bankrupt and the other Defendants for breach of Trust under the *Construction Act* and as common law Trustees, and

makes a specific request for relief that the Claim against each of the Defendants including the Bankrupt that any Judgment obtained by the Plaintiff against the Defendants or any of them survives his or her bankruptcy and they shall not be released by his discharge as such liability falls within the provisions of section 178(4) of the Bankruptcy and Insolvency Act R.S.C. 1985 c. B-3 as amended, arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity;

10) The Bankrupt admits in the Gallucci Affidavit, Fresh as Amended Factum and Additional Written Submissions that:

(a) The funds were commingled in the Bank Account;

(b) The Bankrupt did not keep written records respecting the funds;

(c) The Bankrupt converted portions of these funds to pay out subcontractors and suppliers, which the Bankrupt claims that the conversion was not inconsistent with the purposes of the alleged trust in any event, however from reviewing the Bank Statements and Cheques produced by the Bankrupt at Exhibit J to the Gallucci Affidavit it appears that there may be some payments that could be inconsistent with the trust, namely the notations made in the Bank Statements and Cheques attached at Exhibit J and made payable to the Possible Non-Supplier Payees identified above, some of which could be overhead expenses for condominium fees, insurance, payments to some of the Defendants, and payments of various credit card bills and personal lines of credit;

(d) Due to the commingling and subsequent conversion, the funds disbursed by the Bankrupt to subcontractors and suppliers for separate projects cannot be identified and traced with certainty as being the product of, or substitute for, funds specifically intended for that specific project;

(e) Identification and tracing with certainty is not possible just because the Bankrupt has produced its bank account records, as found at Exhibit J to the Gallucci Affidavit. The issued cheques have no memo notation that would make the purpose of the issued cheque amount clear;

(f) Identification and tracing cannot be made certain from the Bankrupt's recollection due to the length of time that has passed since the alleged trust funds were converted and disbursed by the Bankrupt; and

(g) The funds received and disbursed by the Bankrupt cannot be ascertained as the product of or substitute for the amounts owed to the Bankrupt as they have been mixed in a general mass of funds with the same description.

92 But for the "tracing" arguments made by the Bankrupt that the commingling of the monies destroyed the ability to trace funds, thus allegedly vitiating the statutory Trust under the *Construction Act*, and preventing Rexel from making a claim under s.178(1)(d) and (4) of the BIA, thus allegedly making it "apparent that the proposed action has little prospect of success", in applying the *St. Mary's* tests to the facts listed above, there would otherwise appear to be "sound reasons for lifting [a] stay", given the admissions made by the Bankrupt on this Motion and in the Gallucci Affidavit, as it appears that, for the purposes of the *St. Mary's* tests, that the Bankrupt has admitted that:

1) it has allowed trust funds to be intermingled with other moneys and used for general purposes being inconsistent with the trustee's duty to maintain proper control of the trust funds and a possible breach of its obligations as trustee and a possible breach of the trust provisions of the *Construction Act*;

2) trust funds held in respect of one project may have been used to pay suppliers on a different project or to pay other expenses of the contractor from its sole Bank Account;

3) trust funds were deposited into a general business Bank Account and that the Bankrupt intermingled them with funds from other sources;

4) it may not be able to discharge the onus is on the defendants to show that they have complied with their obligations as trustee of those moneys by establishing that any payments made out of trust funds moneys were to beneficiaries of

the trust or were within the exceptions provided for in the *Construction Act*, the relevant provisions in this case being s. 11(1) and (2);

5) Due to the commingling and subsequent conversion, the funds disbursed by the Bankrupt to subcontractors and suppliers for separate projects cannot be identified and traced with certainty as being the product of or substitute for funds specifically intended for that specific project.

**I. The "Tracing Issue"**

93 The Bankrupt's argues that because it has:

1) admittedly comingled, and converted trust funds in the Bank Account,

2) such that the certainty of subject matter of the trust has been lost,

3) making tracing by Rexel to individual projects impossible, and

4) therefore the statutory trust under the *Construction Act* is vitiated,

5) thus preventing Rexel making a breach of trust claim against the Bankrupt and the other Defendants to the Action and for a declaration that any Judgment obtained by Rexel against the Bankrupt and other Individual Defendants shall not be released by discharge as such liability falls within the provisions of section 178(4) of the BIA, arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity under s.178(1)(d) of the BIA; and therefore

6) leave should not be granted under the *Re Ma/Re Advocate Mines/Re Sangha* tests.

is novel but misguided.

94 The Bankrupt has provided no binding authority that sets out this proposition as being correct.

95 Given the following binding jurisprudential statements on the general purpose of the Trust provisions of the *Construction Act*, I have grave doubts that the Bankrupt's interpretation is correct, given that if correct, they would undermine the protection of s.8 of the Construction Act by eliminating the statutory trust simply by doing what the trust provisions, and jurisprudence interpreting those trust provisions, have sought to prevent the trustee from doing, namely intermingling the trust funds from various projects with general funds, rendering them unidentifiable:

The Court of Appeal in *Airex Inc. v. Ben Air System Inc.*, 2017 ONCA 390 (CanLII):

> "[6] Section 8 of the Act provides that monies received on account of a contract for an improvement constitute a trust fund for the benefit of subcontractors and other persons who supply services or material for the improvement (collectively "subcontractors") and prohibits use of any such funds for a purpose inconsistent with the trust until all such persons have been paid in full."

Molloy, J. in *St. Mary's:*

> "In my view, the language of s. 8(2) of the Act which sets out the obligations of the trustee is mandatory. It provides that the trustee shall not use the trust funds for any purpose inconsistent with the trust until all trades and suppliers are paid all amounts owed to them. Section 8(1) specifically provides that the trust fund is held for the benefit of persons who supplied goods and services to the improvement and who are owed money. In my view, it is the clear intention of the statute that trust funds be used only to pay the claims of beneficiaries until such time as all of them have been paid in full.

96 Rexel is correct that this argument by the Bankrupt conflates the proprietary remedy of a tracing order, or a determination of a proprietary or deemed trust interest in an asset in the possession of a Trustee in Bankruptcy, with a finding of breach of trust under the *Construction Act*.

97 The Bankrupt cites the following cases for its "tracing" argument:

a) British Columbia v. Henfrey Samson Belair Ltd., 1989 CanLII 43 (SCC) (provincial deemed trust for taxes does not have priority over unsecured creditors in relation to exclusion of Trust property from distribution to unsecured creditors under s.67(1)(1) of the BIA).

b) *Graphicshoppe Ltd., Re*, 2005 CanLII 45183(commingled pension contributions do not have priority over unsecured creditors in relation to exclusion of Trust property from distribution to unsecured creditors under s.67(1)(1) of the BIA)

c) *The Guarantee Company of North America v. Royal Bank of Canada, 2019 ONCA 9* (Trust claim under s.8 of the Construction Lien Act is effective and has priority over unsecured creditors in relation to exclusion of Trust property from distribution to unsecured creditors under s.67(1)(1) of the BIA)

d) B.M.P. Global Distribution Inc. v. Bank of Nova Scotia,2009 SCC 15 (CanLII) In BMP, (The common law rule is that the claimant must demonstrate that the assets being sought in the hands of the recipient are either the very assets in which the claimant asserts a proprietary right or a substitute for them)

e) Urbancorp Cumberland 2 GP Inc. (Re),2020 ONCA 197 (CanLII), (trust claim under s.9(1) of the Construction Lien Act is effective to grant priority over sales proceeds generated through a sales process conducted under the *Companies Creditors' Arrangement Act* "CCAA"); and

f) *Carillion* (trust claim by Monitor under CCAA under *Construction Lien Act* does not have priority over sale proceeds held in England)

The basis of the argument in each of these cases is that the claimant was seeking to impose its provincially created statutory trust claim to property held by either a Trustee in Bankruptcy, a Monitor under the CCAA, or being held by a creditor Bank. The basis of the tracing argument in each case is whether or not those funds are sufficiently identifiable in those circumstances and with respect to the first three cases, whether there was an operational conflict between the statutory trust created under the Provincial statute and the Federal insolvency statute, having no conflict if they are traceable and identifiable. But in each case the claimant is making a PROPRIETARY claim to an asset that it claims is subject to a Trust.

98 That is not this case. Rexel is making no PROPRIETARY claim to any funds in the hands of the Trustee in this case, seeking to enforce the *Construction Act* Trust against the interests of unsecured creditors under the provisions of s.67(1)(a) of the BIA, because there ARE NO FUNDS in the hands of the Trustee, as admitted by Mike in the sworn Statement of Affairs.

99 The entire point of the Action brought by Rexel is that THERE ARE NO FUNDS in the hands of the Trustee, as a result of alleged breaches of statutory and common law Trusts by the Bankrupt and the other Defendants.

100 Because Rexel is not claiming proprietary priority over the Trustee to assets held by the Trustee as a Trust claim to property under s.67(1)(a), the arguments relating to commingling and conversion destroying the ability to trace, and therefore vitiating the statutory Trust, are not supported by the cases cited above by the Bankrupt. Rexel is not seeking to establish priority over funds in the hands of the trustee that is the subject matter of a trust, but is making a breach of trust claim against the Bankrupt and the Individual Defendants BECAUSE OF the intermingling and conversion admitted to by the Bankrupt.

101 Leave is being sought with respect to the Bankrupt because, as stated above, a determination must be made that the Bankrupt was in breach of its Trust obligations under the *Construction Act* in order to pursue claims against the operating mind of the Bankrupt under s.13 of the Construction Act. Admissions by the Bankrupt that it had so commingled and converted funds from projects that

> "The funds received and disbursed by the Bankrupt cannot be ascertained as the product of or substitute for the amounts owed to the Bankrupt as they have been mixed in a general mass of funds with the same description",

would tend to help Rexel's case, not hurt it, if the statutory Trust is not destroyed by the commingling.

102 Rexel is correct that none of the cases mentioned in the Fresh as Amended Factum of the Bankrupt stand for the proposition that the commingling or conversion of trust funds preventing tracing abrogates any other claims the beneficiary may have for breach of trust.

103 Rexel is also correct that the Supreme Court of Canada in Citadel General Assurance Co. v. Lloyds Bank Canada, 1997 CanLII 334 (SCC) held that comingling trust funds with other funds does not destroy the trust relationship established under a statutory Trust, La Forest, J. stating:

> 16 The fact that the trust funds in Drive On's account were commingled with other funds does not undermine the relationship of trust between the parties. As Iacobucci J. wrote for the majority of this Court in *Air Canada v. M & L Travel Ltd.*, *supra*, at p. 804, "[w]hile the presence or absence of a prohibition on the commingling of funds is a factor to be considered in favour of a debt relationship, it is not necessarily determinative"; see also *R. v. Lowden* (1981), 1981 ABCA 79 (CanLII), 27 A.R. 91 (C.A.), at pp. 101-2; *Bank of N.S. v. Soc. Gen. (Can.)*, 1988 CanLII 166 (AB CA), [1988] 4 W.W.R. 232 (Alta. C.A.), at p. 238.
>
> . . .
>
> 18 Having found that the relationship between Citadel and Drive On was one of trust, it is clear that Drive On's actions were in breach of trust. Quite simply, Drive On failed to remit to Citadel the insurance premiums collected on Citadel's behalf in July and August 1987. Moreover, I agree with the trial judge that Citadel did not acquiesce in the breach of trust by asking for and receiving the promissory note from Drive On. By accepting the note, Citadel did not represent that it was acquiescing in the use of the funds by the Bank. Consequently, Citadel is not barred from bringing an action against the bank for breach of trust; see *Fletcher v. Collis*, [1905] 2 Ch. 24 (C.A.); P. H. Pettit, *Equity and the Law of Trusts* (7th ed. 1993), at p. 491. The question remains whether the Bank, as a stranger to the trust between Citadel and Drive On, can be liable as a constructive trustee (CanLII), 27 A.R. 91 (C.A.), at pp. 101-2; *Bank of N.S. v. Soc. Gen.* (Can.), 1988 CanLII 166 (AB CA), [1988] 4 W.W.R. 232 (Alta. C.A.), at p. 238.

104 I agree with Rexel that it would be perverse to interpret the trust provisions of the *Construction Act*, and long standing binding jurisprudence interpreting those provisions as prohibiting a trustee from commingling and converting trust funds, in a manner that Trustees could avoid liability for breach of trust by doing the very thing the *Construction Act*, and that long standing binding jurisprudence, forbids.

105 Accordingly, on this tracing argument made by the Bankrupt, I do not find that it is "apparent that the proposed action has little prospect of success" for the purpose of making the determination under the *Re Ma/Re Advocate Mines/Re Sangha* tests, as there is long-standing binding authority that supports the arguments made by Rexel on this Motion.

**II. No Sound Reasons for Lifting the Stay and Little Prospect of Success - Claim does not Survive Bankruptcy**

106 The Bankrupt submits that Rexel fails to show that its claim is one that will survive bankruptcy in any event.

107 Supporting this proposition, the Bankrupt states in the Fresh as Amended Factum:

> "93. In order for a breach of fiduciary duty by a bankrupt to constitute 'misappropriation or defalcation" within the meaning of s. 178(1)(d) so as to give rise to a judgment debt that survives the bankrupt's discharge, there must be some improper dealing with property entrusted to the fiduciary and some element of moral turpitude in the sense of dishonesty, wrongdoing or misconduct.

94. The Bankrupt submits that Rexel has not met its onus to establish a basis for a lifting of the stay of the Bankrupt's bankruptcy-Rexel cannot prove that the Bankrupt was guilty of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary duty, and Rexel has provided neither "sound reasons, [n]or equitable grounds" for the lift of the stay against the Bankrupt in this present motion.

95. As Master Short affirmed in *Campoli Electric*, "there is little point in getting leave to continue this action if the court finds that this is not a case where the judgment should survive bankruptcy". The Bankrupt submits that the same principle applies here to militate against the lift of the stay sought by Rexel."

108 Again, I am constrained by the jurisprudence from ruling on the merits of the dispute, but I can only determine whether there are "sound reasons for lifting [a] stay" in the circumstances where the Bankrupt has raised an intricate legal and factual dispute to prove that "it is apparent that the proposed action has little prospect of success".

109 As noted in:

*Re Ma*

"In our view there is no requirement to establish a *prima facie* case"

*Mathur*

"It is agreed that *Ma* sets a low threshold — a plaintiff must show no more than some chance of success. This is often expressed as a question of whether the plaintiff has pleaded facts that, if believed, would establish a claim. However, the onus on a plaintiff will depend, in part, on the extent to which a defendant adduces evidences that an action is frivolous, vexatious or has little chance of success. In such event, a court may need to have regard at least to the nature and strength of the plaintiff's evidence bearing on the merits of the action."

110 The Bankrupt relies on *Campoli*. As I noted in the preamble, I invited counsel for the Bankrupt at the October hearing to reconsider the interpretation that counsel for the Bankrupt asserted in *Campoli*, and I did so again at the re-convened hearing of the Motion in December, after reviewing the Fresh as Amended Factum.

111 To be completely clear, the particular factual circumstances of *Campoli* that lead to the statement made by Master Short that "there is little point in getting leave to continue this action if the court finds that this is not a case where the judgment should survive bankruptcy" make that statement limited to the facts of why Master Short decided that case, and are not of general application, which I reiterated to counsel for the Bankrupt, twice.

112 In *Campoli*, the lien claimants had settled with the corporate defendant and with the mortgagees and agreed to take a subordinate mortgage in exchange for discharging their liens. The lien claimants signed releases with the corporate defendant AND the individual defendant directors in exchange for being granted the mortgage. The property was sold but for insufficient funds to pay proceeds to the lien claimants. The lien claimants then began an action claiming breach of trust, but 3 years after the date that Master Short determined they were aware of their trust claims, and therefore out of time under the *Limitations Act*.

113 Each of the individual directors had filed proposals under the BIA under which stays were imposed. In addition, CRA had brought claims in the proposals of the directors in the amount of $13,487,679 while the trust claims were only $1,107,657.

114 Master Short determined "there is little point in getting leave to continue this action if the court finds that this is not a case where the judgment should survive bankruptcy." in the particular factual matrix of *Campoli*, because:

i) The claims against the Corporate defendant AND the individual directors had been released by the lien claimants;

ii) AND the trust claims were out of time under the *Limitations Act;*

iii) AND because the Action against the corporate defendant was stayed and also released and no steps had been taken to lift the stay to prove liability for breach of trust by the corporate defendant;

iv) AND because the evidence placed before Master Short *with respect to the individual directors* was insufficient to prove breach of trust as no finding of breach of trust had been found against the corporate defendants, who had denied any liability.

115 Accordingly, other than for stating general principles, because of the particular intricate factual matrix in *Campoli*, I find that *Campoli* is distinguishable on the facts, and in any event is not binding authority on me by a superior court, as I would be bound by the decisions above, and the decision of Kershman, J. in *Yanic Dufresne* .

116 In *Yanic Dufresne* , Kershman, J. states:

[163] The non-compliance with the trust obligation for the trust funds is relevant. The court finds that Mr. Plant's conduct was an improper dealing with property entrusted to a fiduciary. Furthermore, the court finds that there was an element of moral turpitude in the sense of wrongdoing or misconduct on his part: Re Di Paola, at para. 5.

"[175] The court in the present case relies on the reasoning in *Commdoor Aluminium* at paras. 19-20 of Loukidelis J.'s trial decision:

> [19] The onus does not lay with the plaintiff to construct such accounting. I agree with Molloy J.'s analysis and reasoning in *St. Mary's Cement Corporation et al vs Construction Ltd., et al*, 32 O.R. 3(d) 595. The plaintiff need only show as it has, that Solar Inc., received monies from a particular job for which the plaintiff supplied materials and that Solar Inc., owes the plaintiff for those materials, which the evidence has also established.
>
> [20] The trust provisions of section 8 therefore apply and the onus then falls on Solar Inc., and Mr. Demarco, as trustees, to account for those funds. Mr. Demarco has completely failed in discharging that onus.

[176] The plaintiff need only show that the company received the money from a particular job for which the plaintiff supplied materials and that the company owed the plaintiff for those materials and/or services. The court finds that this evidence has been established in this case.

. . .

[178] The court finds that the comingling of the monies by SJD in its account from the various sources, including mortgage financing and from investors, exacerbated the problem of providing a proper accounting."

117 After considering all of the factual admissions made by the Bankrupt in the Gallucci Affidavit, and in the Bankrupt's motion materials, which I have summarized above and will not repeat, and after considering the Trustee's Consent, the Silk Affidavit, the Supplementary Silk Affidavit, and the pleadings of the parties, I find that on this issue as well, that there is sufficient evidence before me to determine that there are "sound reasons for lifting [a] stay" and that the Bankrupt has not provided sufficient evidence on this Motion to prove that "it is apparent that the proposed action has little prospect of success", because "Rexel has failed to show that its claim is one that will survive bankruptcy in any event" as required by *Mathur*, as the Bankrupt has admitted that:

1) it had intermingled and converted funds in the Bank Account,

2) that as a result, the funds received and disbursed by the Bankrupt cannot be ascertained as the product of or substitute for the amounts owed to the Bankrupt as they have been mixed in a general mass of funds with the same description, possibly in violation of the provisions of s.8 of the Construction Act, on the tests set out in *St. Mary's*;

3) it received the money from Kaneff and Amico for the Lionhead Project and the St. Thomas projects and that the Bankrupt owed payment to Rexel for materials it provided that may have been used on those jobs;

4) as per *Yanic Dufresne* , non-compliance with the trust obligation for the trust funds under the *Construction Act* is relevant and that an improper dealing with property entrusted to a fiduciary indicated an element of moral turpitude in the sense of wrongdoing or misconduct;

5) despite the Bankrupt taking the position that the trust funds were commingled and converted and incapable of tracing, and that the funds were used for a purpose consistent with the *Construction Act*, on a review of Exhibit J to the Gallucci Affidavit, there appear to be some payments that could be inconsistent with the trust, namely the notations made in the Bank Statements and Cheques attached at Exhibit J and made payable to the Possible Non-Supplier Payees identified above, some of which could be overhead expenses for condominium fees, insurance, payments to some of the Defendants, and payments of various credit card bills and personal lines of credit

118 The Bankrupt having admitted these facts, I find that there is a prospect of success that Rexel can prove that the claim by Rexel against the BANKRUPT is a debt that will not be released by the Bankrupt's discharge, as such liability may fall within the provisions of section 178(4) of the BIA as arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity, based on the above mentioned jurisprudence, and in particular *Commdoor* and *Yanic Dufresne* .

**Summary of Order Granted**

119 For all of the reasons set out above, and utilizing my Judicial discretion as Registrar under the BIA, I find that under s. 69.4 of the BIA I may make a declaration lifting the automatic stay under the BIA as, after considering all of the evidence on this motion, and all legal arguments made by the Bankrupt and Rexel, I am satisfied that:

(a) Rexel is "likely to be materially prejudiced by the continued operation" of the Stay of Proceedings relating to the Bankrupt; and

(b) "... it is equitable on other grounds to make such a declaration.", as the evidence of the Bankrupt will be crucial in the Action to establish the factual framework surrounding the various transactions which are alleged by Rexel to be part and parcel of the breach of trust and, accordingly, there cannot be a completed adjudication of the issues in the action among Rexel and all of the Individual Defendants to the Action without the production of documents in the possession of, and the discovery of, the Bankrupt; and that depriving Rexel of "fundamental procedural tools under the Rules and trial practice would constitute a form of material prejudice";

(c) sound reasons, consistent with the scheme of the BIA, exist for relieving against the otherwise automatic stay of proceedings, as set out in great detail above, and

(d) I have not found, for the reasons set out in great detail above, that the Bankrupt has adduced evidence that an action is frivolous, vexatious or has little chance of success, on the evidence before me on this Motion.

120 Accordingly I have granted the Order requested by Rexel that the stay of proceedings, pursuant to section 69.3(1) of the be lifted so as to permit Rexel to continue with the Action as against the Bankrupt, and have signed the Draft Order provided by Rexel as amended by me.

**COSTS**

If the parties cannot agree on the disposition of the costs of the motion, they may make written submissions, not exceeding three pages each, the Rexel within 20 days and the Bankrupt within 40 days.

*Motion granted.*

**End of Document**

# TAB 25

2019 ABQB 23
Alberta Court of Queen's Bench

Alberta Energy Regulator v. Lexin Resources Ltd

2019 CarswellAlta 73, 2019 ABQB 23, [2019] A.W.L.D. 784, 301 A.C.W.S. (3d) 242, 69 C.B.R. (6th) 39

# Alberta Energy Regulator (Plaintiff) and Lexin Resources Ltd., 1051393 B.C. Ltd., 0989 Resource Partnership, LR Processing Ltd., and LR Processing Partnership (Defendants)

B.E. Romaine J.

Judgment: January 14, 2019
Docket: Calgary 1701-03460

Counsel: James Hanley, for Midstream Canada Ltd
Robin Gurofsky, Garrett Finegan, for Receiver Grant Thornton
David LeGeyt, for MFC Energy Finance Inc.
Francco P. De Luca, for Alberta Energy Regulator
Richard Billington, Q.C., for Young Energy

Subject: Civil Practice and Procedure; Contracts; Insolvency
**Related Abridgment Classifications**
Bankruptcy and insolvency
V Bankruptcy and receiving orders
**Headnote**
Bankruptcy and insolvency --- Bankruptcy and receiving orders — Miscellaneous
M Ltd. applied to lift stay of proceedings in receivership of L Ltd., in order to allow M Ltd. to assume operatorship of certain gas facilities and gathering systems — Application dismissed — Evidence established that it was more likely than not that M Ltd. would not be in position to assume operatorship on sale — Prejudice to receiver and other creditors of L Ltd. if stay was lifted outweighed prejudice, if any, that would be suffered by M Ltd. if stay was not lifted, and there were no equitable grounds that would otherwise justify lifting of stay — As noted by receiver, insolvent operator provisions were not intended to be utilized strategically by co-owners or their assignees to obtain operatorship that would otherwise not be contractually available — Rather, they were intended to protect non-operators from real risks and prejudices that could arise when operator became insolvent.
**Table of Authorities**
**Cases considered by *B.E. Romaine J.*:**

*Alignvest Private Debt Ltd. v. Surefire Industries Ltd.* (2015), 2015 ABQB 148, 2015 CarswellAlta 485, 23 C.B.R. (6th) 66, 39 B.L.R. (5th) 87, 16 Alta. L.R. (6th) 1, 3 P.P.S.A.C. (4th) 308, 608 A.R. 292 (Alta. Q.B.) — considered

*Bank of Montreal v. Bumper Development Corp.* (2016), 2016 ABQB 363, 2016 CarswellAlta 1278, 38 C.B.R. (6th) 118 (Alta. Q.B.) — considered

*Firenze Energy Ltd. v. Scollard Energy Ltd.* (2018), 2018 ABQB 126 (Alta. Q.B.) — considered

*Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc.* (2005), 2005 CarswellOnt 9935, 29 C.B.R. (5th) 62, 277 D.L.R. (4th) 568 (Ont. S.C.J.) — referred to

*Knechtel Furniture Ltd., Re* (1985), 56 C.B.R. (N.S.) 258, 20 E.T.R. 217, 8 C.C.E.L. 193, 1985 CarswellOnt 190 (Ont. S.C.) — referred to

*Ma, Re* (2001), 2001 CarswellOnt 1019, 24 C.B.R. (4th) 68, 143 O.A.C. 52 (Ont. C.A.) — considered

*Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 63 Alta. L.R. (2d) 361, 92 A.R. 81, 72 C.B.R. (N.S.) 1, 1988 CarswellAlta 318 (Alta. Q.B.) — distinguished

*York Realty Inc. v. Alignvest Private Debt Ltd.* (2015), 2015 ABCA 355, 2015 CarswellAlta 2108, 31 C.B.R. (6th) 98, 391 D.L.R. (4th) 756, 4 P.P.S.A.C. (4th) 339, (sub nom. *Alignvest Private Debt Ltd. v. Surefire Industries Ltd.)* 609 A.R. 201, (sub nom. *Alignvest Private Debt Ltd. v. Surefire Industries Ltd.)* 656 W.A.C. 201, 32 Alta. L.R. (6th) 61, 51 B.L.R. (5th) 33 (Alta. C.A.) — referred to

**Statutes considered:**

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

Generally — referred to

s. 69.4 [en. 1992, c. 27, s. 36(1)] — considered

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

Generally — referred to

APPLICATION by M Ltd. to lift stay of proceedings in receivership of L Ltd., in order to allow M Ltd. to assume operatorship of certain gas facilities and gathering systems.

***B.E. Romaine J.*:**

**I. Introduction**

1 Midstream Canada Ltd applied to lift the stay of proceedings in the receivership of Lexin Resources Ltd, 1051393 BC Ltd, 0989 Resource Partnership, LR Processing Ltd and LR Processing Partnership (collectively, Lexin) in order to allow Midstream to assume operatorship of certain gas facilities and gathering systems. I denied the application on the basis that, in the circumstances of this receivership, the prejudice to the Receiver of lifting the stay far outweighs the prejudice to Midstream, and it was not equitable to lift the stay for other reasons. These are my reasons.

**II. Relevant Facts**

2 Originally, Midstream applied to lift the stay imposed under the receivership order with respect to three gas facilities and gathering systems (the Facilities) and 21 wells in which Midstream and Lexin have various interests. However, when the application was argued, Midstream proceeded only on the basis of the Facilities.

3 The wells and Facilities were shut-in pursuant to an Alberta Energy Regulator order dated February 15, 2017. At that time, the wells and facilities were co-owned by Lexin and Exxon Mobil Energy Canada and operated by Lexin.

4 Exxon did not apply to lift the stay imposed by the receivership order. On December 21, 2017, Midstream agreed to purchase Exxon's interest in the wells and Facilities. This sale closed on February 1, 2018. It included not only Exxon's interest in the 21 wells jointly owned with Lexin, but also 32 additional wells in which Lexin has no interest.

5 Midstream has applied to the Alberta Energy Regulator for approval of the transfer of the Exxon well licenses, but had not yet obtained such approval at the time this application was heard.

6 The three Facilities at issue are:

a) the Hooker Gas Gathering System, in which Lexin owns a 75% interest;

b) the Hooker East Compression and Gas Gathering System, in which Lexin owns a 75% interest in three of the four functional units and a 50% interest in the fourth functional unit, and therefore a 68.75% overall interest in the system; and

c) the South East Hooker Compression and Gas Gathering System, in which Lexin owns an approximately 45% interest.

7 The receivership order imposing the stay was granted on March 20, 2017. Since July, 2017, the Receiver has been marketing Lexin's assets, including the wells and Facilities in issue. The marketing materials specify that Lexin is the operator of the wells

and Facilities. The sales process has been extended a number of times, due in part to complications arising from an unrelated claim.

8 On May 3, 2018, Midstream filed its application to lift the stay.

9 While Midstream may be entitled by reason of its majority ownership to assert operatorship of the South East Hooker Facility, it requires the operatorship of all three Facilities in order to commerce moving product to market from the 32 wells in which Lexin has no interest.

10 The Facilities are governed by Construction, Ownership and Operation Agreements (the CO&O Agreements) that are materially identical with respect to the provisions relevant to this application.

11 These CO&O Agreements adopt the standard form model Petroleum Joint Venture Association 1999 Standard Operating Procedure (the 1999 PJVA).

**III. The Issue**

12 The issue is whether it is appropriate to lift the stay in the circumstances of this receivership and with reference to Midstream's contractual rights.

**IV. Analysis**

13 A. The Test for Lifting the Stay.

As noted in *Alignvest Private Debt Ltd. v. Surefire Industries Ltd.*, 2015 ABQB 148 (Alta. Q.B.) at paras 40 and 43 (appeal on other grounds dismissed, [2015] A.J. No. 1234 (Alta. C.A.)), the test for lifting a stay imposed pursuant to a receivership order focuses on the totality of circumstances and the relative prejudice to the parties involved in the receivership.

14 Guidance can be drawn from the provisions of section 69.4 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 as amended, in determining whether a stay in a receivership should be lifted. The Court should be satisfied that the party applying to lift the stay is likely to be materially prejudiced by the stay or that it would be equitable to lift the stay on other grounds. The burden is on the applicant: *Ma, Re*, [2001] O.J. No. 1189 (Ont. C.A.) .

15 Lifting the stay is not routine: there must be sound reasons to relieve against the stay: *Re Ma* , at para 3.

16 In order for a party applying to lift the stay to show material prejudice, it must show that it would be treated differently or some way unfairly or would suffer worse harm than other creditors if the stay is not lifted: *Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc.* (2005), 29 C.B.R. (5th) 62 (Ont. S.C.J.) at paras 18-19. The mere fact that a party is not entitled to exercise a contractual right for which it has bargained is not a sufficient reason to lift the stay. In that respect, the prejudice to the applicant is no different qualitatively from that suffered by other creditors, who also lose, in whole or part, the benefit of their contracts by reason of the debtor's insolvency.

17 Since the Court's decision in *Alignvest*, there have been at lease two decisions that have caused some uncertainty about the test to be applied to such applications in the context of operatorship of oil and gas assets.

18 The first case relied on by Midstream is *Bank of Montreal v. Bumper Development Corp.*, 2016 ABQB 363 (Alta. Q.B.) . In that case, the applicant Eagle Energy Inc and the debtor were parties to a joint operating agreement that incorporated the 2007 Canadian Association of Petroleum Operating Procedure (the 2007 CAPL). They were also parties to a construction ownership and operation agreement with respect to certain facilities. Those contracts included a clause that provided for the immediate replacement of the operator if the current operator became bankrupt or insolvent, was placed in receivership or sought an order under the *Companies' Creditors Arrangement Act*, RSA 1985 c C-36. These clauses are sometimes referred to as "*ipso facto*" clauses.

19 Eagle also had the right under contract to elect to become the operator upon disposition of the debtor's interest in the joint venture properties, rather than consenting to the purchaser of the properties debtor's becoming the operator.

20 It is important to the outcome of the case that there was evidence that the Receiver had agreed with Eagle to only sell a non-operated interest to third-party purchasers

21 Macleod, J approved a sale of the debtor's interest to a third-party without prejudice to Eagle's right to argue the issue of operatorship at a later hearing. At that hearing, Eagle and the purchaser made opposing submissions, with no position taken either way by the Receiver. Macleod, J found that, given Eagle's negotiations with the Receiver, Eagle believed it would become operator even if it was not the successful bidder for the underlying assets. The purchaser "did not have any reasonable expectation that it was purchasing operatorship": para 22. McLeod, J found that it would be unfair to deprive Eagle of its "clear contractual right" to be operator. He lifted the stay *nunc pro tunc* and declared Eagle to be entitled to be the operator of the wells and facilities.

22 Midstream relies on *obiter dicta* comments made by the Court at paragraphs 18 and 19 of *Bumper*, as follows:

> Had Eagle pursued its right to be Operator at the time of the granting of the Receivership Order or soon thereafter, I can think of no reason why this Court would not have acceded to Eagle's request to lift the stay and grant a declaration with respect to both the wells and the Battery.
>
> The stay was granted incidental to the appointment of the Receiver to permit for orderly realization and distribution. Eagle's right to operate, however, arises under a contract which pre-dates the receivership. Also, there is no reason to interfere with the contractual rights of Eagle which are not subject to the security of Bumper's creditors.

23 He distinguished *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 92 A.R. 81 (Alta. Q.B.) , in which the Court reached a contrary conclusion, on the basis that *Norcen* involved the CCAA and not a receivership. I must disagree with the opinion of Justice Macleod on that issue, as, in my view, the tests for lifting a stay under the *BIA* and the *CCAA* are substantially the same.

24 The obiter comments made by Justice Macleod on whether an application to lift the stay made prior to the sale of assets would have been successful were made without reference to the appropriate test for lifting a stay at that time, and did not reference the issue of relative prejudice. The application before Justice Macleod was an after-sale dispute between the two parties to the 2007 CAPL, and had no impact on the receivership itself. The decision appears to rely on an interpretation of a contractual provision in the 2007 CAPL that allows a party to become operator upon the sale of the operator's working interest post-sale. Thus, the decision is distinguishable from the situation in this case.

25 The recent case of *Firenze Energy Ltd. v. Scollard Energy Ltd.*, 2018 ABQB 126 (Alta. Q.B.) , was also relied upon by Midstream. In that case, Scollard, a debtor in receivership, and Firenze Energy Ltd were joint working interest owners in wells and facilities under an agreement that again incorporated the 2007 CAPL with Scollard as operator. An offer was before the Court that greatly exceeded other offers, including that of Firenze but this offer was conditional on the purchaser retaining the right to be operator of the facilities. Firenze applied to lift the stay and assume operatorship pursuant to clause 2.02A(a) of the 2007 CAPL, similar to the clause relied upon in *Bumper*, which provides that the operator will be replaced immediately if it becomes bankrupt or insolvent.

26 The Court adopted the reasoning in *Alignvest*, noting that, generally speaking, the fact that a stay operates to deny a party a particular contractual remedy is not a sufficient reason to lift the stay. The Court also noted that the existence of an *ipso facto* clause, while valid between contracting parties, is void against a trustee in bankruptcy on policy grounds and that thus the stay should not be lifted on that basis.

27 The Court applied the *Alignvest* test, indicating that it required the Court to focus on the totality of the circumstances and the relative prejudice to the parties involved in the receivership.

28 However, the Court then considered what it characterized as "the more central issue", which was not initially raised by counsel. Dario, J referred to clauses 2.06 and 2.09 together with clause 2.02(A)(g) of the 2007 CAPL, which she noted provide that an operator may not transfer operatorship to an assignee without the approval of the other working interest owners, requiring a vote of at least two parties with working interests of more than 50%. The Court noted that, if there are only two owners when the operator resigns or is removed, the other party may become the operator on the service of notice as long as it holds more than 40% of the working interest; *Scollard* at para 19. Section 2.02A(g) of the 2007 CAPL provides that the operator will be replaced immediately after service of notice if the operator "assigns or attempts to assign its general powers and responsibilities of supervisor and management as operator", but exempts from this provision a pending appointment of a new operator under clause 2.06.

29 In the *Scollard* situation, Scollard and Firenze were equal working interest owners for most of the wells and facilities in question. Thus, the Court observed at para: 21.

> Firenze therefore appears to have the unconditional right to assume operatorship (in all but the four wells and associated Facilities in which it holds 40% or less of a working interest) under CAPL 2007. Thus, Firenze argues, the transfer by the Receiver of Scollard's working interest cannot include a transfer of the right of operatorship. If this were permitted, the Receiver would be placed in a better position than Scollard, who could not have transferred the operatorship outside of the procedure set out in clause 2.06, and the Receiver would be conveying more than the debtor had the right to convey before the receivership.

30 The decision notes that the Receiver argued that the issue of the transfer of the operatorship should be left for a later day when there was an offer for the Court to consider for approval; in other words, when the triggering event set out in section 2.02A(g) had actually occurred. However, the Court disagreed with this suggestion, noting that the Receiver had made conflicting statements about whether or not it was marketing the operatorship, and finding that "the manner in which the Receiver has marketed the assets of Scollard....is not in accordance with clauses 2.06 and 2.09 of CAPL 2007." The Court was also concerned about prolonging the litigation.

31 In summary, the Court allowed the stay to be lifted so that Firenze could serve the necessary notice to remove Scollard as operator under clause 2.02A(g).

***2. Application of the Test in this Case***

32 Midstream submits that it suffers prejudice from its inability to rely on the *ipso facto* or operator insolvency contractual provisions.

33 As noted previously, the mere existence of such contractual provisions is not in itself a sufficient basis to lift a stay. While they may be valid between contracting parties in the ordinary course of events, these provisions are void against a receiver on policy grounds: *Knechtel Furniture Ltd., Re* (1985), 56 C.B.R. (N.S.) 258 (Ont. S.C.); Ex parte *Mackay* (1873), 8 Ch App 643.

34 The reason for such a policy is clear: the prejudice to a creditor seeking to rely on such a clause is no different from that suffered by other creditors by reason of the debtor's insolvency, and giving effect to such clauses would undermine the purpose of a stay in insolvency, to permit the orderly and equitable realization and distribution of the debtor's assets.

35 The insertion of *ipso facto* clauses in agreements relating to operation of oil and gas assets reflect the fact that operators deal with funds on behalf of the non-operating parties, and that the insolvency of an operator can give rise to a risk that the operator will comingle funds and/or put a non-operator's share of revenues at risk. However, that risk ceases to exist when a receiver is appointed.

36 The courts have sometimes found material prejudice where an applicant was a co-owner when the stay was put in place, and the properties in question were actively producing, such that a receiver might pursue different investment and operational decisions than a party with a long-term interest in the properties in question. However, that is not the situation in this application.

Midstream purchased its interest in the Facilities knowing that they were shut-in, and that there was no risk that the Receiver would make any long term investment or operational decisions that may not align with Midstream's interests. While it is possible that a third-party purchaser's interests may not align with those of Midstream, Midstream must surely have been aware of that possibility when it made the business decision to purchase the properties. While Midstream submits that it wants to restart the Facilities, and thus would suffer delay in its plans if the stay is not lifted, it was not clear at the time the application was heard that Midstream would be able to obtain the necessary license transfer and approvals to reopen the Facilities, and other interested creditors submit that, in any event, Midstream's plans would cause it to be in breach of contracts governing the Facilities.

37 The prejudice to the Receiver is more significant. First, lifting the stay would subject the Receiver to significant capital and operating expenditures which it cannot realistically fund. The Receiver submits that it is not in a good position to assess and analyse such expenditures, and would be prejudiced by being forced to expend time and resources on this issue during a complex sales process.

38 Second, it is clear that lifting the stay would introduce uncertainty into the sales process, particularly at this late state of the process, well after the bid deadline of October, 2017. While the Receiver has not marketed the operatorship of the Facilities as something that can be necessarily sold or assigned to the successful bidder, the Receiver has been clear about which Facilities Lexin currently operates and which CO&O Agreements govern these Facilities. As a result, bidders had a reasonable expectation that they could assume operatorship of the Facilities if their bids were successful. Bids have been submitted on the basis that Lexin is the current operator of the Wells and Facilities and also on the basis that Facilities would be shut-in when purchased. Bidders had a reasonable expectation that the *ipso facto* provisions would not be relied on to transfer operatorship prior to the sales process concluding. Midstream's counsel concedes that lifting the say would complicate the sales process and reduce the number of prospective purchasers.

39 The third, and most persuasive reason why the stay should not be lifted is that this would prevent the Receiver from relying on certain replacement of operator provisions in the relevant contracts, and would therefore result in Midstream taking advantage of the insolvency process to appropriate operatorship rights that would not otherwise be available to it.

40 If the stay is not lifted, a purchaser of two of the three Facilities, the Hooker Gas Gathering System and the Hooker East Compression and Gas Gathering System, would have a contractual right to replace Lexin as operator of these Facilities.

41 While clause 303(d) of the 1999 PJVA provides that the Operator shall cease to be operator if it ceases to be an owner, clause 304(c) states that:

> Notwithstanding subclauses 204(g), 304(a) and (b), if there are only two (2) Owners and Operator resigns or otherwise ceases to be Operator, the Owner who was not Operator previously shall automatically become Operator effective the date the previous Operator ceases to be Operator, unless in the case of an assignment by Operator of its Facility Participation pursuant to Article IX, the Owners cannot agree as to whom should be Operator, the Owner with the largest Facility Participation shall become Operator.
>
> (emphasis added)

42 Article IX provides for certain notice and documentation requirements if an owner wishes to assign its interests to a third party.

43 As the Receiver notes, one likely result of the sales process will be an assignment by Lexin of its interests in the Hooker System and the Hooker East System pursuant to Article IX of the 1999 PJVA. Provided that Lexin is the operator when its interests are assigned, the assignee will have the opportunity to become operator of these systems as it will have the largest Facility Participation in these Facilities. Midstream submits that there is no evidence that the prospect of becoming operator would be of value to a purchaser, but that is disingenuous, given the benefits that accrue contractually to operators.

44 If the stay is lifted prior to the conclusion of the sales process and Lexin is replaced as operator, Lexin and the eventual purchaser would not be able to rely on these operatorship rights. Thus, Midstream's suggestion that the stay could be lifted without prejudice to any rights a purchaser would acquire does not address the prejudice.

45 The denial of Midstream's application in this case is not inconsistent with *Scollard*. In *Scollard*, it appears that the Court concluded that the applicant, given its ownership interests, would ultimately be able to assume operatorship, although there was no evidence in that case that the necessary triggering events that would permit this would occur as a result of a sale.

46 In this case, the opposite is true: the evidence establishes that it is more likely than not that Midstream would not be in a position to assume operatorship on a sale. At any rate, the contractual provisions at issue in *Scollard* are not the same as those at issue in this case.

47 In conclusion, the prejudice to the Receiver and other creditors of Lexin if the stay is lifted outweighs the prejudice, if any, that would be suffered by Midstream if the stay is not lifted, and there are no equitable grounds that would otherwise justify the lifting of the stay. As noted by the Receiver, the insolvent operator provisions are not intended to be utilized strategically by co-owners or their assignees to obtain operatorship that would otherwise not be contractually available. Rather, they are intended to protect non-operators from the real risks and prejudices that can arise when an operator becomes insolvent.

*Application dismissed.*

**End of Document**

# TAB 26

2008 ABQB 398
Alberta Court of Queen's Bench

Stone Sapphire Ltd. v. Transglobal Communications Group Inc.

2008 CarswellAlta 896, 2008 ABQB 398, [2008] A.W.L.D. 3027, 169 A.C.W.S. (3d) 250, 44 C.B.R. (5th) 124

# Stone Sapphire Ltd. (Plaintiff) and Transglobal Communications Group Inc. and Steven Prescott (Defendants)

D. Lee J.

Judgment: June 27, 2008
Docket: Edmonton 0503-00170

Counsel: Kenneth W. Fitz for Plaintiff
Alex Kotkas for Defendants

Subject: Civil Practice and Procedure; Insolvency

MOTION by plaintiff to lift stay of judgment.

***D. Lee J.*:**

**Background**

1 Transglobal has not paid for products, sourced from Stone Sapphire in 2004. The invoices and amounts in question were detailed in paragraph 10 of the Statement of Claim as follows: —

| Transglobal PO# | | Invoice Date | Invoice No. | Description of Goods | Invoice Amount |
|---|---|---|---|---|---|
| TG1 195 | | 28/Jun/04 | SSL-1 57 | 4255DG1 Jumbo core gift bag / TGI I 95&1 14-04 | US$14,424.48 |
| TG1194 | | 28/Jun/04 | SSL-158 | 4248DG4 Petite gift bag /TG1194&98.04 | US$4,165.56 |
| | # | 31/Aug/04 | SSL-254 | Pedex courier charge of Jul,2004 | US$618.80 |
| | # | 06/Sep/04 | SSL-278 | Customs duty forfilm | US$128.90 |
| TG1 150 | | 10/Jun/04 | SSL-161 | SM 3PK gift bag / TGI 150&86-04 | US$35,308.22 |
| TGI 180 | | 04/Jul/04 | SSL-175 | 4286DT1 LG Bday popup I TG1 180&87-04 | US$23,981.58 |
| TG1168 | | 10/Jul/04 | SSL-184 | 1093D 3x3 angled book /TG1168&75-04 | US$32,631.98 |
| | # | 15/Sep/04 | SSL-305 | Fedex courier charge of Aug.2004 | US$79486 |
| TG1202 | | 10/Jul/04 | SSL-180 | 3015DG 4PK everyday CD box / TG1202&1 13-04 | US$24,413.77 |
| TG1 175 | | 24/Aug/04 | SSL-246 | 227pcs Xmas asst / TGI 1 75&82-04 | US$42.41 7.38 |
| TG 1184 | | 30/Jul/04 | SSL-20 I | 2258DG1 8pk Xmas bags / TG1 1 84&1 04-04 | US$168,588.80 |
| TG1 196 | | 14/Jul/04 | SSL-176 | 4284DG5 Petite gift bag I TGI 196&99-04 | US$4,013.68 |
| TG 1179 | | 14/Jul/04 | SSL-1 77 | 4284DG4 Petite gift bag / TGI 1 79&1 42-04 | US$7.61 8.59 |
| TG1203 | | 20/Jul/04 | SSL-193 | 4449DG med vellum bag /TG1203&119-04 | US$26,983.65 |
| TGI 171 | | 18/Aug/04 | SSL-236A | Set of 20 children's books with carry case I TGI 171 & 84-04 | US$9,069.93 |
| TG1204 | | 18/Jul/04 | SSL-192A | Gift bag / TG1204&120-04 | US$22,154.06 |
| TG1 204 | | 18/Jul/04 | SSL-192B | Gift bag! TG1204&120-04 | US$19,133.98 |
| TG1205 | | 21/Jul/04 | SSL-196 | 8ctTarun tissue/TG1205&123-04 | US$1,413.72 |
| TG1 212 | | 21/Jul/04 | SSL-1 97 | Wrap kale santa on green / TG1212&125-04 | US$3,677.86 |
| TGI 197 | | 25/Jul/04 | SSL-1 99 | Tuscan journal / TG1 1 97&1 35-04 | US$14,561.06 |
| TG1 213 | | 23/Jul/04 | SSL-200A | 4238 stripe & dots bag set / TG121 3&140-04 | US$46,917.38 |
| TG1 170 | | 18/Aug/04 | SSL-235 | Set of 20 children's books with carry case / TG1 1 70&83-04 | US$17006.13 |

| | | | | |
|---|---|---|---|---|
| TG1 171 | 25/Aug/04 | SSL-236B | Set of 20 children's books with carry case / TG1 171 &84-04 | US$17,006.13 |
| TG1213 | 23/Jul/04 | SSL-200B | 4238 stripe & dots bag set /TG1213&140-04 | US$5,770.27 |
| TG1214 | 04/Aug/04 | SSL-203 | 4255DG2 Jumbo core gift bag set / TG1214&138-04 | US$15,594.46 |
| TG1 190 | 30/Jul/04 | SSL-204 | 4460DG sm occ bag set / TG1 1 99&1 28-04 | US$23,842.69 |
| # | 15/Oct/04 | SSL-348 | TG sampling | US$50,085.00 |
| TG1 167 | 07/Aug/04 | SSL-224 | CMA story books/ TGI 1 67&74-04 | US$51,420.60 |
| TG1185 | 17/Aug/04 | SSL-208 | 2258DG1 8pk Xmas bags/TG1185&105-04 | US$80,840.78 |
| TG1216 | 09/Aug/04 | SSL-205 | 4248DG6 petite core gift bag /TG1216&139-04 | US$9,288.14 |
| TG1 215 | 08/Aug/04 | SSL-21 6 | IN1 KT7 Finger poppet books / TGI 215&1 43-04 | US$31,752.00 |
| TGI 198 | 13/Aug/04 | SSL-228 | Tuscan journal / TG1 1 98&1 36-04 | US$11,109.42 |
| TGI2I 7 | 17/Aug/04 | SSL-214 | 2534DG SM Xmas glitter bag / TG1217&1 57-04 | US$109,846.04 |
| TG1238 | 31/Aug/04 | SSL-245 | 42480G7 petite core gift bag /TG1238&180-04 | US$4,823.35 |
| TG1234 | 31/Aug/04 | SSL-252 | 4255DG2 Jumbo gift bag set / TG1234&173-04 | US$15,594.46 |
| TGI 149 | 18/Aug/04 | SSL-237 | Scrapbook / TG1 149&46-04 | US$334,939.75 |
| TG1 193 | 07/Sep/04 | SSL-266 | Set of 21 children's books / TG1 1 93&95(A)-04 | US$31,468.50 |
| TG1218 | 07/Sep/04 | SSL-269 | SM DG 2004 mixed GB asst/TG1218&158(A)-04 | US$89,588.72 |
| TG1188 | 07/Sep/04 | SSL-270 | Holographic wrap asst/TG1188&124-04 | US$76,521.06 |
| TG1236 | 11/Sep/04 | SSL-281 | 4248DG8 Petite gift bag set /TG1236&178-04 | US$4,823.35 |
| TGI 237 | 11/Sep/04 | SSL-282 | 4255DG4 Jumbo gift bag set / TG1 237&1 79-04 | US$15,594.46 |
| TG1232 | 23/Sep/04 | SSL-232 | Hans Med Xmas gift bag asst / TG1232&201-04 | US$14,326.04 |
| TG1264 | 13/Sep/04 | SSL-299-1 | Xmas bag asst/TG1264&229-04 | US$12,917.23 |
| TG1 251 | 15/Sep/04 | SSL-298-1 | Xmas gift bag asst / TG1251&257-04 | US$8,156.59 |
| TG1225 | 14/Sep/04 | SSL-286 | SM DG 2004 Halo GB asst/TG1225&160-04 | US$53,925.73 |
| TG1219 | 14/Sep/04 | SSL-288 | SM D/C hot stamp bag /TG1219&159-04 | US$22,831.20 |
| TG1264 | 15/Sep/04 | SSL-299-2 | Xmas bag asst/TG1264&229-04 | US$29,190.37 |
| TGI 186 | 14/Sep/04 | SSL-285 | DG Xmas 2004 8-PK gft bag set / TG11I 86 &1 06-04 | US$160,157.91 |
| TGI 187 | 28/Sep/04 | SSL-321 | DG Xmas 2004 8-PK gft bag set / TG 11 87& 107-04 | US$103,594.03 |
| TG1227 | 03/Sep/04 | SSL-260 | QVC book/TG 1227 & 195-04 | US$4,463.55 |
| TG1250 | 22/Sep/04 | SSL-297 | Xmas bag asst/TG 1250 & 254-04 | US$31,470.92 |
| TG1251 | 22/Sep/04 | SSL-298-2 | Xmas gift bag asst/TG1251 & 257-04 | US$21,998.59 |
| TG 1183 | 15/Sep/04 | SSL-258 | Small 3-pk asst gift bags / TG11 83 & 88-04 | US$35,308.22 |
| TG1241 | 18/Sep/04 | SSL-275 | CMA sea life / TG1241 & 202-04 | US$45,045.00 |
| TG 1240 | 10/Sep/04 | SSL-276 | Pop up W/ padded cover / TGI 240&227-04 | US$49.1 03.15 |
| TGI2O1 | 14/Sep/04 | SSL-287 | 4445DG Med matte ant floral bag / TG12OI&126-04 | US$41,838.93 |
| TG1248 | 3D!Sep/04 | SSL-31 I | Bible finger poppet book / TG1248&220-04 | US$52,057.41 |
| TG1246 | 22/Sep/04 | SSL-314 | DG Petite core 9#/TG1246&205-04 | US$4,823.35 |
| TG1226 | 21/Sep/04 | SSL-320 | SM DG 2004 Halo GB asstITGI226&161-04 | US$24,825.28 |
| TG1251 | 04/Oct/04 | SSL-298-3 | Xmas gift bag asst I TG1251&257-04 | US$19,213.28 |
| TG1245 | 16/Oct/04 | SSL-312 | My first book I TG1245&222-04 | US$45,645.60 |
| | | | **TOTAL RECEIVABLES** | **US$2,280,825.93** |

2 After examinations for Discovery, Stone Sapphire brought a partial Summary Judgment application. The Summary Judgment application dealt only with the "Undisputed Invoices", as was defined at paragraph 10 of my April 12, 2007 Reasons for Judgment now reported at 2007 ABQB 236 (Alta. Q.B.) which reads: —

> 10 Proceeding on the basis that the Charge-backs all relate to the items claimed for in this summary judgment Application, the net amount owing to Stone Sapphire for which there is no genuine issue for trial (having been ordered, inspected, delivered and sold by Transglobal at a profit to its retail customers) is USD $1,533,352.62 (the "Undisputed Invoices").

3 I found judgment in Stone Sapphire's favour in the amount of USD $1,533,352.62. Pursuant to my June 5, 2007 Order, the entry of the Order arising from the April 12, 2007 Reasons for Judgment was stayed pending Transglobal's intended Motion to vary the Summary Judgment decision. A number of conditions were imposed on Transglobal in this regard.

4 These conditions included the requirement that the judgment amount of USD $1,533,352.62 be paid into Court by Transglobal before Transglobal's application to vary the Summary Judgment decision would be heard.

5 After numerous difficulties in having Transglobal comply with the Court's direction, these funds were eventually paid into Court where they currently remain earning interest.

6 The Summary Judgment variation application by Transglobal was dismissed in written Reasons dated April 12, 2007 now reported at 2007 ABQB 238 (Alta. Q.B.).

7 On May 20, 2008, Transglobal filed a Notice of Intention to Make Proposal (the "Notice of Intention") pursuant to subsection 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S. 1985, c. B-3.

8 The Notice of Intention lists secured creditors with outstanding amounts totaling $2,000,005.00. With respect to unsecured creditors, the amounts listed on the Notice of Intention total $6,079,594.60.

9 A secured creditor of Transglobal HSBC Canada Bank has, without notice to Stone Sapphire made an application that seeks to access the monies paid into Court arising from the Summary Judgment application.

10 As a result, an application to determine the entitlement to the Judgment Amount funds paid into Court is being arranged by counsel for the secured creditor before a Judge on the Commercial List of this Court, and is tentatively scheduled to take place August 15, 2008 (the "Entitlement Application").

11 Transglobal is also currently involved in litigation with its Controller and more recently General Manager of Transglobal's Edmonton Office. Mr. Kulbaba was a Transglobal employee from November, 2002 until he resigned on April 30, 2008.

12 Stone Sapphire submits that Affidavit evidence in that proceeding touches on issues already before the Court in this Action, in particular Stone Sapphire's present application to confirm Stone Sapphire's legal position resulting from my Summary Judgment decision given the present Notice of Intention and pending Entitlement Application.

**The Kulbaba Affidavit**

13 On June 12, 2008 Mr. Kulbaba's counsel caused to be filed an Affidavit sworn by Mr. Kulbaba in the Court of Queen's Bench of Alberta Judicial District of Calgary Action No. 0801 04948.

14 It is submitted that Mr. Kulbaba's Affidavit is germane to the issues before the Court in the present Stone Sapphire matter in the following respects:

(a) Evidence with respect to the Stone Sapphire claim at paras. 86 to 89 which read as follows: —

> 86. Over the time I was with Transglobal, I observed Prescott quite closely. In those observations, I saw him take very aggressive and very unfair stances towards those he had disputes with. I witnessed him lie to others in an effort to benefit himself and Transglobal.
>
> 87. For instance, one of Tranglobabl's suppliers was a company called Stone Sapphire. In 2004, Transglobal owed Stone Sapphire a lot of money for goods supplied to Transglobal. Prescott told me he did not intend to pay the amount owing. Notwithstanding such decision, he continued to receive more goods from Stone Sapphire. When questioned about payment for goods sent, I observed Mr. Prescott lie to Stone Sapphire. Specifically, attached hereto and marked as Exhibit "O" is an email chain between Mr. Prescott and Mr. Rana of Stone Sapphire from August 2004. As can be seen from Exhibit "O", Mr. Rana has asked Mr.

> Prescott about payment on invoices as Stone Sapphire has apparently committed to pay factories with the funds Transglobal owed. Mr. Prescott responds by referencing an apparent cheque from Dollar Tree for $2.7 million that he says he will use part of, once it clears the bank. That was a lie. That cheque never existed. Transglobal never received such funds from Dollar Tree. Indeed, I don't ever recall Transglobal ever receiving a cheque from anybody in such a large amount. That is what I reference in my reply on Exhibit "O" where I say "That's a nice check". Prescott's final response to me acknowledges, I believe, the lie where he says:
>
> > Now if only my guy that handle my banking could cash the damn thing!
>
> 88. Attached hereto and marked as Exhibit "P" is the Statement of Calim in a lawsuit commenced by Stone Sapphire against Transglobabl and Mr. Prescott.
>
> 89. I am aware that in 2007, Justice Lee of the Alberta Court of Queen's Bench awarded summary judgment to Stone Sapphire on its claim against Transglobal and that, as a result therefore, Transglobal had to pay approximately USD $1.5 million into court. It took some time to pay this amount, due to Transglobabl's poor cash flow. At that time the funds were being paid, Prescott did not tell me that it was in respect of a judgment.

(b) Evidence with respect to Mr. Prescott's approach in dealing with business related matters at paragraphs 82, 83, 90, 92 and 93 which read as follows: —

> 82. From almost the outset, Prescott told me that he disliked Ms. Cowles. Prescott said this was partly as a result of her being too talkative with the designers at Transglobal. Prescott did not think this was proper for the receptionist to do. Leading into late 2004, Prescott began to pressure me to fire Ms. Cowles. I resisted such pressure.
>
> 83. In late November 2004, Ms. Cowles' boyfriend had some serious health issues (as I recall, some organ failure) and was hospitalized. A week or two later, Prescott called me and told me that I had to fire Ms. Cowles. I protested that her boyfriend was in the hospital and it was just before Christmas. Over the next several days, Prescott continued to pressure me until, ultimately, I gave in and terminated Ms. Cowles. She did not take it well and was very upset with me.
>
> 90. Likewise, Transglobabl used to us a salesperson in the United States named Tim Quinn. In 2006, Mr. Prescott was attempting to force Mr. Quinn to change his sales agreement to one less favourable to Mr. Quinn. As part of this, Mr. Prescott was withholding payment of sales commissions to Mr. Quinn. In June 2006, Mr. Prescott, however, made a few payments to Mr. Quinn. Attached hereto and marked as Exhibit "Q" is a copy of the subsequent email exchange between Prescott and I over those payments. As can be seen, Mr. Prescott's final answer summarizes his approach:
>
> > ... Quinn has no representation now that his lawyer quit, you know the drill feed him some carrot then club him over the head with a stick and leave him like a baby seal.
>
> 92. Finally, Transglobal's former Executive Vice President of International Operations was Mr. Robert Raschke. Mr. Raschke, like me, carried many corporate expenses on his personal card and then sought reimbursement from the company. Mr. Prescott fired Mr. Raschke on March 31 or April 1, 2008. As of that time, I understand from Mr. Raschke and believe to be true that he was owed approximately USD $18,000 as reimbursement for corporate expenses. I understand from Mr. Prescott that on Mr.Raschke's last day at Transglobabl, Mr. Prescott gave Mr. Raschke a cheque for the USD $18,000 or so in expenses he was owed. Very shortly thereafter, Mr. Prescott called me and told me to put a stop payment on the cheque. I followed his direction.

93. Similarly, when Andrew Dyakon was leaving, Prescott told me repeatedly that he was going to "fuck him over".

(c) Mr. Prescott's lack of honesty at paragraphs 2, 3, 11, 13, 20, 24, 34, 38, 39, 47, 48, 50, 54, 58, 66, 69, 76, 81, 86, 87, 95 and 98 which read as follows: —

2. In his April 29, 2008 Affidavit ("April 29 Affidavit") Prescott swears that he relied upon me respecting Transglobal's accounting and financial affairs and to manage Transglobal's books and finances. Likewise, both Mr. Prescott's April 29 Affidavit and his May 30, 2008 Affidavit ("May 30 Affidavit") suggest a portrait that Mr. Prescott was relatively uninvolved in and unaware of Transglobal's financial and accounting affairs. As set out throughout the rest of this Affidavit, such statements and suggestions by Mr. Prescott are untrue and misleading. The truth is that Mr. Prescott was extremely involved in Transglobal's day to day accounting affairs, including in particular the incurring of expenses charged to Transglobal and the salary of Transglobal'5 employees, including me.

3. As set out in detail below, I believe that Mr. Prescott has initiated this litigation against me because Transglobal is in serious financial difficulty and I am a convenient scapegoat for Mr. Such conduct is, unfortunately, something that I have witnessed previously from Mr. Prescott in relation to other former Transglobal employees as well as some of Transglobal's business partners.

11. I note from my review of the April 29 Affidavit and May 30 Affidavit that Prescott alleges that various records are missing from Transglobal's offices; the explicit or implicit implication from such allegations is that I was somehow involved in destroying such records. I specifically deny all such implications or statements; they are false.

13. Included in the items that were thrown out were a large number of file folder boxes. While I do not specifically know what records were in those boxes, I do know that several of them came from Transglobal's filing room. I was present during Prescott's cross-examination on his Affidavits on June 5, 2008 and I heard him testify that he only threw out approximately one four foot by four foot pallet of records. That is not true; I personally witnessed many more records than that being thrown out. I would estimate there two to three pallets of records stacked five feet tall. From what I observed, the records thrown out were selected indiscriminately. As mentioned above, the process was very rushed. There was no time to go through each box and file to see precisely what was being thrown out. Since this incident, however, I know that many of Transglobal's records for matters such as payroll for prior years have been missing.

20. I believe that the records that Prescott alleges are missing from Transglobal's files are not in fact missing. So far as I knew when I left Transglobal on April 29, 2008, my credit card statements, credit card receipts, expense reports, backup for such reports and payroll (other than as might have been thrown out by Prescott in 2006 or otherwise) were still present at Transglobal's offices. I do not know why Prescott is not presenting those records to the Court, but fear that it could be because those records are inconsistent with the allegations that he makes against my wife and I.

24. At paragraph 36 of his April 29 Affidavit, Prescott alleges that I endorsed and cashed cheques made out to Transglobal for my own personal benefit. This is not true. Rather, cheques petty cash were often cashed at the Royal Bank and the Royal Bank did not like to cash cheques made "To Cash", but rather wanted them made out to a person, and, as such, petty cash reimbursement cheques were frequently made payable to "Transglobal" or a Transglobal employee including myself or the accounting assistant. I told Prescott this, and it is for that that he signed and approved the cheques made out to "Transglobal", "Tracy Desjarlais" or (on a couple of occasions) "Josh Kulbaba" for petty cash reimbursement. When cashed, the banker would make me sign the back of the cheque in order to obtain cash. The cheques attached to Prescott's April 29

Affidavit at Exhibit "P" and at least two of the cheques attached to Prescott's April 29 Affidavit at Exhibit "Q" are examples of cheques for the reimbursement of petty cash expenses.

34. Indeed, contrary to the evidence he gave during his cross-examination, Prescott scrutinized and approved employee expense claims (regardless of whether by payroll or cheque reimbursement) throughout the time I was with Transglobal, not just in the recent past. As an example, attached hereto and marked collectively as Exhibit "F" are a bundle of emails to, from or relating to Prescott and his scrutiny and review of employee expense claims.

38. At paragraphs 8 and 9 of Prescott's April 29 Affidavit, Prescott suggests that I removed the company credit card statements from Transglobal's Edmonton office. That is not true. I did not remove any records from Transglobal's Edmonton office. So far as I know, they were all present at Transglobal's offices when I left on April 29, 2008.

39. Prescott's description of what happened on April 18, 2008 is also false and misleading. In the late afternoon on Friday, April 18, 2008, Prescott advised me that he wanted to go over Transglobal's expenses in detail. I told Prescott that my father in law was visiting from Calgary and because I had plans to meet him and my family for dinner and plans over the weekend, I could not review Transglobal's expenses with him until the following week. Prescott indicated that that would be fine as he would be there the entire next week and so I left Transglobal's office at around 4:00 p.m. Prescott did not, however, raise any questions about the expenses with mc the following week.

47. It was not just my personal expenses that were billed to the company; Prescott himself charged many, many personal expenses to the company. For instance, he purchased a $65,000 diamond ring for his wife that he asked me to record on the books as "commission expense". Likewise, while the company bought several Dodge Vipers that were recorded as company assets, the company also purchased several others that were expensed and not listed as assets.

48. Prescott instructed me to book those assets in other expense categories such as "travel" or "commission" Likewise, the company leased a Hummer; when the lease was up, Prescott purchased the Hummer with corporate funds and wrote the cost off to commission or travel expense. The company did not list the Hummer as an asset, In booking these purchases, I only ever did so at Prescott's specific instruction. As examples of Prescott's direction and involvement in characterizing such expenses, attached hereto and marked as Exhibit "F" is an email relating to Prescott's involvement in directing how to book personal expenses charged to the company.

48. Likewise, though I do not recall ever seeing y backup for Prescott or his wife's company credit cards, I know from my discussions with him and seeing the statements for those cards that they put many, many of their personal expenses, such as meals and travel, on the company account. Frankly, it was simply part of the culture of working with Mr. Prescott that this is how some personal expenses were paid.

50. At paragraph 17 of the April 28 Affidavit Prescott alleges that he reviewed Transglobal's online expense report summaries and discovered that the expenses on my Transglobal credit card are different than the expenses listed on my expense reports for the same period. As explained above, expense reports were only submitted in respect of expenses that I incurred on my personal credit card or that were otherwise paid out of my pocket. Expense reports were not submitted with respect to charges to my Transglobal credit card because Transglobal received the statements for that card which set out all of the charges to the card and with the approval of Prescott, the balance of that card was always paid out of Transglobal's accounts. As he admitted in cross-examination, Prescott knows that these are different processes. Given Prescott's very personal knowledge of the expenses and processes at Transglobal, I believe that the allegations in paragraph 17 of Prescott's April 29 Affidavit were deliberately misleading.

54. As shown at Exhibit "D" of Prescott's April 29 Affidavit, and specifically at page 82, I used my Transglobal credit card in Toronto and Edmonton in the same day. Prescott did not disclose to the Court that those charges involve the Toronto and Edmonton Airports. He is well aware that I traveled to Toronto in January 2007 for Transglobal business and returned to Edmonton the same day. Likewise, at page 88 the charge in Coquitlarn related to a same-day trip I made to Vancouver from Edmonton for Transglobal in July. Attached hereto and marked as Exhibit "C" is a copy of the itinerary for such trip. I believe this record should be included with the backup records that I left at Transglobal's offices that Prescott has not produced in this litigation.

58. Finally, and perhaps most seriously, I believe Prescott was fully aware on April 29, 2008 that I could not have had a second card issued for Julia. When we obtained a card for his wife, Prescott — as the only person with authority at Transglobal — had to personally sign application forms to have the second card issued. Attached hereto and marked as Exhibit "L" is a copy of an email from me to Prescott forwarding the "new card" forms for his wife in June 2006.

66. From paragraph 23 to paragraph 32 of his April 29 Affidavit Prescott alleges that I had unfettered access to payroll and that I fraudulently paid myself more than I was contractually entitled to. Those allegations are not true.

69. While I heard Prescott in his cross-examination deny that I was entitled to bank pay, that evidence was not true. Attached hereto and marked as Exhibit "M" is an email from Transglobal's then-accounting assistant to me and other Transglobal employees confirming our bank hours as of December 7, 2004.

76. With particular respect to paragraph 35 and Exhibit "0", Mr. Prescott has completely misrepresented this exchange. In late March 2008, I sent Prescott some financial statements. A few weeks later Mr. Prescott requested that I send him a listing of employee wages that matched these financial statements. Because at the time I sent the original financial statements the March 2008 payroll had not been run yet, it did not have the final figures, which would have included the extra pay run for me. I advised Prescott that that statement would reflect that I was paid $20,000.00 in March 2008 because of the 13th Month Bonus that I was paid. Prescott requested that I revise the statement to show only the usual and recurring monthly salary payments. As a result, I sent Exhibit "0" to his April 29 Affidavit.

81. At paragraphs 17 through 19 of the May 30 Affidavit, Mr. Prescott gives incorrect and misleading information about Ms. Cowles. Ms. Cowles was hired around April 2004. She had no accounting experience. She was originally hired to be a receptionist, but I told Prescott I believed I could help her become an accounting assistant.

86. Over the time I was with Transglobal, I observed Prescott quite closely. In those observations, I saw him take very aggressive and very unfair stances towards those he had disputes with. I witnessed him lie to others in an effort to benefit himself and Transglobal.

87. For instance, one of Transglobal's suppliers was a company called Stone Sapphire. In 2004, Transglobal owed Stone Sapphire a lot of money for goods supplied to Transglobal. Prescott told me he did not intend to pay the amount owing. Notwithstanding such decision, he continued to receive more goods from Stone Sapphire. When questioned about payment for goods sent, I observed Mr. Prescott lie to Stone Sapphire. Specifically, attached hereto and marked as Exhibit "0" is an email chain between Mr. Prescott and Mr. Rana of Stone Sapphire from August 2004. As can be seen from Exhibit "0", Mr. Rana has asked Mr. Prescott about payment on invoices as Stone Sapphire has apparently committed to pay factories with the funds Transglobal owed. Mr. Prescott responds by referencing an apparent cheque from Dollar Tree for $2.7 million that he says he will use part of, once it clears the bank. That was a lie. That cheque never

> existed. Transglobal never received such funds from Dollar Tree. Indeed, I don't ever recall Transglobal ever receiving a cheque from anyhpy in such a large amount. That is what I reference in my reply on Exhibit "0" where I say "That's a nice check". Prescott's final response to me acknowledges, I believe, the lie where he says:
>
> > Now if only my guy that handle my banking could cash the damn thing!
>
> 95. In Mr. Prescott's April 29 Affidavit, I see (at para. 56) that Mr. Prescott swore that Transglobal would undertake to pay damages should the Court later determine it should as a result of seeking the ex parte Attachment Order. I know that as of April 29 2008 such undertaking was worthless. The company was effectively insolvent.
>
> 98. Set off against those claims, Transglobal has little in the way of assets. Most of its equipment is leased. Attached hereto and marked as Exhibit "T" are the latest draft of the December 31, 2007 financial statements for Transglobal that were available to me upon my departure (these date from April 21, 2008). As can be seen, the company only had $4.4 million in assets. A significant part of those assets is the "$1,249,627 Cash in trust". That cash is part of the USD $1.5 million that Transglobal had paid into Court in the Stone Sapphire lawsuit. Given his intimate familiarity with Transglobal's finances, I believe that Prescott was fully aware of Transglobal's insolvency and inability to meet the undertaking when it applied for the *ex parte* Order on April 29, 2008.

15 The Court's attention is drawn to the financial statements of Transglobal for 2007 which are appended as Exhibit "T" to the Kulbaba affidavit. It is submitted that Transglobal's alleged cash flow and gross margin difficulties in 2007 (see Prescott Affidavit filed September 11, 2007 at paragraphs 16 to 18) stated in support of the order to extend payment terms for the Summary Judgment Amount into Court represented a further fraud by Mr. Prescott on the Court. Mr. Prescott's cash flow difficulties were attributable to: —

> (a) Management salaries of $463,000.00;
>
> (b) Legal fees of $578,810.00; and
>
> (c) Extraordinary foreign exchange loss of $421,988.

16 It is submitted that Transglobal's gross sales increased in 2007 and cost of goods sold declined.

**The Desjarlais Affidavit**

17 On June 12, 2008 a Transglobal employee filed an affidavit in support of Mr. Kulbaba. Ms. Desjarlais' affidavit also calls into question Mr. Prescott's honesty at paragraphs 10, 11, and 12 which read as follows: —

> 10. I understand from Mr. Prescott's Affidavits that his evidence is that certain accounting records relating to payroll and expenses have gone missing from Transglobabl's offices. I have some information that contrasts with such evidence.
>
> 11. First, with respect to credit card statements, I see from Mr. Prescott's Affidavit that he alleges that all of Mr. Kulbaba's company credit card statements went missing from Mr. Kulbaba's office on April 18, 2008. I know that is not so. Specifically, on April 29, 2008 I recall that I had at my desk the most recent credit card bill for Mr. Kulbaba (covering the month of March, 2008). At the end of the day, I put that statement back in Mr. Kulbaba's office in the same place that credit card statements were always filed. It did not appear to me that anything was missing from this file at that time; the previous month's statement was there and what seemed like the normal number of statements before that for Mr. Kulbaba's credit card were also there.

> 12. Second, respecting the receipts for Mr. Kulbaba's company credit card that I mentioned above, those too were still at Transglobal's office well into the month of May 2008. Indeed, at one point I handed the file containing those receipts to Mr. Prescott and Transglobabl's attorney. After the receipts were reviewed, I was told that these were "only the business receipts" and "not the personal ones". I understood from such comments that the receipts I provided were not what Mr. Prescott was looking for. I have reviewed Exhibit "G" to Mr. Prescott's May 30, 2008 Affidavit. While some of the pages are difficult to read, as seems to be implied by paragraph 16 of Mr. Prescott's May 30, 2008 Affidavit, I can confirm that I handed more receipts to Mr. Prescott than are shown on Exhibit "G".

**The Lutomsky Affidavit**

18 On June 12, 2008 a former Transglobal employee filed an affidavit in support of Mr. Kulbaba. It is submitted that Mr. Lutomsky's affidavit also calls in to question Mr. Prescott's honesty at paragraphs 11, 13, and 14 which read as follows: —

> 11. From Mr. Prescott's Affidavit sworn May 30, 2008 I understand that Mr. Prescott alleges that Mr. Kulbaba "orchestrated" the termination of Ms. Crystal O'Hara Cowles, a former Transglobal employee. I have evidence that I believe contradicts that allegation.
>
> 13. I specifically deny that I ever suggested to anyone, including Mr. Prescott, Mr.Ursulak or anyone else, that Mr. Kulbaba was worried or had "nightmares" about being charged for sexual harassment regarding Ms. Cowles. Any evidence to the contrary is untrue.
>
> 14. From Mr. Prescott's Affidavits, it appears to me that he is taking the position that he was relatively uninvolved in the day-to-day affairs at Transglobal's Edmonton office. I do not believe that is an accurate reflection. Specifically, I recall that Mr. Prescott, with the assistance of his relative Dean Ursulak, an IT employee at Transglobal, would regularly monitor employees. For instance, I personally observed Mr. Ursulak reviewing employee "ichat" logs. These were logs of employee-to-employee electronic communications. I understood at the time that the employees did not know their conversations were being monitored. At the end of each day, Mr. Ursulak and Mr. Prescott would go over what Mr. Ursulak had monitored. Finally, I recall thatMr. Ursulak discovered several internet websites created by some employees about themselves — these were also monitored by Mr. Ursulak and Mr. Prescott so that they could review employee communications. Given the foregoing, it is my belief that Mr. Prescott was very much involved and aware of what was happening at Transglobal on a daily basis. Given the lengths he went to in order to monitor frivolous matters like employee conversations, I do not believe that he could have been unaware about expenses being incurred by employees such as Mr. Kulbaba.

**Analysis**

19 In a decision rendered on April 12, 2007 I granted summary judgment to the Plaintiff in the amount of USD $1,533,352.62.

20 Following my colleague Justice Graesser's decision of March 4, 2008 to allow Transglobal to adduce fresh evidence with respect to the Summary Judgment, Transglobal's application for reconsideration and for consideration of the new evidence was argued before me on April 2, 2008.

21 In the interim Transglobal's secured creditor, HSBC, issued a 10 day demand. Transglobal filed a Notice of Intention under the *BIA* order to allow it to obtain alternate financing.

22 In the course of the *BIA* proceedings Transglobal argued that this Court ought to be provided with sufficient time to decide the reconsideration motion. HSBC then agreed refrain from immediately applying to have the $1.5 million in this action paid to it as the secured creditor of Transglobal.

23 The Plaintiff Stone Sapphire applies for an Order that judgment be entered against the Defendant Transglobal Communications Group Inc. ("Transglobal"), and for an Order lifting the stay of proceedings which arises under s. 69 of the

*Bankruptcy and Insolvency Act* ("*BIA*",). Transglobal is not a bankrupt, but has filed a Notice of Intention to make a proposal to its creditors.

24 In this hearing, the Plaintiff has submitted extensive materials from another action involving Transglobal's former employees.

25 An Attachment Order in respect of Mr. Kulbaba's assets has been granted by this Court ex parte. Cross-examinations of Mr. Kulbaba and others has yet to occur, but are expected to occur within the next couple of weeks. While the elements of Kulbaba's affidavit which refer to matters involving Stone Sapphire apparently are or will be refuted by Mr. Prescott in his evidence, Mr. Kulbaba has also apparently retained Bennett Jones to address the continuation of the Attachment Order which is scheduled to be heard shortly before my colleague Clark, J.

26 I dismissed the Transglobal reconsideration application in written Reasons dated June 27, 2008, now reported at 2008 ABQB 397 (Alta. Q.B.).

27 A hearing in the *BIA* proceedings to determine the question of whether the Plaintiff or HSBC has priority to the funds held in court in this action has been scheduled for August 15, 2008.

28 The general jurisdiction of the Court is well known from s. 8 of the *Judicature Act*, R.S.A. 2000, c. J-2: —

> 8 The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

29 Judgments of the Court take effect from the date of pronouncement, *Alberta Rules of Court* s. 322: —

> 322(1) Every judgment and order is to be dated as of the day on which it is pronounced.
>
> (2) Every judgment and order takes effect from
>
> (a) the date of pronouncement, or
>
> (b) if the Court gives leave for the judgment or order to come into force before or after the date of pronouncement, the judgment or order takes effect from the date so ordered.
>
> (3) This Rule applies whether or not the judgment or order has been entered in accordance with these Rules.

30 In this case, the Summary Judgment decision takes effect from April 12, 2007 being the date that my Reasons for Judgment were issued.

31 Stone Sapphire argues that the actions of Transglobal over the last year culminating in the filing of the Notice of Intention have the potential effect of "clouding" Stone Sapphire's position *vis a vis* the monies paid into Court. Stone Sapphire wishes to ensure there is no ambiguity arising with respect to the Summary Judgment decision of April 12, 2007.

32 Accordingly if Transglobal's application to vary the Summary Judgment decision is denied, then it is Stone Sapphire's position relative to the funds paid into Court be finalized, that is, Stone Sapphire's position arising from the Summary Judgment decision must be finalized as it would have been in April, 2007 but for the procedural steps and irregularities occasioned by Transglobal thereafter.

33 Stone Sapphire says that it is not seeking a Judgment of the Court that would in anyway address the relative rights of Transglobal's creditors, including Stone Sapphire, to the Summary Judgment funds presently paid into Court.

34 Stone Sapphire acknowledges that it's legal entitlement, and that of the secured creditor HSBC or any other Transglobal creditor to those monies paid into Court will be the subject of the separate Entitlement Application tentatively scheduled to be argued August 15, 2008.

35 Stone Sapphire merely seeks through this application to ensure that:

(a) the order arising Summary Judgment already issued by the Court on April 12, 2007 is entered; and

(b) that no stay of proceedings arising from the Notice of Intention affects finalization of Stone Sapphire's position.

36 It is submitted that this will ensure that whatever rights that Stone Sapphire has in the monies paid into Court are preserved, and will allow those rights to be presented as fairly and strongly as possible. However Stone Sapphire acknowledges that the substantive issues as to the respective entitlement of Stone Sapphire, HSBC and other creditors will be addressed on August 15, 2008 at the Entitlement Application.

37 In summary Stone Sapphire says that the theatrics of Transglobal over the past year have the potential of clouding the entitlement issue. Stone Sapphire submits that there should be no ambiguity with respect to it's position at the time the Entitlement Application is heard.

38 Stone Sapphire seeks:

(a) An Order entering Judgment in the form of the Order of April 12, 2007;

(b) An Order lifting the Stay provided for in paragraphs 2 and 11 of my Order granted on June 5, 2007;

(c) An Order lifting the stay of proceedings which came into effect pursuant to s. 69 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 upon the Defendant filing a Proposal.

39 Transglobal submits that Stone Sapphire has failed to lead any evidence to support it's application to enter Judgment against Transglobal, and to lift the stay of proceedings under s. 69 of the *BIA* is appropriate in the circumstances. There is no evidence that Stone Sapphire is being materially prejudiced by the stay of proceedings under the *BIA*, and that there is an equitable ground to justify the stay being lifted.

**Conclusion**

40 One of the objects of the *BIA* is to provide that all creditors of the same class are treated equally, and that an "orderly distribution" is made, with creditors ranking *pari passu*. The statutory stay of proceedings achieves that by preventing one creditor from taking proceedings or steps which may give it an unfair advantage relative to the other creditors: *Holden & Moawetz*, *Annotated Bankruptcy and Insolvency Law of Canada* (3d) Vol. II.

41 Further the stay of proceedings allows a debtor such as Transglobal the breathing room necessary to focus its efforts to the reorganization of its debts and the making of a proposal for the benefit of all creditors, rather than expending its time and efforts to respond to formal court proceedings of one particular creditor, to the detriment of its other stakeholders.

42 In particular, s.69.l of the *BIA* provides for an automatic stay of any remedy as against a party filing a proposal, such that a person shall not commence or continue any action, execution or other proceedings for the recovery of a "claim provable in bankruptcy".

> 69.1 Subject to subsections (2) to (6) and sections 69,4 and 69.5, on the filing of a proposal under subsection 62(1) in respect of an insolvent person,

> (a) No creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged or the insolvent person becomes bankrupt;

43 The definition of provable claim is quite broad, and appears to include Stone Sapphire's claims, whether reduced to a formal judgment or not:

> 121(1) **Claims Provable** — 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.

44 While s. 69.4 does give the court the discretion to lift the stay, the creditor must establish that it is materially prejudiced by the stay that it is equitable on other grounds to do so.

> 69.4 A creditor who is affected by the operation of section 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; and
>
> (b) that it is equitable on other grounds to make such a declaration.

45 Stone Sapphire has failed to adequately lead evidence as to why the automatic stay of proceedings should be lifted in respect of this claim, or in respect of the judgment should it be entered. The onus is on Stone Sapphire to establish that it is being materially prejudiced by the stay.

46 Generally, Courts will consider lifting a stay when the action is one that would survive the *BIA* proceedings, that the matter is an unliquidated debt that is so complex that the summary process under the *BIA* is inappropriate, if the insolvent person's involvement is necessary in respect of other parties, if the action is necessary to recover under an available policy of insurance, or that the action has progressed to a point where logic dictates that the action continue to judgment. However the Courts have stated that even if the stay is lifted to prosecute an action, execution on any Judgment will invariably be stayed: *Advocate Mines Ltd., Re*, [1984] O.J. No. 2330 (Ont. S.C.).

47 In the case at bar, Stone Sapphire purpose has failed to explain for what purpose that the stay be lifted to ensure that "no stay of proceedings arising from the Notice of Intention affects finalization of Stone Sapphire's position".

48 At the very least, regardless of the purpose, and the statement by Stone Sapphire that it is not "seeking a judgment of the Court that would in anyway address the relative rights of Transglobal's creditors" to the court funds, the effect of lifting the stay is that Transglobal's focus and efforts will be taken away from working with the Proposal Trustee and developing a proposal for the benefit of all of its creditors.

49 To allow an unsecured creditor to either proceed with an action that is ultimately compromised under the *BIA*, or to enforce on a judgment while a company attempts to reorganize its affairs for the purpose of filing a proposal, usurps the intent and purpose of the *BIA*.

50 I conclude that Stone Sapphire has failed to meet the onus upon it, and has failed to show any or sufficient circumstances that would justify the stay being lifted. The interests of the creditors as a whole must be considered, and without any evidence that there is material prejudice and that there are equitable grounds to support an order, Stone Sapphire's application to lift the stay must fail, particularly where it can point to no specific purpose for the lifting of the stay.

51 I do however reconfirm that no stay of proceedings arising from the Notice of Intention will affect the entry of the Order arising from Stone Sapphire's Summary Judgment already issued by the Court on April 12, 2007. My Summary Judgment decision takes effect from the date of its pronouncement on April 12, 2007 pursuant to Rule 322(2).

52 In my opinion the non-entry of the Summary Judgment Order, and the Court's recent rehearing application now dismissed, does not mean that Stone Sapphire's position relative to the funds now paid into Court has been compromised.

53 I conclude with or without a stay, that Stone Sapphire may be an unsecured creditor whose rights in the court funds rank subordinate to any creditor that holds a security interest in those funds. This issue however must still be determined at the motion of HSBC Bank of Canada who asserts a first ranking security interest in the funds.

54 Stone Sapphire argues that it has judgment and that the funds presently paid into Court are Stone Sapphire's monies that cannot be released because Stone Sapphire is an off-shore company, unless and until Transglobal's Counterclaim has been addressed. Stone Sapphire argues since there was no right of legal or equitable set off, the monies paid into Court are Stone Sapphire's funds, and therefore Stone Sapphire is not an unsecured creditor with respect to the Judgment amount.

55 Without fully assessing Stone Sapphire's specific purpose for lifting the stay, the court simply cannot know if the circumstances warrant it, or if an unfair advantage results from it.

56 I conclude that in any event Stone Sapphire's rights relative to the secured creditor will be fully argued and considered when the entitlement application proceeds on August 15, 2008.

*Motion dismissed.*

**End of Document**

# TAB 27

2020 ONSC 1482
Ontario Superior Court of Justice

Eureka 93 Inc. et. al. (Re)

2020 CarswellOnt 3482, 2020 ONSC 1482, 316 A.C.W.S. (3d) 611, 77 C.B.R. (6th) 289

# IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF EUREKA 93 INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

AND IN THE MATTER OF THREE RELATED INTENEDED PROPOSALS (LIVEWELL FOODS CANADA INC., ARTIVA INC., and VITALITY CBD NATURAL HEALTH PRODUCTS INC.)

Calum MacLeod J.

Heard: March 6, 2020
Judgment: March 9, 2020
Docket: 33-2618511

Counsel: E. Patrick Shea, for Debtors
Sean Zweig, for Dominion Capital LLC
Lou Brzezinski, for Proposal Trustee

Subject: Insolvency

MOTION by debtors for relief pursuant to *Companies' Creditors Arrangement Act*.

***Calum MacLeod J.*:**

1 The debtors (the NOI Companies) move to have four related matters consolidated, to extend the time for making proposals, and for approval of proposed interim priority financing arrangements ("DIP financing").

2 Four related corporations have served notice of intention to make a proposal pursuant to s. 50.4 (1) of the *Bankruptcy and Insolvency Actt* [1] . Three of the corporations are subsidiaries of Eureka 93, the publicly traded parent company. Only one of these corporations has any significant asset. That is Artiva Inc. which owns a 100 acre parcel of land containing a largely completed, licenced, but not yet operational, cannabis facility. The purpose of the proposed financing is to complete the facility and to generate sales so that there is cash flow.

3 The temporary financing and extension of time to make a proposal is actively supported by the secured creditor holding the first mortgage. Other creditors are either in support of the plan or are neutral but the motion is strongly opposed by Dominion Capital on behalf of a group of three secured creditors ("the noteholders"). Dominion takes the view that "there is no business to rehabilitate, no air of reality to the NOI Companies' business plan, no significant assets apart from the Ottawa facility, and no hope of satisfying the claims of creditors through the Proposal Proceedings."

4 If an extension of time is not granted, then pursuant to s. 50.1 (8) of the *BIA* the NOI companies will be deemed to have made an assignment in bankruptcy on March 15 th , 2020. If the interim financing is not granted then it is likely there will be a receivership and a liquidation of the assets. In that case there will be no recovery for the unsecured creditors. The total debt at this point in time appears to be in excess of $28 million although that is inclusive of intercompany debt.

5 If the plan is approved it is possible but not guaranteed that the value of the business as a going concern will be higher than the "as is" value of the land, it is possible the debtors will put forward an acceptable proposal and possible there will be full

recovery for the secured creditors and something for those that are unsecured. On the other hand, the plan may fail, the proposal may be voted down but there will be another $2.3 million in debt in priority to all other creditors.

6 The court must decide if it is reasonable to authorize this additional debt while continuing to protect the debtors from their existing creditors in the hope that this will generate a better outcome. The noteholders urge the court not to do so.

**Background**

7 Eureka 93 Inc. is the parent company of a corporate group that was intended to be a vertically integrated hemp and cannabis company. Livewell and Vitality are subsidiaries of Eureka and Artiva is a subsidiary of Livewell. Eureka is or was publicly traded until a cease trading order was issued by the Ontario Securities Commission (OSC) in September of last year when it ran into significant financial difficulty and was unable to meet its obligations as an issuer of securities.

8 Eureka is a holding company and currently has five employees. Artiva owns a farm equipped with greenhouses and has a cannabis cultivation licence from Health Canada. This facility (the Ottawa facility) is not yet completed and it requires a further significant capital investment to begin production. None of the other corporations are operational at this time. The focus of the motion and of the intended proposal is to salvage the Ottawa facility and to generate positive cash flow through Artiva.

9 Dominion describes the business of Artiva as more of an idea than a reality. They say that Artiva owns the land and the Ottawa facility but does not have a business. Despite the significant funds raised to date, the Ottawa facility remains incomplete and inoperable. The noteholders take the view that permitting the NOI companies to raise more funds in priority to the existing secured creditors is futile and will only result in further erosion of their collateral and any potential recovery for the existing creditors. Essentially, the moving party has no faith in Eureka's remaining management nor in the business plan the proponents now seek to put forward.

10 I have reviewed the First Report of the Proposal Trustee (Deloittes). The Proposal Trustee has not audited the financial statements or verified any of the representations made by management. The trustee has reviewed the proposed cash flow and is satisfied that the interim financing would provide sufficient liquidity to bring the facility to completion and to begin. The Proposal Trustee recommends the plan. It believes it is a better option than either an immediate bankruptcy or uncontrolled efforts by secured creditors to realize on their security. The facility is largely completed to Health Canada standards. It was successful in obtaining the licence to grow and sell cannabis in September of last year. No crop could have been legally grown before that date. It requires roughly $650,000.00 to complete the construction and $160,000.00 to purchase inventory.

11 The interim financing plan is expensive and would add $2.3 million in debt to the burden already in place. A large potion of the cost is the cost of professional fees to work through the insolvency and restructuring and the cost of high risk borrowing. The plan involves at least three significant assumptions which cannot be tested and carry significant risks. There is the risk that the remaining construction will not be completed on time, to specification and within budget. There is the risk that production of cannabis will not ramp up as smoothly as predicted. There is the risk that buyers of the product will not be found in sufficient time or numbers to meet the cash flow predictions.

12 In addition, there is always the risk that even if all of this falls into place, the proposal or proposals will prove unacceptable to the creditors and an insolvency or a receivership will still result. The debtors have reason to believe that if the facility is completed, they will be able to refinance the project or to sell it as a going concern. On the evidence before me, those are not empty hopes, but they are by no means guaranteed.

**Analysis**

13 All parties agree to administrative consolidation of the four intended proposals. This makes sense. It is necessary for each corporation to make a proposal because of the ownership structure. All shares of the subsidiaries are owned by Eureka. There is no benefit to having four separate court files. [2]

14 All parties are in agreement with the proposed sealing. It is not in the public interest to have sensitive financial information such as appraisals of the land or the identity of potential purchasers in the public domain at this time. The documents contained in the "confidential document brief" will be sealed until further order. [3]

15 This is not a plan of rearrangement under the *Companies' Creditors Arrangement Act* [4] nor is it even a proposal at this point. It is a notice of intention to make a proposal under s. 50.4 (1) of the *BIA*. This procedure permits the debtor to gain the statutory protection of a stay of proceedings without initial court approval while, subject to compliance with the terms of the Act, it attempts to put itself in the position to make a proposal. But the Act only permits this for 30 days within which time it is necessary to either put together a proposal or to obtain further approval and protection from the court. [5]

16 The court may extend the time to make a proposal and during that time the court may approve interim financing pursuant to s. 50.6 (1) of the Act. In making that decision and in exercising its discretion, the court is mandated to consider all relevant factors including those set out in subsection (5). That subsection reads as follows:

> **Factors to be considered**
>
> (5) In deciding whether to make an order, the court is to consider, among other things,
>
> • (a) the period during which the debtor is expected to be subject to proceedings under this Act;
>
> • (b) how the debtor's business and financial affairs are to be managed during the proceedings;
>
> • (c) whether the debtor's management has the confidence of its major creditors;
>
> • (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
>
> • (e) the nature and value of the debtor's property;
>
> • (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> • (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

17 It is the position of the noteholders that the proposed interim financing would materially prejudice the noteholders by placing another $2.3 million in debt in priority to its security. This of course is inherent in approving DIP financing and is not the only consideration. [6] Still it is part of the analysis. $2.3 million in additional debt over the next month is significant. It is also the position of the noteholders that they have no confidence in management or the ability of that management to successfully bring the project to fruition and generate positive cash flow.

18 I appreciate the concerns of the noteholders. I share the concern that there is a significant risk inherent in cultivating a first crop of cannabis and finding buyers. This is an industry in its infancy and the struggles of some of the established companies in this area are public knowledge. In fact, on the day of the hearing Canopy Growth Corp. announced it was closing two greenhouse facilities in British Columbia and cancelling a project planned for Ontario. [7]

19 Counsel for the debtor submitted that this was not an appropriate area for judicial notice particularly in light of the specific evidence before me. The affidavit evidence filed on behalf of the debtors indicated a different business strategy focused on seedlings or "clones" and painted an optimistic picture of quickly generating positive cash flow. I agree that a news report should not be taken as evidence, but it is useful background. There is no doubt that there is significant risk for any new business particularly in an evolving and volatile sector such as legal cannabis production.

20 The question is whether this is a risk worth taking despite the misgivings of the noteholders and the potential prejudice to their position. I am encouraged by the First Report of the Proposal Trustee and the support for the plan set out therein. I am also impressed by the support for the plan voiced by the representative of the first mortgagee and the interim lenders.

21 I appreciate that both the interim lender and the first mortgagee are fully secured against the value of the land but the willingness to lend the additional funds is supported by their analysis of the plan as viable. Mr. Martin deposes that he has been working with Mr. Poli since September of 2019 and has full confidence in the plan. It is his position that the interim financing plan and proposal proceedings based on a completed and operational facility is likely to generate greater value for all stakeholders than would be the case in a liquidation.

22 There are other stakeholders, not the least of which are two lien claimants and the unsecured creditors. There is at least $15 million in secured debt and over $9 million in unsecured debt. As noted, the other secured creditors support the motion and neither the lien holders nor the unsecured creditors appeared to oppose it.

23 There are five current employees but perhaps 20 other employees who were laid off from the various companies. The completion of the project and the start of cannabis production would involve calling some of those employees back to work.

24 I am persuaded that immediate liquidation would have dire effects whereas the brief extension of time and the interim financing hold at least the prospect of increased value and a successful proposal. [8]

**Conclusion & Order**

25 I am granting the proposed order substantially in the form proposed although I have simplified the title of the proceedings in paragraph 2 of the draft order as shown at the top of these reasons. I am also imposing an additional term.

26 During the extension period, the court will require a bi-weekly status report confirming the interim funding is in place, verifying progress of construction, the continued validity of the cultivation licence and progress towards production of a first crop.

27 In the event that there is a significant deviation from the plan as proposed or if any of the assumptions built into the interim financing plan fail to materialize or require significant readjustment, the noteholders or any other creditor may move to lift the stay or for amendment of the order.

28 I may be spoken to for further direction if required or if there is any dispute as to the form of the order.

29 The parties may also arrange to speak to the matter if any party seeks costs.

*Motion granted.*

Footnotes

1 RSC 1985, C. B-3 as amended

2 See *Electro Sonic Inc., Re*, 2014 ONSC 942 (Ont. S.C.J. [Commercial List])

3 See *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) @ paras 63 - 65

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

5 See *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List])

6 See *OVG Inc., Re*, 2013 ONSC 1794 (Ont. S.C.J.)

7 See: *https://business.financialpost.com/cannabis/canopy-growth-lays-off-500-workers-shuts-massive-b-c-greenhouse-facilities*

8 See *Mustang GP Ltd., Re*, 2015 ONSC 6562 (Ont. S.C.J.)

**End of Document** 

# TAB 28

2020 BCSC 1359
British Columbia Supreme Court

1057863 B.C. Ltd. (Re)

2020 CarswellBC 2275, 2020 BCSC 1359, 323 A.C.W.S. (3d) 310, 82 C.B.R. (6th) 253

# In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

And In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57

And In the Matter of a Plan of Compromise or Arrangement of 1057863 B.C. Ltd., Northern Resources Nova Scotia Corporation, Northern Pulp Nova Scotia Corporation, Northern Timber Nova Scotia Corporation, 3253527 Nova Scotia Limited, 3243722 Nova Scotia Limited and Northern Pulp NS GP ULC (Petitioners)

Fitzpatrick J.

Heard: July 31, August 5, 2020
Judgment: September 14, 2020
Docket: Vancouver S206189

Counsel: S. Collins, W.W. MacLeod, J. Roberts, for Petitioners
R.G. Grant, Q.C., M.P. Chiasson, Q.C., for Province of Nova Scotia
P.J. Reardon, for Paper Excellence Canada Holdings Corporation
E. Pillon, L. Nicholson, for Monitor, Ernst & Young Inc.
R.A. Pink, Q.C., for Unifor, Local 440
B. Brammall, for Pacific Harbor North American Resources Ltd, as the proposed interim lender
N. MacParland, for Atlas Holdings LLC and Blue Wolf Capital Management, LLC
H.P. Whiteley, for Envirosystems Inc., dba Terrapure Environmental
B. Hebert, for Pictou Landing First Nation
S. Choo, for Nova Scotia Superintendent of Pensions

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

APPLICATION by bankrupt companies for relief including extension of stay; APPLICATION by union for order allowing union to represent employees.

***Fitzpatrick J.*:**

**INTRODUCTION**

1 On June 17, 2020, the petitioners filed these proceedings seeking a restructuring solution to their financial problems, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

2 The petitioner, 1057863 B.C. Ltd., a British Columbia company, is the parent company of the other petitioners. The corporate group also includes various limited partnerships that are not named petitioners. Together, the group operates a pulp mill in Pictou County, Nova Scotia (the "Pulp Mill"). They also conduct related forestry activities in the Province of Nova Scotia to support those operations. I will refer to the group collectively as the "Petitioners".

3 On January 31, 2020, the Petitioners were required to shut down the Pulp Mill, resulting in a complete cessation of its business activities. At the centre of the reasons for the shut down is an Effluent Treatment Facility ("ETF") that became inoperable after that date. The ETF is source of considerable controversy with certain of the stakeholders.

4 Without the ability to use the ETF, the Pulp Mill could not operate.

5 The Petitioners describe that the shut down of the Pulp Mill had a "devastating effect" on them and their partners. Indeed, most employees were laid off after the shut down.

6 On June 19, 2020, the Petitioners sought and the Court granted an initial order under the *CCAA* (the "Initial Order"). The Petitioners' stated intention at that time was to continue to ensure the orderly hibernation, care and maintenance of the Pulp Mill while they investigated and assessed various restructuring options. The Initial Order granted was what is colloquially termed a "skinny" order, particularly in light of new strictures under s. 11.001 of the *CCAA* that limit the initial relief to what is reasonably necessary during the initial stay period.

7 In the Initial Order, I appointed Ernst & Young Inc. as Monitor. I granted a Director's Charge limited to $500,000. I extended the stay of proceedings to the limited partnerships, as appropriate in these circumstances: *4519922 Canada Inc., Re*, 2015 ONSC 124 (Ont. S.C.J. [Commercial List]) at para. 37. Finally, I granted an Administration Charge of $500,000. At the time of the initial hearing, the Petitioners indicated that it was their intention to come back to the Court to seek approval of interim financing and other relief, including approval of a Key Employee Retention Plan ("KERP") and authority to pay certain pre-filing amounts.

8 Since June 19, 2020, I have extended the stay a number of times to allow further discussions between the Petitioners and their stakeholders toward a possible resolution, including with the Province of Nova Scotia ("Nova Scotia"), their major secured creditor. The Monitor supported those extensions, as set out in its first report to the Court dated July 2, 2020 (the "First Report").

9 Unfortunately, considerable disagreement remains as to whether this proceeding should continue and if so, on what terms.

10 This hearing was essentially the comeback hearing. The Petitioners sought an Amended and Restated Initial Order ("ARIO") to incorporate the original relief in the Initial Order, with some amendments; significantly, they sought approval for interim financing that would allow their restructuring activities to continue.

11 On August 6, 2020, I granted an ARIO that incorporated much of the relief sought. In addition, I granted the order sought by Unifor, Local 440 ("Unifor") for representative status in this proceeding. These reasons follow from my decisions at that time.

**BACKGROUND**

12 The Pulp Mill has a considerable history leading to the current and fraught relationship between the owners of the Pulp Mill and other stakeholders, being Nova Scotia in particular. I will only provide a very high-level description of that history as is relevant to this application.

13 The Pulp Mill has been in operation since 1967. It is located on Abercrombie Point in Pictou County, NS. The process of producing pulp at the Pulp Mill creates wastewater, and it is necessary to treat that wastewater before discharge. Since 1972, the treatment of the wastewater was done at the ETF, which is located near "Boat Harbour". Nova Scotia owns the ETF and has leased it to the Pulp Mill's owners over the years. As stated, the Pulp Mill cannot operate without treating the wastewater at the ETF.

14 The Pulp Mill is adjacent to reserve lands of the Pictou Landing First Nation ("PLFN"), a Mi'kmaq First Nation.

15 In 2011, Paper Excellence Canada Holdings Corporation ("PEC") directly or indirectly acquired ownership of the Petitioners. PEC describes having spent more than $118 million in respect of the operations of the Pulp Mill and related activities.

16 Events leading to the Petitioners' financial difficulties include:

a) In 2014, there was an effluent leak in the pipeline from the Pulp Mill to the ETF; that event led to PLFN members blockading the area;

b) In 2015, Nova Scotia passed the *Boat Harbour Act*, S.N.S. 2015, c. 4 (the "*BHAct*"). The *BHAct* required the Petitioners cease using the ETF for the reception and treatment of effluent from the Pulp Mill by January 31, 2020. The deadline set in this legislation was contrary to the terms of the lease between Nova Scotia and the Pulp Mill (entered into prior to PEC's involvement) that contemplated use of the ETF until December 31, 2030;

c) The Petitioners set about planning for a replacement ETF ("RETF") that would allow the Pulp Mill's operations to continue past January 2020. The Petitioners have spent considerable monies to advance the project, with financial and other contributions by Nova Scotia;

d) The Petitioners' efforts to establish the RETF involved, understandably, considerable input and agreement from Nova Scotia under its environmental and regulatory process and requirements;

e) The RETF approval process did not go smoothly, at least from the Petitioners' point of view. In part, the process took place in the face of litigation between Nova Scotia and PLFN relating to Nova Scotia's decisions in relation to the Petitioners and the Pulp Mill;

f) The Petitioners say that they told Nova Scotia that it was not possible to complete the RETF by January 2020. Nova Scotia says that they never gave the Petitioners any inkling that a possible extension would be afforded to them;

g) Matters came to a head somewhat in late December 2019. Nova Scotia's Minister of Environment ("MOE") determined that a further environmental assessment report ("EAR") was required for the RETF. Almost immediately thereafter, Nova Scotia gave formal notice to the Petitioners that no extension under the *BHAct* was forthcoming;

h) In January 2020, the Petitioners filed a judicial review proceeding challenging the MOE's requirement to file a further EAR (the "Judicial Review");

i) The Pulp Mill ceased operations on January 12, 2020;

j) Commencing January 29, 2020, the MOE issued various orders to the Petitioners in respect of the orderly shutdown of the Pulp Mill. The MOE's May 14, 2020 order was appealed to the Supreme Court of Nova Scotia (the "Appeal"); and

k) The Petitioners have clearly signalled to Nova Scotia that they are seeking financial redress from the Province arising from the passage and implementation of the *BHAct* (the "BH Claim"). As matters stand, the Judicial Review and Appeal are in abeyance, along with the Petitioners' consideration of the BH Claim against Nova Scotia.

17 The primary debt owed by the Petitioners is to PEC and Nova Scotia. The Petitioners owe PEC approximately $213 million; $30 million of that amount is secured against the Petitioners' assets. The Petitioners owe Nova Scotia approximately $85 million, which has a first ranking secured position against the assets. The Petitioners also owe Nova Scotia $1.3 million on an unsecured basis.

18 In addition to unsecured amounts owed to PEC, Nova Scotia and employees, the Petitioners owe approximately $4.3 million to trade creditors and owners of the timberlands that they harvested.

19 Before the shutdown of the Pulp Mill, the Petitioners employed approximately 200 unionized persons, represented by Unifor. In addition, there were approximately 135 other full-time employees, including salaried personnel. The Petitioners also retained approximately 600 contractors on a full or part-time basis.

20 As of June 2020, approximately 32 employees and 18 seasonal part-time employees remained. The rest of the employees were laid off or terminated.

21 Considered more broadly, the impact of the shutdown of the Pulp Mill has had far-reaching and considerable negative consequences for the stakeholders.

22 The Monitor confirms in the First Report that the Petitioners contributed more than $279 million annually to the Nova Scotia economy, arising from purchases of goods and services. The Petitioners maintained a supply chain of approximately 1,379 companies who supported the operations of the Pulp Mill. Finally, the Pulp Mill provided employment for an estimated 2,679 full-time equivalent jobs, generating an estimated $38 million annually in provincial and federal taxes.

**INTERIM FINANCING**

23 The Petitioners seek court approval of an interim financing term sheet (the "Term Sheet") for a financing facility (the "Interim Lending Facility") between the Petitioners, as borrowers, PEC, as arranger and agent, and PEC together with Pacific Harbor North American Resources Ltd., as lenders (collectively, the "Interim Lenders").

24 The Interim Lending Facility contemplates a maximum principal amount of $50 million. However, the Petitioners presently only seek approval of an initial advance of $15 million and a corresponding charge in favour of the Interim Lenders over the Petitioners' assets in first ranking priority (the "Interim Financing Charge"). The stated purpose for these initial funds is to allow payment of the Petitioners' expenses to December 2020. If the Term Sheet is approved, the Petitioners intend to make later applications for court approval to access further draws.

25 In support of their request, the Petitioners prepared a budget to detail the uses of the $50 million (the "Financing Budget"). The Financing Budget indicates the projected financing requirements of the Petitioners to June 2022. As stated by Bruce Chapman, the general manager of the Petitioners and PEC, those projections were based on a "successful outcome" of these proceedings, said to include: the successful shutdown of the ETF; hibernation of the Pulp Mill; identifying, designing, and obtaining approvals for the RETF; and, negotiating contributions and financing associated with those activities.

26 After the Petitioners' introduced the Financing Budget as part of this application, Nova Scotia raised a variety of objections. Nova Scotia's response at para. 2, filed in opposition to the application, sets out those objections:

> (a) there is no restructuring plan being pursued by the Applicants;
>
> (b) the DIP financing will be used to fund the Applicants' pre-filing obligations;
>
> (c) the DIP financing will be an inappropriate re-prioritization of security;
>
> (d) the cash flow statements are not supported by appropriate documentation; and
>
> (e) the Applicants have not engaged the Province in any meaningful way, other than to continue to pursue their agenda for obtaining the DIP financing to fund existing obligations.

27 The Monitor has brought considerable balance and objectivity forward in terms of assisting the stakeholders in understanding the Financing Budget. In particular, the Monitor has sought to address Nova Scotia's concerns in the face of significant disputes between the Petitioners and Nova Scotia.

28 In the Monitor's second report dated July 23, 2020 (the "Second Report"), the Monitor introduced the concept of milestones. The milestones set out categories of work or activities required to move the overall restructuring toward the anticipated "success" date of June 2022. Target Completion Dates are identified in the "Milestones Schedule" at Appendix C to the Second Report, along with Evaluation Dates and the Cumulative DIP Draw required by the respective dates. This "Milestones Schedule" provides, in my view, considerable structure to the approval process and it will allow, in the future, the Court, the Monitor and the stakeholders (particularly Nova Scotia) to gauge the ongoing progress of the Petitioners' efforts.

29 In addition, the Monitor assisted in the development of an interim budget to December 2020 (the "Interim Budget"). That document, discussed in the Monitor's Second Report and its Supplemental Report dated July 30, 2020, provides a detailed breakdown of the activities and the estimated cost of those activities under the initial draw of $15 million. Those activities and costs are:

| Activity | Activity Costs |
|---|---|
| Boat Harbour operations and de-commissioning costs and environmental costs | $6,846,698 |
| Mill operating costs | $1,231,650 |
| Financing and administration costs | $407,734 |
| Employee costs | $1,161,104 |
| Severance and salary continuations | $2,646,498 |
| Professional fees (includes approx. $575,000 for the Judicial Review and Appeal) | $3,481,625 |
| **TOTAL** | **$15,775,308** |

30 The Monitor anticipates that, with cash on hand of approximately $4.8 million, the Petitioners will have sufficient funding through to the end of 2020 with this interim financing.

31 Section 11.2(1) and (2) of the *CCAA* confirms the Court's jurisdiction to approve interim financing and approve a charge in priority to existing secured creditors:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

32 The Supreme Court of Canada recently commented on the importance of the relief available under s. 11.2, including the granting of an interim lenders' charge. In *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (S.C.C.) at para. 85-86, the Court confirmed that a court may exercise its discretion to approve such financing to achieve the important statutory objective under the *CCAA* of not only providing working capital, but also enabling the "preservation and realization of the value of a debtor's assets".

33 The Court in *Callidus* also acknowledged that a court's ability to grant a charge in favour of an interim financier is often necessarily and practically the only way to secure this benefit:

> [89] Such charges, also known as "priming liens", reduce lenders' risks, thereby incentivizing them to assist insolvent companies. As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by taking a security interest in the borrower's assets. However, debtor companies under *CCAA* protection will often have pledged all or substantially all of their assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank behind those other creditors. Although super-priority charges do subordinate secured creditors' security positions to the interim financing lender's — a result that was controversial at common law — Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) [citations omitted].

34 Section 11.2(4) of the *CCAA* sets out certain non-exhaustive factors to be considered by the court in deciding whether to approve interim financing and grant an interim lenders' charge:

> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;

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

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

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

(g) the monitor's report . . .

35 No one factor set out in s. 11.2(4) governs or limits the Court's consideration. The exercise is necessarily one of balancing the respective interests of the debtors and its stakeholders towards ensuring, if appropriate, that the financing will assist the debtor company to obtain the "breathing room" said to be needed to hopefully achieve a restructuring acceptable to the creditors and the court: *White Birch Paper Holding Co., Re*, 2010 QCCS 1176 (C.S. Que.), at para. 33 and *Pacific Shores Resort & Spa Ltd., Re*, 2011 BCSC 1775 (B.C. S.C. [In Chambers]) at para. 49.

36 I will discuss the factors in turn.

37 These proceedings were filed in mid-June 2020. Despite the Petitioners' initial intentions to undertake a restructuring process to mid-2022 under the Interim Lending Facility, their ambitions have been significantly curtailed, at least in the short term. Under the present proposal, the Petitioners seek only to extend these proceedings to December 2020, when hopefully there will be further clarity about how the restructuring may proceed. This shortened period will allow the Court, the Monitor and the stakeholders to get a sense of the Petitioners' progress toward assessing whether any further extension of the proceedings is justified.

38 Nova Scotia submitted that, if the Court approved the interim financing and extended the stay, that stay period should only be to October 2020, when the Court could assess matters then.

39 I would not accede to this submission. There is considerable cost and energy to bring matters forward to the Court, which may not necessarily be justified depending on the status of matters in October 2020. Rather, I accept that the financing is justified in order to allow further operations to December 2020. I have specifically ordered the Monitor to provide oversight with respect to the Petitioners' expenditures to ensure that they are consistent with the Interim Budget. In addition, I ordered that the Monitor file a formal report with the Court by no later than October 31, 2020 as to the status of the Petitioners' restructuring efforts and spending under the Interim Budget. That information will of course be available to the stakeholders. If anything arises from that report, the Monitor or any stakeholder may apply to the Court.

40 Nova Scotia has raised, however obliquely, concerns regarding how the Petitioners' business and financial affairs will be managed during the proceedings. In my view, this largely arises from the great degree of mistrust and suspicion, if not downright animosity, that exists in the chasm that separates Nova Scotia and the Petitioners.

41 Nova Scotia filed various affidavits in support of its opposition to this application, being those of Duff MacKay Montgomerie, Paul Bradley and Kenneth Swain. All of these affidavits were intended to provide Nova Scotia's side of the "story" and respond to Mr. Chapman's various affidavits. Mr. Chapman replied to the points raised in Nova Scotia's affidavits.

42 Clearly, the disagreements between the Petitioners and Nova Scotia are many, and some long-standing. Two major issues relate to (a) payments made by the Petitioners to PEC as a shareholder some years ago when monies were owed to Nova Scotia, and (b) the use of monies advanced by Nova Scotia to the Petitioners for environmental expenses under a Contribution Agreement. I only note the existence of those disputes; in my view, there is no need at this time and in these proceedings to resolve those disputes. Whether those disputes need to be resolved in the fullness of time remains to be seen.

43 I accept that Nova Scotia's concerns give rise to some question as to the future conduct of these proceedings. However, this question is largely answered by the Monitor, who raises no concerns regarding the conduct of the Petitioners' management from the time of the Initial Order. As stated in *Pacific Shores* at para. 31, the good faith requirement to support the relief on

this application relates to conduct within the proceeding, not conduct pre-existing the filing. The Monitor continues to provide oversight with respect to the Petitioners' activities.

44 One of the major factors is whether the loan would enhance the prospect of the Petitioners making a viable compromise or arrangement with their creditors.

45 The result of not approving this financing is stark. The shutdown of the Pulp Mill has resulted in a complete cessation of any revenue. Both Mr. Chapman and the Monitor confirm that, without the financing, the Petitioners cannot continue any restructuring efforts or even the continued hibernation of the Pulp Mill. The Monitor confirms that a lack of funding would likely result in a receivership or bankruptcy, with the usual dire result of yielding nothing for the majority of the stakeholders.

46 A large portion of the $15 million interim financing is earmarked for what Mr. Chapman calls "critical expenses" relating to the direct and indirect expenses of the hibernation of the Pulp Mill. In its opposition, Nova Scotia does not address what would happen in the event that PEC walked away from its investment in the Petitioners and the Pulp Mill. As best I can tell, Nova Scotia seems to be ready to test PEC's resolve to determine if PEC will, as the shareholder, fund the ongoing costs itself without any interim financing and related charge.

47 In my view, given the sensitive nature of the assets, and the potential and negative consequences particular to the environment and local population arising on a liquidation, I do not consider it is reasonable to allow a "game of chicken" to take place between Nova Scotia and PEC. It appears to be the case that even if a receivership takes place (perhaps at the behest of Nova Scotia), many of these costs would be incurred in any event: *Pacific Shores* at para. 49(f).

48 Nova Scotia also takes issue with payment of pre-filing unsecured amounts, including amounts owed to employees and former employees, which the Petitioners seek to fund under the Financing Budget and the Interim Budget. I will address that issue separately below.

49 Finally, Nova Scotia takes great umbrage in having an Interim Financing Charge placed ahead of its own charge when some of the funds under the Financing and Interim Budgets are to be used to some extent to advance litigation (or potential litigation) against it. Paragraph 10 of the Term Sheet provides that the purpose of the facility is in part to fund expenses associated with:

> . . . the evaluation, settlement or progression of claims and other legal remedies that may be available to the Borrowers and to pay transaction costs, fees and expenses [including all reasonable fees and expenses in connection with any other proceeding pursued or defended by the Borrowers relating to the Northern Pulp facility and business] . . .

50 It is common ground that the "claims and other legal remedies" include the Judicial Review, the Appeal and the potential BH Claim against Nova Scotia. The estimated cost in the Interim Budget of professional fees toward those matters is approximately $575,000. Nova Scotia questions whether the Interim Financing Facility is simply to improve the Petitioners' negotiating position with Nova Scotia.

51 The Petitioners state that they remain committed to pursuing the re-start of the Pulp Mill in an environmentally responsible manner by ultimately constructing the RETF and resuming operations. The Petitioners believe that a re-start of operations affords Nova Scotia the best opportunity to recover its secured claims for money advanced. Nova Scotia disagrees and appears to have considered the consequences of a complete and permanent shutdown of the Pulp Mill.

52 The Petitioners say that they have continued the litigation — and are still considering the BH Claim — against Nova Scotia only as a backstop if they are not able to resolve their outstanding claims against Nova Scotia through negotiation and settlement. As noted by the Petitioners' counsel, the rights of the Petitioners under the Judicial Review, the Appeal and the BH Claim are choses in action and part of the Petitioners' assets. In *Callidus* at para. 96, the Court recognized that funding to preserve a "litigation asset" may be appropriate if it is intended to preserve and realize upon that asset for the benefit of the stakeholders.

53 In my view, in the overall context, the limited amount of litigation funding proposed to be spent between now and December 2020 is justified in these circumstances. If the proceedings are extended beyond that date, and further funding for that purpose is requested, the Court may revisit the matter.

54 Another factor is the nature and value of the Petitioners' property. The Monitor sets out in the First Report that the 2019 unaudited consolidated assets of the Petitioners (at book value) was approximately $343 million. The estimated liabilities as of mid-June 2020 were approximately $311 million. By any measure, most of the value of the Petitioners' assets, particularly the Pulp Mill, will only be realized if the Pulp Mill begins operations again. That necessarily involves the establishment of the RETF.

55 The Interim Financing Facility, as limited by the initial draw under the Interim Budget, will allow the Petitioners a short period (some five months) to show real progress toward that objective of enhancing the value of their assets. I do not agree with Nova Scotia that the Petitioners have failed to identify any restructuring plan or that the Interim Financing Facility *is* the plan. The materials before the Court clearly show a "kernel of a plan" — namely the restart of the Pulp Mill and the Petitioners' operations, all intended to alleviate the dire financial circumstances here and allow the Petitioners to fashion a way forward with the support of their creditors. The Petitioners should be allowed some opportunity to advance their efforts to that end, if possible.

56 Another significant factor here is whether any creditor would be materially prejudiced if the Interim Financing Charge is granted. Clearly, Nova Scotia, as the major and presently first ranking secured creditor thinks so. It is not difficult to discern that Nova Scotia faces a myriad of concerns with respect to the Petitioners and the Pulp Mill, including relating to the environment, employment of its citizens, the general welfare of the employees, obligations to the PLFN and the state of its economy.

57 It is not my role on this application to judge how Nova Scotia has seen fit to balance its duties and obligations in this complex situation. Nova Scotia is clearly frustrated with the Petitioners, noting in particular that it has already contributed significant amounts of public money and other benefits to assist them in meeting their environmental obligations.

58 I agree that Nova Scotia faces prejudice, although not to the degree submitted by its counsel. As stated above, it remains the case that, if a receivership occurs, a receiver would incur some of these expenses anyway. This is particularly so, with respect to the expenses (both direct and indirect) intended to protect the environment and the citizens of Pictou County in the Pulp Mill hibernation process.

59 I have no concerns that Nova Scotia is anything but committed to the well-being of the environment and its citizens, particularly those living near the Pulp Mill, such as members of the PLFN. I acknowledge Nova Scotia's concerns, but they must be balanced against other stakeholder interests and prejudice faced by those stakeholders if the financing is not approved: *Pacific Shores* at para. 49.

60 The final factor is whether the monitor supports the financing. That is clearly the case here. As stated above, the Monitor has attempt to bridge the gap between Nova Scotia's concerns and the objectives of the Petitioners. It has succeeded to some degree.

61 The Monitor has carefully analyzed the proposed financing terms. In its various reports, the Monitor has provided a detailed summary of the key elements of the Term Sheet, including specific terms that Nova Scotia questioned (including those provisions relating to payment-in-kind terms, change of control, right of first refusal and right to match, a prohibition on voluntary provisions and certain default terms). In light of submissions made by the Petitioners, and comments of the Monitor, I have no concerns regarding those matters.

62 Nova Scotia also raised an issue with respect to possible action by the Interim Lenders if there is an Event of Default (para. 23 of the Term Sheet). Again, I had no concerns in that respect as those were normal terms. I ordered an amendment to the draft ARIO to ensure that it was consistent with the provisions in the Term Sheet.

63 The Monitor recommends approval of the Interim Financing Facility, limited to the initial draw under the Interim Budget. I expect that the Monitor will work closely with the Petitioners in the next few months to ensure that proper expenditures are made

in accordance with the Interim Budget. Such oversight will allow adequate protection to the stakeholders in this critical interim period while the Petitioners explore what options are available to them in the future with or without certain stakeholder support.

64 I conclude that the Interim Financing Facility is reasonable and appropriate in the circumstances. I approve the interim draw of $15 million, as sought. This financing will provide a viable short term path forward to allow the Petitioners to explore restructuring options, all for the benefit of the entire large stakeholder group, including Nova Scotia, the employees (both past and present) and members of the PLFN, all of whom were represented on this application.

65 As noted by Petitioners' counsel, no other viable alternatives are available to avoid the significant and negative social, economic and environmental consequences if the Petitioners do not receive the funding they need to advance their restructuring plan.

**SEVERANCE / SALARY CONTINUATION PAYMENTS**

66 The Initial Order provided that the Petitioners could pay certain employee expenses incurred prior to that date:

> 4. The Petitioners shall be entitled, but not required, to pay the following expenses which may have been incurred prior to the Order Date:
>
> > (a) all outstanding wages, salaries, employee and pension benefits (including long and short term disability payments), vacation pay and expenses (but excluding severance pay) payable before or after the Order Date, in each case incurred in the ordinary course of business and consistent with the relevant compensation policies and arrangements existing at the time incurred . . .

67 The pre-filing unsecured employee obligations fall into two categories:

> a) 191 unionized employees were terminated before filing (or expect to be terminated shortly), trigging severance obligations under Unifor's collective bargaining agreements (the "Severance Obligations"). Before the filing, approximately half of that amount ($1.65 million) was paid, leaving approximately $1.94 million to be paid (some already due and the rest to be funded into July 2021); and
>
> b) Between January and June 2020, 45 salaried employees were terminated. In that event, their employment agreements require payment of salary continuance (the "Salary Continuance"). Before the filing, $3.3 million of Salary Continuance was paid. Under the terms of the Initial Order, $370,000 was paid to these employees. The remaining estimated amount of Salary Continuance budgeted to be paid from August 2020 to September 2024 is approximately $3.5 million.

68 The Interim Budget provides for payment of the Severance Obligations and the Salary Continuance, together with benefits to retired employees. The Petitioners seek an order allowing them to make such payments, estimated in total at $2.9 million to December 2020.

69 Unifor understandably supports the Petitioners' request to make pre-filing payments of the Severance Obligations in accordance with the Interim Budget.

70 There is no dispute between the parties that I have the jurisdiction to authorize payment of pre-filing unsecured obligations. Section 11 of the *CCAA* provides a broad discretion to the Court to make any order as may be "appropriate in the circumstances". The more difficult question is whether I *should* exercise my discretion to allow such payments here.

71 Nova Scotia disputes that these payments are appropriate in the circumstances. The Monitor presents, appropriately, a neutral exposition of the relevant circumstances, without recommendation.

72 The Petitioners refer to *Cinram International Inc., Re*, 2012 ONSC 3767 (Ont. S.C.J. [Commercial List]). In *Cinram*, the Court authorized payments to certain employees, including any obligations that arose prior to the filing. However, as noted

at paras. 23 and 43, the Court did so in the context of Cinram's "ongoing business operations" and with respect to the "active employment of employees in the ordinary course".

73 In this case, there are no ongoing business operations as discussed in *Cinram*; in addition, the payments are to be made to *former* employees who were terminated before the filing.

74 The circumstances considered in *JTI-Macdonald Corp., Re*, 2019 ONSC 1625 (Ont. S.C.J. [Commercial List]) are also unhelpful to the Petitioners. At paras. 24-25, the Court's discussion of payment of pre-filing employee claims took place within the context of "critical suppliers" and the need to ensure continued delivery of necessary goods and services for the debtor's operations and to support the restructuring. The Court accepted the recommendation of the proposed monitor that pre and post-filing "payroll and benefits" be paid. The monitor's reasons included that many of the relevant payments would have priority status and/or give rise to director liability if not paid. Further, in the proposed monitor's experience, it is common to pay pre-filing and post-filing obligations to employees in the normal course, to ensure continued and uninterrupted service by employees. Importantly, the debtor had sufficient cash on hand to pay these expenses, which is not the case here.

75 The reasons advanced by the Petitioners in asserting that these payments are "critical" are much more ephemeral than the reasons advanced in *JTI-Macdonald*. The Petitioners argue that allowing payment of the pre-filing unsecured employee amounts (in addition to ongoing employee expenses) is necessary to:

a) preserve the Petitioners' going concern value;

b) ensure that the other activities provided for in the Interim Financing Budget can be carried out by the Petitioners' remaining employees;

c) mitigate the adverse effects of the Pulp Mill's closure in the communities in which the Petitioners operate. The Petitioners emphasize the significant negative consequences suffered by the lay-offs and terminations, particularly in the face of the COVID-19 pandemic;

d) preserve their relationships with the employees who are no longer working, many of whom are expected to be called upon to return to employment at the Pulp Mill in the future if the construction of the RETF is undertaken; and

e) preserve their relationship with Unifor. The Petitioners state that unions as a whole will inevitably be present in some form if the Petitioners resume operations. They say that preserving an effective working relationship with Unifor, consistent with Unifor's collective bargaining agreements, will provide an additional benefit to them, both during and after these proceedings.

76 The Petitioners also reiterate that payment of these pre-filing employee amounts will signal their commitment to the stakeholders to develop and implement a plan to recommence the Pulp Mill's operations and in doing so, alleviate financial hardship within what they describe is a critical stakeholder group.

77 I appreciate that court approval to allow payment to employees, even for pre-filing unsecured amounts, is often granted. When a debtor is conducting ongoing operations during a proceeding, it will often be necessary to ensure that employment relationships are not disrupted so as to hinder the restructuring efforts.

78 However, the starting point for this discussion continues to be that *all* pre-filing unsecured amounts are not to be paid in a *CCAA* proceeding, even if owed to employees. All pre-filing creditors are covered under the general stay of proceedings; any payment is the exception to the general rule. That starting point is intended to preserve the *status quo* between creditors of the debtor pending the debtor advancing a fair and equitable proposal at the end of the day in respect of all of its obligations.

79 At that later stage, it is generally anticipated that unsecured creditors will be treated fairly and equitably in any plan of arrangement, usually by way of a *pro rata* payment, subject to certain minimum requirements with respect to employee claims, as set out in s. 6(5) of the *CCAA*.

80 Two Ontario decisions, cited by Nova Scotia, are of assistance.

81 The first decision is *Nortel Networks Corp., Re*, [2009] O.J. No. 2558 (Ont. S.C.J. [Commercial List]) aff'd *Nortel Networks Corp., Re*, 2009 ONCA 833 (Ont. C.A.) [hereinafter Sproule]. In the lower court, Justice Morawetz (as he then was) was addressing requests from the union and former employees for payment of their pre-filing claims for retirement allowance payments, voluntary retirement options, vacation pay, benefit options and termination and severance pay.

82 At para. 51 of *Nortel*, Morawetz J. noted that it was necessary to take into account the overall financial picture of the applicants, who opposed the applications. There, as here, the debtor was not in a position to pay their obligations to all creditors and a number of defaults were present, including those relating to the unionized and former employees. At para. 57, Morawetz J. described that *Nortel* was not carrying on "business as usual", which is also the case here. The Court dismissed the application stating:

> [60] An overriding consideration is that the employee claims whether put forth by the Union or the Former Employees, are unsecured claims. These claims do not have any statutory priority.
>
> . . .
>
> [80] At this stage of the Applicants' CCAA process, I see no basis in principle to treat either unionized or non-unionized employees differently than other unsecured creditors of the Applicants. Their claims are all stayed. The Applicants are attempting to restructure for the benefit of all stakeholders and their resources should be used for such a purpose.

83 In *Sproule*, the Court of Appeal agreed that the stay applied to these types of claims:

> [39] The *CCAA* stay provision is a clear example of a case where the intent of Parliament, to allow the court to freeze the debt obligations owing to all creditors for past services (and goods) in order to permit a company to restructure for the benefit of all stakeholders, would be frustrated if the court's stay order could not apply to statutory termination and severance payments owed to terminated employees in respect of past services.

84 The Court in *Nortel* asked the monitor to investigate whether an interim payment might be made to the employees in any event. That request was made, however, in very different circumstances where there were no significant secured creditors and a distribution to the unsecured creditors seemed likely in any event:

> [87] However, I am also mindful that the record, as I have previously noted, makes reference to a number of individuals that are severely impacted by the cessation of payments. There are no significant secured creditors of the Applicants, outside of certain charges provided for in the CCAA proceedings, and in view of the Applicants' declared assets, it is reasonable to expect that there will be a meaningful distribution to unsecured creditors, including retirees and Former Employees. The timing of such distribution may be extremely important to a number of retirees and Former Employees who have been severely impacted by the cessation of payments. In my view, it would be both helpful and equitable if a partial distribution could be made to affected employees on a timely basis.

85 In *Windsor Machine & Stamping Ltd., Re*, [2009] O.J. No. 3195 (Ont. S.C.J. [Commercial List]), the union brought an application to require the debtors to pay termination and severance pay owing as a result of post-filing terminations. The major secured creditor objected. Justice Morawetz similarly rejected this application, citing the priority of that secured creditor:

> [43] First, the priority of secured creditors must, in my view, be recognized. Counsel to the Union made the submission that the Applicants and the Bank are advancing a priority argument that may be relevant in a bankruptcy or receivership proceeding but not in a CCAA proceeding, as there is no priority distribution scheme in the CCAA. In my view this submission is misguided. Although there is no specific priority distribution scheme in the CCAA, that does not mean that priority issues should not be considered. An initial order under the CCAA usually results in a stay of proceedings as against secured creditors as well as unsecured creditors. The stay prevents secured creditors from taking enforcement proceedings which would confirm their priority position. The inability of a secured creditor to take such enforcement proceedings should

not result in an enhanced position for unsecured creditors. There is no basis, in my view, for the argument that somehow the absence of a statutory distribution scheme entitles unsecured creditors to obtain enhanced priority over secured creditors for pre-filing obligations. To give effect to this argument would result in a situation where secured creditors would be prejudiced by participating in CCAA proceedings as opposed to receivership/bankruptcy proceedings. This could very well result in a situation where secured creditors would prefer the receivership/bankruptcy option as opposed to the CCAA option as it would recognize their priority position. Such an outcome would undermine certain key objectives of the CCAA, namely, (i) maintain the *status quo* during the proceedings; and (ii) to facilitate the ability of a debtor to restructure its affairs. In my view, it is essential, in a court supervised process, to give due consideration to the priority rights of secured creditors. In this case, the secured creditors have priority over the termination pay and severance pay claims of the Tilbury Union Employees and the Pellus Union Employees.

[44] Second, counsel to the Union also submits that based on the rationale in the decision of the Court of Appeal in *Re 1231640 Ontario Inc. (State Group)* (2007), 37 C.B.R. (5th) 185 (Ont. C.A.), priority rules do not crystallize in a CCAA proceeding. I do not accept this argument. *State Group* addressed a priority issue as between competing PPSA secured creditors in the context of a interim receivership under s. 47 of the BIA. The issue in *State Group* was whether a s. 47 BIA receiver was a person who represents creditors of the debtor under s. 20(1)(b) of the PPSA. The Court of Appeal held that an interim receiver was not such a person. The issue in *State Group* governs the relationship as between competing interests under the PPSA. In my view, it does not stand for the proposition that the priority position of a secured creditor vis-à-vis unsecured creditors should not be recognized in the context of a CCAA proceeding.

[45] Third, the Union put forth submissions to the effect that, in this particular situation, the amount of termination pay and severance pay is relatively low and the Applicants have the cash to pay the amounts owing and, further, that such payments would not jeopardize the Proposed Sale.

[46] In my view, the fact that the Applicants may have available cash does not mean that the Applicants can use the cash as they see fit. The asset is to be used in accordance with credit agreements and court authorized purposes, including those set out in the Amended and Restated Initial Order. I am in agreement with these submissions of counsel to the Applicants as set out at [15]. This Order placed restrictions on the use of cash, which restrictions are consistent with legal priorities. In my view, the fact that the Applicants have cash does not justify an alteration of legal priorities. The legal priority position is that the claims for termination pay and severance pay are unsecured claims which rank pari passu with other unsecured creditors and subordinate to the interests of the secured creditors. (See also *Indalex Limited*, [2009] O.J. No. 3165, CV-09-8122-00CL — July 24, 2009 on this point.)

[47] I acknowledge that the situation facing the employees is unfortunate and that in *Nortel*, a hardship exception was made. However, this exception was predicated, in part, on the reasonable expectation that there will be a meaningful distribution to unsecured creditors, including the former employees. Such is not the case in this matter.

86 The circumstances here are more resonant with the facts discussed in*Nortel* and *Windsor Machine*. Given that this proceeding is very much in its early days, I cannot conclude that a distribution to pre-filing unsecured claims (including to the employees) is likely at the end of the day. There are no ongoing operations; there is no cash with which to pay these amounts.

87 Significantly, Nova Scotia, the major secured creditor, whose security would be primed by these payments, objects. In the absence of any objection by Nova Scotia, and with the general support of the Petitioners and the stakeholders appearing on this application, I might have come to a different conclusion.

88 The Petitioners also argue that the Severance Obligations constitute inchoate priority charges under provisions of the Nova Scotia *Labour Standards Code*, R.S.N.S. 1989, c. 246 (the "*Code*"). They argue that these provisions would be triggered if an employee makes a successful claim to the Nova Scotia Labour Board (the "Board") and the Board issues an order. They refer to s. 88 of the *Code* that provides that amounts in an order are a debt due to the Board secured by a lien or mortgage that has priority over all other liens, charges, or mortgages. They also refer to ss. 90 and 90A of the *Code* with respect to potential

actions by the Board. However, any such actions are currently stayed under the Initial Order, just as they are with respect to any action that might have been taken by Nova Scotia as a secured creditor.

89 This is an unpersuasive argument by the Petitioners in any event. It is well taken that a province cannot create priorities that alter the federal scheme of distribution in the event of a bankruptcy: *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ss. 86-87, 136: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.). Given that these proceedings are in their nascent days, it is anyone's guess on the outcome. A bankruptcy remains a possibility, however slight in the Petitioners' minds.

90 I accept, without hesitation, that these hard working and dedicated employees will meet my decision with a great deal of disappointment, if not dismay. The reasons for the closure and shutdown are completely divorced from their commitment to their jobs. I also appreciate that this vulnerable group of stakeholders will suffer arising from my decision. I say this knowing that the Petitioners represented — or at least previously represented — a significant employer in the province and in Pictou County, particularly. I expect that many of these lost jobs, no doubt some with expertise involving work at pulp mills, cannot be easily replaced, if at all.

91 The Petitioners have emphasized the need to maintain the goodwill of their workforce in the event that the RETF is constructed and operations recommence. Whether or not the Petitioners will achieve that objective is simply unknown at this time.

92 Unfortunately, I conclude that there is no principled basis upon which I could exercise my discretion to grant this relief. The Petitioners have not advanced a persuasive case toward authorizing such payments in such nebulous circumstances, particularly when it would amount to prioritizing those unsecured creditors over the existing security of Nova Scotia and where Nova Scotia objects.

**TERRAPURE**

93 Before and after the *CCAA* filing, Envirosystems Inc., dba Terrapure Environmental ("Terrapure") provided services to the Petitioners relating to the removal of wastewater. The pre-filing debt owed to Terrapure for its services is approximately $1.1 million.

94 The Petitioners do not seek any relief in favour of Terrapure, such as a declaration that it is a "critical supplier". Indeed, by the date of this application, the Petitioners had found an alternate means to remove the wastewater and they advised that it is unlikely they will need any further services from Terrapure.

95 Terrapure's position on this application is to support the approval of the Interim Financing Facility and the payment of the unsecured pre-filing claims of the employees, but only if Terrapure is similarly paid its pre-filing unsecured claim.

96 The general discussion above regarding the general application of the stay of proceedings with respect to unsecured creditors equally applies to Terrapure. Nova Scotia similarly objects to any payment to Terrapure, since the means to make any such payment could only arise from the Interim Financing Facility.

97 In my view, there is no basis to prefer Terrapure in this case by allowing payment of its pre-filing unsecured claim. All claims by unsecured creditors are equally covered by the stay under the Initial Order, including the claims by employees, as discussed above, and Terrapure.

98 In the event that the Court did not approve payment of its pre-filing debt, Terrapure requested the addition of a term in the ARIO to confirm that it has no further obligation to provide services to the Petitioners. No one raised any objections to that provision and I grant that relief.

**KEY EMPLOYEE RETENTION PLAN (KERP)**

99 The Petitioners seek approval of a KERP and the granting of a Court ordered KERP charge to a maximum of $342,207 (the "KERP Charge"). They say that the KERP is for a select group of key employees to incentivize their continued retention, which is necessary if there is to be any viable prospect for the Petitioners to pursue their restructuring strategy.

100 They propose that the KERP Charge rank directly below the Directors' Charge.

101 The Court may exercise its discretion under its general statutory jurisdiction under s. 11 of the *CCAA* to approve a KERP and grant a KERP Charge: *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145 (Ont. S.C.J.) at para. 27.

102 As the Petitioners note, courts across Canada have approved key employee incentive plans in numerous *CCAA* proceedings: for example, *Nortel Networks Corp., Re*, [2009] O.J. No. 1044 (Ont. S.C.J. [Commercial List]) and *U.S. Steel Canada*.

103 In *Walter Energy Canada Holdings, Inc., Re*, 2016 BCSC 107 (B.C. S.C.), this Court stated:

> [58] Factors to be considered by the court in approving a KERP will vary from case to case, but some factors will generally be present. See for example, *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); and *U.S. Steel Canada* at paras. 28-33.

104 In *Walter Energy* at para. 59, I discussed the *Grant Forest Products* factors, as follows:

- Is this employee important to the restructuring process?
- Does the employee have specialized knowledge that cannot be easily replaced?
- Will the employee consider other employment options if the KERP is not approved?
- Was the KERP developed through a consultative process involving the Monitor and other professionals?; and
- Does the Monitor support the KERP and a charge?

105 More recently, in *Aralez Pharmaceuticals Inc. (Re)*, 2018 ONSC 6980 (Ont. S.C.J. [Commercial List]) at para. 30, Justice Dunphy stated that three criterion underlie all of the considerations of key employee retention and incentive programs in insolvency proceedings as discussed in the relevant case law: arm's length safeguards, necessity and reasonableness of design.

106 As Mr. Chapman describes, the KERP has been designed to facilitate and encourage the continued participation of select key employees of the Petitioners who are contemplated to either (a) provide necessary services up to the expiry of the stay period (to December 2020); or (b) guide the business through the restructuring and preserve value for stakeholders over the length of the case.

107 The KERP consists of two independent programs: the Key Management Employee Retention Plan (the "Management KERP") and the Key Technical Employee Retention Plan (the "Technical KERP"). These plans would apply to a small number of employees: five under the Management KERP; two under the Technical KERP. Payments under the Technical KERP are conditional on the proceedings continuing on the date that each payment is to be made and do not amount to a long-term payment commitment if the restructuring fails.

108 The Petitioners' evidence on this application fully supports an affirmative answer to all of the above questions set out in *Walter Energy*. These employees are important to the restructuring process; the Monitor describes a "knowledge and operational void" if their employment is not further secured in some fashion. Given the nature of the assets in question, I agree that these employees, both management and technical, have specialized knowledge that cannot be easily replaced.

109 There is no evidence on this application that any of these employees are considering other employment options if the KERP is not approved. However, that lack of evidence is not fatal to approval of the KERP since that very scenario is intended to be avoided by approval of the KERP.

110 The KERP was developed through a consultative process involving the Monitor. The Monitor supports the KERP and the KERP Charge, noting that without securing this "human capital", the ability of the Petitioners to restructure their affairs will be greatly impaired.

111 The Monitor notes in particular that Mr. Chapman, a PEC employee and general manager of the Pulp Mill, is included in the KERP. The Monitor describes Mr. Chapman as a "key resource" and provides that his continued support is "critical" toward achieving a successful restructuring. Mr. Chapman has been the person providing significant evidence in support of the Petitioners in this proceeding to date, which speaks to that fact.

112 No stakeholder opposes this relief. In my view, such relief is appropriate. I approve the KERP and I grant the KERP Charge on the terms sought.

**ADMINISTRATION / DIRECTORS' CHARGES**

113 The Petitioners have not sought an increase of the Administration Charge on this application. The Petitioners seek the continuation of the Administration Charge in its previously approved amount (not to exceed $500,000) to secure professional fees and disbursements of the Monitor, counsel to the Monitor and the Petitioners' counsel.

114 The Petitioners have also determined that they do not require an increase of the Directors' Charge at this time. The Petitioners seek the continuation of the Directors' Charge in its previously approved amount (not to exceed $500,000) to secure the indemnity provided for in the Initial Order.

115 Again, no opposition arises. In my view, continuing this relief from the Initial Order is appropriate and I grant it.

**STAY EXTENSION**

116 The Petitioners seek an extension of the stay to December 31, 2020.

117 Under s. 11.02(2) of the *CCAA*, the Court has broad jurisdiction to extend a stay of proceedings where the circumstances warrant and for any period the Court considers necessary. Baseline considerations include those set out in s. 11.02(3) of the *CCAA*, including confirmation that the debtor is acting with due diligence and in good faith and that the relief sought is appropriate.

118 The comments of court in *Timminco Ltd., Re*, 2012 ONSC 2515 (Ont. S.C.J. [Commercial List]) aptly set out the statutory objectives intended to be achieved by the stay:

> [15] The stay of proceedings is one of the main tools available to achieve the purpose of the CCAA. The stay provides the [debtors] with a degree of time in which to attempt to arrange an acceptable restructuring plan or sale of assets in order to maximize recovery for stakeholders. The court's jurisdiction in granting a stay extends to both preserving the *status quo* and facilitating a restructuring. See *Re Stelco Inc.*, (2005) O.J. No. 1171 (C.A.) at para. 36.

119 Throughout this proceeding, and to this time, the Monitor confirms its view that the Petitioners have been working in good faith and with due diligence. The Monitor recommends the extension of the stay to December 31, 2020.

120 It will be more than apparent from the discussion above and the orders I have granted, particularly as to the Interim Financing Facility, that I have concluded that an extension of the stay to December 31, 2020 is appropriate in the circumstances. As discussed above, there is somewhat of a "check" on the proceedings arising from the Monitor's report that will be filed before the end of October 2020.

121 The stay period to December 2020 will allow the Petitioners to advance their objective of securing a restructuring option for the benefit of the stakeholders. I conclude that they should be afforded the opportunity to do so here.

**UNIFOR APPLICATION**

122 Unifor seeks an order authorizing it to represent the current and former union members of the local, including pensioners, retirees, deferred vested participants, and their surviving spouses and dependants, employed or formerly employed by the Petitioners, in these proceedings. Unifor does not seek any court ordered funding to secure its participation or that of Pink Larkin, its counsel.

123 The Petitioners support this relief and no stakeholder objects.

124 As with much of the above relief, the Court has jurisdiction to exercise its discretion to grant the order sought under its broad statutory jurisdiction found in s. 11 of the *CCAA*.

125 In *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 1328 (Ont. S.C.J. [Commercial List]), the Court discussed the factors typically considered in granting such relief. Justice Pepall (as she then was) set those out as follows:

> [21] Factors that have been considered by courts in granting these orders include:
>
> • the vulnerability and resources of the group sought to be represented;
>
> • any benefit to the companies under *CCAA* protection;
>
> • any social benefit to be derived from representation of the group;
>
> • the facilitation of the administration of the proceedings and efficiency;
>
> • the avoidance of a multiplicity of legal retainers;
>
> • the balance of convenience and whether it is fair and just including to the creditors of the Estate;
>
> • whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
>
> • the position of other stakeholders and the Monitor.

See also *Target Canada Co., Re*, 2015 ONSC 303 (Ont. S.C.J.) at para. 61.

126 I agree that these employees presently have a commonality of interest that is best represented in this proceeding as an entire group. Wanda Skinner is the president of the Unifor local. Ms. Skinner's affidavit #2 sworn July 28, 2020 supports the vulnerability of the unionized employees arising from the disastrous economic consequences to them of losing their jobs and benefits.

127 Unifor clearly has a relationship with this cohort and is in the best position to advance the entire group's interests, at least at this time. That representation will be a benefit to the Petitioners in advancing this restructuring by facilitating discussions between them. The estate will incur no cost by reason of Unifor's representation, welcome news given the lack of cash resources available to the Petitioners.

128 The order sought by Unifor is consistent with the order granted in the Fraser Papers Inc. restructuring: see *Fraser Papers Inc., Re* [2009 CarswellOnt 6169 (Ont. S.C.J. [Commercial List])], 2009 CanLII 55115 and 2009 CanLII 63589 [2009 CarswellOnt 7125 (Ont. S.C.J. [Commercial List])].

129 I am satisfied that the terms of the order sought are appropriate, with one exception. In para. 3 of the draft order, Unifor seeks authority to "determine, file, advance or compromise" any claims of its current or former employees. The only change I would make to that provision is to amend it to provide that any compromise proposed to be made by Unifor will be subject to court approval. This will ensure some oversight in respect of any decisions that Unifor seeks to make for the employee group they will represent.

*Companies' application granted in part; union's application granted.*

# TAB 29

2015 ONSC 6562
Ontario Superior Court of Justice

Mustang GP Ltd., Re

2015 CarswellOnt 16398, 2015 ONSC 6562, 259 A.C.W.S. (3d) 623, 31 C.B.R. (6th) 130

# In the Matter of the Notice of Intention to Make a Proposal of Mustang GP Ltd.

In the Matter of the Notice of Intention to Make a Proposal of Harvest Ontario Partners Limited Partnership

In the Matter of the Notice of Intention to Make a Proposal of Harvest Power Mustang Generation Ltd.

H.A. Rady J.

Heard: October 19, 2015
Judgment: October 28, 2015
Docket: 35-2041153, 35-2041155, 35-2041157

Counsel: Harvey Chaiton, for Mustang GP Ltd., Harvest Ontario Partners Limited Partnership and Harvest Power Mustang Generation Ltd.
Joseph Latham, for Harvest Power Inc.
Jeremy Forrest, for Proposal Trustee, Deloitte Restructuring Inc.
Robert Choi, for Badger Daylighting Limited Partnership
Curtis Cleaver, for StormFisher Ltd.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

MOTION by debtors for approval of proposal.

***H.A. Rady J.*:**

**Introduction**

1 This matter came before me as a time sensitive motion for the following relief:

(a) abridging the time for service of the debtors' motion record so that the motion was properly returnable on October 19, 2015;

(b) administratively consolidating the debtors' proposal proceeding;

(c) authorizing the debtors to enter into an interim financing term sheet (the DIP term sheet) with StormFisher Environmental Ltd. (in this capacity, the DIP lender), approving the DIP term sheet and granting the DIP lender a super priority charge to secure all of the debtors' obligations to the DIP lender under the DIP term sheet;

(d) granting a charge in an amount not to exceed $150,000 in favour of the debtors' legal counsel, the proposal trustee and its legal counsel to secure payment of their reasonable fees and disbursements;

(e) granting a charge in an amount not to exceed $2,000,000 in favour of the debtors' directors and officers;

(f) approving the process described herein for the sale and marketing of the debtors' business and assets;

(g) approving the agreement of purchase and sale between StormFisher Environmental Ltd. and the debtors; and

(h) granting the debtors an extension of time to make a proposal to their creditors.

**Preliminary Matter**

2 As a preliminary matter, Mr. Choi, who acts for a creditor of the debtors, Badger Daylighting Limited Partnership, requested an adjournment to permit him an opportunity to review and consider the material, which was late served on October 15, 2015. He sought only a brief adjournment and I was initially inclined to grant one. However, having heard counsel's submissions and considered the material, I was concerned that even a brief adjournment had the potential to cause mischief as the debtors attempt to come to terms with their debt. Any delay might ultimately cause prejudice to the debtors and their stakeholders. Both Mr. Chaiton and Mr. Latham expressed concern about adverse environmental consequences if the case were delayed. No other stakeholders appeared to voice any objection. As a result, the request was denied and the motion proceeded.

3 Following submissions, I reserved my decision. On October 20, 2015, I released an endorsement granting the relief with reasons to follow.

**Background**

4 The evidence is contained in the affidavit of Wayne Davis, the chief executive officer of Harvest Mustang GP Ltd. dated October 13, 2015. He sets out in considerable detail the background to the motion and what has led the debtors to seek the above described relief. The following is a summary of his evidence.

5 On September 29, 2015, the moving parties, which are referred to collectively as the debtors, each filed a Notice of Intention to Make a Proposal pursuant to s. 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended. Deloitte Restructuring Inc. was named proposal trustee.

6 The debtors are indirect subsidiaries of Harvest Power Inc., a privately owned Delaware corporation that develops, builds, owns and operates facilities that generate renewable energy, as well as soil and mulch products from waste organic materials.

7 Harvest Power Mustang Generation Ltd. was established in July 2010 in order to acquire assets related to a development opportunity in London. In October 2010, it purchased a property located at 1087 Green Valley Road from London Biogas Generation Inc., a subsidiary of StormFisher Ltd. The intent was to design, build, own and operate a biogas electricity production facility.

8 In November 2011, a limited partnership was formed between Harvest Power Canada Ltd., Harvest Power Mustang GP Ltd. and Waste Management of Canada Corporation, referred to as Harvest Ontario Partners Limited Partnership or Harvest Ontario Partners. It was formed to permit the plant to accept organic waste to be used to generate renewable electricity. After the partnership was formed, Harvest Power Mustang Generation Ltd. became a 100 percent owned subsidiary of the partnership. In June 2012, its personal property was transferred to the partnership. It remains the registered owner of 1087 Green Valley Road.

9 The plant employs twelve part and full time employees.

10 The debtors began operating the biogas electrical facility in London in April 2013. Unfortunately, the plant has never met its production expectations, had negative EBITDA from the outset and could not reach profitability without new investment. The debtors had experienced significant "launch challenges" due to construction delays, lower than expected feedstock acquisition, higher than anticipated labour costs, and delays in securing a necessary approval from the Canadian Food Inspection Agency for the marketing and sale of fertilizer produced at the facility.

11 Its difficulties were compounded by litigation with its general contractor, arising from the earlier construction of the facility. The lawsuit was ultimately resolved with the debtors paying $1 million from a holdback held by Harvest Ontario Partners as well as a 24 percent limited partnership interest in the partnership. The litigation was costly and "caused a substantial drain on the debtors' working capital resources".

12 The debtors' working capital and operating losses had been funded by its parent company, Harvest Power Inc. However, in early 2015 Harvest Power Inc. advised the debtors that it would not continue to do so. By the year ended September 2015, the debtors had an operating loss of approximately $4.8 million.

13 In January 2015, the debtors defaulted on their obligations to Farm Credit Canada, its senior secured creditor, which had extended a demand credit facility to secure up to $11 million in construction financing for the plant. The credit facility was converted to a twelve year term loan, secured by a mortgage, a first security interest and various guarantees. In February 2015, FCC began a process to locate a party to acquire its debt and security, with the cooperation of the debtors. FCC also advised the debtors that it would not fund any restructuring process or provide further financing. The marketing process failed to garner any offers from third parties that FCC found acceptable.

14 On July 9, 2015, FCC demanded payment of its term loan from Harvest Ontario Partners and served a Notice of Intention to Enforce Security pursuant to s. 244(1) of the *BIA*. In August 2015, an indirect subsidiary of Harvest Power Inc. — 2478223 Ontario Limited — purchased and took an assignment of FCC's debt and security at a substantial discount.

15 Shortly thereafter, StormFisher Ltd., which is a competitor of Harvest Power Inc., advised 2478223 that it was interested in purchasing the FCC debt and security in the hopes of acquiring the debtors' business. It was prepared to participate in the sale process as a stalking horse bidder and a DIP lender.

16 On September 25, 2015, 2478223 assigned the debt and security to StormFisher Environmental Ltd., a subsidiary of StormFisher Ltd., incorporated for the purpose of purchasing the debtors' assets. The debt and security were purchased at a substantial discount from what 2478223 had paid and included cash, a promissory note and a minority equity interest. StormFisher Ltd. is described as having remained close to the Harvest Power group of companies in the time following its subsidiary's sale of the property to Harvest Power Generation Ltd. Some of its employees worked under contract for Harvest Power Inc. It was aware of the debtors' financial difficulties and had participated in FCC's earlier attempted sale process.

17 On September 29, 2015, the debtors commenced these proceedings under the *BIA*, in order to carry out the sale of the debtors' business as a going concern to StormFisher Environmental Ltd. as a stalking horse bidder or another purchaser. Given the lack of success in the sale process earlier initiated by FCC, and concerns respecting the difficulties facing the renewable energy industry in general and for the debtors specifically, the debtors believe that a stalking horse process is appropriate and necessary.

18 In consultation with the proposal trustee, the debtors developed a process for the marketing and sale of their business and assets. The following summary of the process is described by Mr. Davis in his affidavit:

> i. the sale process will be commenced immediately following the date of the order approving it;
>
> ii. starting immediately after the sale process approval date, the debtors and the proposal trustee will contact prospective purchasers and will provide a teaser summary of the debtors' business in order to solicit interest. The proposal trustee will obtain a non-disclosure agreement from interested parties who wish to receive a confidential information memorandum and undertake due diligence. Following the execution of a non-disclosure agreement, the proposal trustee will provide access to an electronic data room to prospective purchasers;
>
> iii. at the request of interested parties, the proposal trustee will facilitate plant tours and management meetings;
>
> iv. shortly following the sale process approval date, the proposal trustee will advertise the opportunity in the national edition of the Globe and Mail;
>
> v. the bid deadline for prospective purchasers will be 35 days following the sale process approval date. Any qualified bid must be accompanied by a cash deposit of 10% of the purchase price;

vi. the debtors and the proposal trustee will review all superior bids received to determine which bid it considers to be the most favourable and will then notify the successful party that its bid has been selected as the winning bid. Upon the selection of the winning bidder, there shall be a binding agreement of purchase and sale between the winning bidder and the debtors;

vii. if one or more superior bids is received, the debtors shall bring a motion to the Court within seven business days following the selection of the winning bidder for an order approving the agreement of purchase and sale between the winning bidder and the debtors and to vest the assets in the winning bidder;

viii. the closing of the sale transaction will take place within one business day from the sale approval date;

ix. in the event that a superior bid is not received by the bid deadline, the debtors will bring a motion as soon as possible following the bid deadline for an order approving the stalking horse agreement of purchase and sale.

19 StormFisher Environmental Ltd. is prepared to purchase the business and assets of the debtors on a going-concern basis on the following terms:

A partial credit bid for a purchase price equal to: (i) $250,000 of the debtors' total secured obligations to StormFisher Environmental Ltd. (plus the DIP loan described below); (ii) any amounts ranking in priority to StormFisher Environmental Ltd.'s security, including the amounts secured by: (a) the administration charge; (b) the D&O charge (both described below); and (c) the amount estimated by the proposal trustee to be the aggregate fees, disbursements and expenses for the period from and after closing of the transaction for the sale the debtors' business to the completion of the *BIA* proceedings and the discharge of Deloitte Restructuring Inc. as trustee in bankruptcy of estate of the debtors.

20 The debtors and the proposal trustee prepared a cash flow forecast for September 25, 2015 to December 25, 2015. It shows that the debtors will require additional funds in order to see them through this process, while still carrying on business.

21 StormFisher Environmental Ltd. has offered to make a DIP loan of up to $1 million to fund the projected shortfall in cash flow. In return, the DIP lender requires a charge that ranks in priority to all other claims and encumbrances, except the administration and D&O charges. The administration charge protects the reasonable fees and expenses of the debtors' professional advisors. The D&O charge is to indemnify the debtors for possible liabilities such as wages, vacation pay, source deductions and environmental remedy issues. The latter may arise in the event of a wind-down or shut down of the plant and for which existing insurance policies may be inadequate. According to Mr. Davis, the risk if such a charge is not granted is that the debtors' directors and officers might resign, thereby jeopardizing the proceedings.

22 The debtors have other creditors. Harvest Power Partners had arranged for an irrevocable standby letter of credit, issued by the Bank of Montreal to fund the payment that might be required to the Ministry of Environment arising from any environment clean up that might become necessary.

23 Searches of the *PPSA* registry disclosed the following registrations:

(a) *Harvest Ontario Partners:*

(i) FCC in respect of all collateral classifications other than consumer goods. On August 12, 2015, change statement filed to reflect the assignment of FCC's Debt and Security to 2478223;

(ii) BMO in respect of accounts.

(b) *Harvest Power Mustang Generation Ltd.*

(i) FCC in respect of all collateral classifications other than consumer goods. On August 12, 2015, change statement filed to reflect the assignment of FCC's Debt and Security to 2478223;

(ii) BMO in respect of accounts; and

(iii) Roynat Inc. in respect of certain equipment.

24 There are two registrations on title to 1087 Green Valley Road. The first is for $11 million in favour of FCC dated February 28, 2012 and transferred to 2478223 on October 8, 2015. The second is a construction lien registered by Badger Daylighting Limited Partnership on July 2, 2015 for $239,191. The validity and priority of the lien claim is disputed by the debtors and 2478223.

**Analysis**

***a) the administrative consolidation***

25 The administration order, consolidating the debtors' notice of intention proceedings is appropriate for a variety of reasons. First, it avoids a multiplicity of proceedings, the associated costs and the need to file three sets of motion materials. There is no substantive merger of the bankruptcy estates but rather it provides a mechanism to achieve the just, most expeditious and least expensive determination mandated by the *BIA General Rules*. The three debtors are closely aligned and share accounting, administration, human resources and financial functions. The sale process contemplates that the debtors' assets will be marketed together and form a single purchase and sale transaction. Harvest Ontario Partners and Harvest Power Mustang Generation Ltd. have substantially the same secured creditors and obligations. Finally, no prejudice is apparent. A similar order was granted in *Electro Sonic Inc., Re*, 2014 ONSC 942 (Ont. S.C.J. [Commercial List]).

***b) the DIP agreement and charge***

26 S. 50.6 of the *BIA* gives the court jurisdiction to grant a DIP financing charge and to grant it a super priority. It provides as follows:

> **50.6(1)** ***Interim Financing:*** On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(b)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.
>
> **50.6(3)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

27 S. 50.6(5) enumerates a list of factors to guide the court's decision whether to grant DIP financing:

> **50.6(5)** ***Factors to be considered:*** In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the debtor is expected to be subject to proceedings under this Act;
>
> (b) how the debtor's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the debtor's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
>
> (e) the nature and value of the debtor's property
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

28 This case bears some similarity to *P.J. Wallbank Manufacturing Co., Re*, 2011 ONSC 7641 (Ont. S.C.J.). The court granted the DIP charge and approved the agreement where, as here, the evidence was that the debtors would cease operations if the relief were not granted. And, as here, the DIP facility is supported by the proposal trustee. The evidence is that the DIP lender will not participate otherwise.

29 The Court in *Wallbank* also considered any prejudice to existing creditors. While it is true that the DIP loan and charge may affect creditors to a degree, it seems to me that any prejudice is outweighed by the benefit to all stakeholders in a sale of the business as a going concern. I would have thought that the potential for creditor recovery would be enhanced rather than diminshed.

30 In *Comstock Canada Ltd., Re*, 2013 ONSC 4756 (Ont. S.C.J.), Justice Morawetz was asked to grant a super priority DIP charge in the context of a *Companies' Creditors Arrangement Act* proceeding. He referred to the moving party's factum, which quoted from *Indalex Ltd., Re*, 2013 SCC 6 (S.C.C.) as follows:

> [I]t is important to remember that the purpose of CCAA proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:
>
> > ...the purpose of the *CCAA*... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.
>
> In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57 (dissenting):
>
> > The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
> >
> > . . .
> >
> > Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the CCAA judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate".
> >
> > [Emphasis in original]

31 I recognize that in the *Comstock* decision, the court was dealing with a *CCAA* proceeding. However, the comments quoted above seem quite apposite to this case. After all, the *CCAA* is an analogous restructuring statute to the proposal provisions of the *BIA*.

***c) administration charge***

32 The authority to grant this relief is found in s. 64.2 of the *BIA*.

**64.2 (1)** ***Court may order security or charge to cover certain costs:*** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

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

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

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

**64.2 (2)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

33 In this case, notice was given although it may have been short. There can be no question that the involvement of professional advisors is critical to a successful restructuring. This process is reasonably complex and their assistance is self evidently necessary to navigate to completion. The debtors have limited means to obtain this professional assistance. See also *Colossus Minerals Inc., Re*, 2014 ONSC 514 (Ont. S.C.J.) and the discussion in it.

***d) the D & O charge***

34 The *BIA* confers the jurisdiction to grant such a charge at s. 64.1, which provides as follows:

**64.1 (1)** On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

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

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

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

35 I am satisfied that such an order is warranted in this case for the following reasons:

• the D & O charge is available only to the extent that the directors and officers do not have coverage under existing policies or to the extent that those policies are insufficient;

• it is required only in the event that a sale is not concluded and a wind down of the facility is required;

• there is a possibility that the directors and officers whose participation in the process is critical, may not continue their involvement if the relief were not granted;

• the proposal trustee and the proposed DIP lender are supportive;

***e) the sale process and the stalking horse agreement of purchaser sale***

36 The court's power to approve a sale of assets in the context of a proposal is set out in s. 65.13 of the *BIA*. However, the section does not speak to the approval of a sale process.

37 In *Brainhunter Inc., Re* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]), Justice Morawetz considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring application under the *CCAA* and in particular s. 36, which parallels s. 65.13 of the *BIA*. He observed:

> 13. The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Nortel Networks Corp., Re*, [2009] O.J. No. 3169(Ont. S.C.J. [Commercial List]), I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:
>
> (a) Is a sale transaction warranted at this time?
>
> (b) Will the sale benefit the whole "economic community"?
>
> (c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
>
> (d) Is there a better viable alternative?
>
> 14. The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.
>
> 15. Section 36 of the CCAA expressly permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.
>
> 16. Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.
>
> 17. I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

38 It occurs to me that the Nortel Criteria are of assistance in circumstances such as this — namely on a motion to approve a sale process in proposal proceedings under the *BIA*.

39 In *Meta Energy Inc. v. Algatec Solarwerke Brandenberg GmbH*, 2012 ONSC 175 (Ont. S.C.J.) the Court was asked to approve a sales process and bidding procedures, which included the use of a stalking horse credit bid. The court reasoned as follows:

> 6. Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair Corp.*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which

offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

(i) the fairness, transparency and integrity of the proposed process;

(ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,

(iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

7. The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, BIA proposals, and CCAA proceedings.

40 I am satisfied that the sale process and stalking horse agreement should be approved. It permits the sale of the debtors' business as a going concern, with obvious benefit to them and it also maintains jobs, contracts and business relationships. The stalking horse bid establishes a floor price for the debtors' assets. It does not contain any compensation to StormFisher Environmental Ltd. in the event a superior bid is received, and as a result, a superior bid necessarily benefits the debtors' stakeholders rather than the stalking horse bidder. The process seems fair and transparent and there seems no viable alternative, particularly in light of FCC's earlier lack of success. Finally, the proposal trustee supports the process and agreement.

***f) Extension of time to file a proposal***

41 It is desirable that an extension be granted under s. 50.4 (9) of the *BIA*. It appears the debtors are acting in good faith and with due diligence. Such an extension is necessary so the sale process can be carried out. Otherwise, the debtors would be unable to formulate a proposal to their creditors and bankruptcy would follow.

42 For these reasons, the relief sought is granted.

*Motion granted.*

**End of Document** 

# TAB 30

Court File No. CV-20-00639217-00CL

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

| | | |
|---|---|---|
| THE HONOURABLE | ) | FRIDAY, THE 8TH |
| | ) | |
| JUSTICE KOEHNEN | ) | DAY OF MAY, 2020 |
| | ) | |
| | ) | |

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **GREEN RELIEF INC.** (the "**Applicant**")

**ORDER**
**(Re: Stay Extension, DIP Term Sheet Approval, Sealing Order)**

**THIS MOTION**, made by the Applicant pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an order, among other things: (i) extending the stay of proceedings from May 8, 2020 to and including June 19, 2020; (ii) approving the term sheet (the "**Second Bridge DIP Term Sheet**") entered into between the Applicant and Neilank Jha (in such capacity, the "**Second Bridge DIP Lender**") dated May 1, 2020, pursuant to which the Second Bridge DIP Lender agreed to loan the maximum principal amount of $500,000 to the Applicant (the "**Second Bridge DIP Facility**"), subject to the terms and conditions of the Second Bridge DIP Term Sheet, a copy of which is appended to the Affidavit of Neilank Jha sworn May 1, 2020 (the "**Jha Affidavit**") as Exhibit "E"; and (iii) sealing Confidential Exhibit "C" to the Jha Affidavit until further order of the Court, was heard this day by teleconference in substitution to an in-person hearing at 330 University Avenue, Toronto, Ontario.

**ON READING** the Jha Affidavit and the Exhibits thereto, and the Second Report of PricewaterhouseCoopers Inc., LIT, ("**PwC**"), in its capacity as Monitor of the Applicant (the "**Monitor**"), dated May 4, 2020 (the "**Second Report**"), and on hearing the submissions of counsel for the Applicant, counsel for the Monitor, and those other parties listed on the Counsel Slip, no one else appearing although duly served as appears from the Affidavit of Service of Adam Driedger sworn May 1, 2020,

**SERVICE**

1. **THIS COURT ORDERS** that the time for service and filing of the Notice of Motion and the Motion Record is hereby validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

**STAY EXTENSION**

2. **THIS COURT ORDERS** that the Stay Period as ordered and defined in paragraph 15 of the Amended and Restated Initial Order dated April 8, 2020 (the "**Initial Order**"), is hereby extended up to and including June 19, 2020.

**SECOND BRIDGE DIP FINANCING**

3. **THIS COURT ORDERS** that the Applicant is hereby authorized and empowered to obtain and borrow under the Second Bridge DIP Facility from the Second Bridge DIP Lender in order to finance the Applicant's working capital requirements and other general corporate purposes, provided that the borrowings under such credit facility shall not exceed $500,000, unless permitted by further Order of this Court.

4. **THIS COURT ORDERS** that the Second Bridge DIP Facility shall be on the terms and subject to the conditions set forth in the Second Bridge DIP Term Sheet, filed.

5. **THIS COURT ORDERS** that the Second Bridge DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "**Second DIP Lender's Charge**") on the Property (as defined in the Initial Order), which Second DIP Lender's Charge shall not secure any obligation that exists between the Applicant and the DIP Lender before this Order is made. The Second DIP Lender's Charge shall have the same priority as the First DIP Lender's Charge (as defined in the Initial Order) and rank *pari passu* with the First DIP Lender's Charge.

6. **THIS COURT ORDERS** that paragraphs 25(c), (d) and paragraphs 37 to 47 of the Initial Order shall apply to the Second Bridge DIP Term Sheet, the Second Bridge DIP Facility and the Second DIP Lender's Charge, as applicable.

**SEALING**

7. **THIS COURT ORDERS** that Confidential Exhibit "C" to the Jha Affidavit is hereby sealed, confidential and shall not form part of the public record, and that Confidential Exhibit "C" shall be placed into a separate confidential exhibit book that is kept separate and apart from all other contents in the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order and shall only be opened upon further order of the Court.

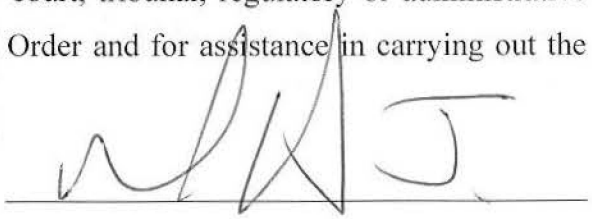
**GENERAL**

8. **THIS COURT ORDERS** that the Second Report filed in the CCAA Proceedings and the Monitor's activities as set out therein are hereby approved.

9. **THIS COURT ORDERS** that, notwithstanding Rule 59.05, this Order is effective from the date that it is made, and is enforceable without any need for entry and filing. In accordance with Rules 77.07(6) and 1.04, no formal order need be entered and filed unless an appeal or a motion for leave to appeal is brought to an appellate court. Any party may nonetheless submit a formal order for original signing, entry and filing when the Court returns to regular operations.

10. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Applicant and the Monitor, and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order.

11. **THIS COURT ORDERS** that each of the Applicant and the Monitor be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.



IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **GREEN RELIEF INC.**

Court File No.: CV-20-00639217-00CL

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

Proceedings commenced at Toronto

**ORDER**
(Re: Stay Extension, DIP Term Sheet, Sealing Order)

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Lawyers for Green Relief Inc.

# TAB 31

Court File No. CV-20-00639217-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **GREEN RELIEF INC.**

Applicant

**AFFIDAVIT OF NEILANK JHA**
(Sworn May 1, 2020)

I, Neilank Jha, of the City of Vaughan, in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

## I. INTRODUCTION

1. I am the Chief Executive Officer ("**CEO**") of Green Relief Inc. ("**Green Relief**" or the "**Applicant**") and a member of the board of directors of Green Relief, having served in these roles since March 2019. I have also been a Green Relief shareholder since January 2019.

2. Prior to joining Green Relief, I was a full-time practicing neurosurgeon. I hold a Medical Degree from McMaster University, a Masters Degree in behavioural economics from the London School of Economics, and an MBA from the Ivey Business School at Western University.

3. As CEO, my primary responsibilities include managing the overall operations and resources of Green Relief, making strategic corporate decisions, and acting as the main point of contact between the board of directors and the day-to-day management team.

4. As such, I have knowledge of the matters hereinafter deposed to, save where I have obtained information from others. Where I have obtained information from others, I have stated the source of the information and believe it to be true.

5. All capitalized terms used herein and not otherwise defined have the meanings set forth in my affidavit sworn April 15, 2020, in support of the Amended and Restated Initial Order.

6. This affidavit is sworn in support of the Applicant's motion for an Order:

(a) extending the Stay Period from May 8, 2020 up to and including June 19, 2020;

(b) approving a second bridge debtor-in-possession term sheet (the "**Second Bridge DIP Term Sheet**") entered into between Green Relief and myself (in such capacity, the "**Second Bridge DIP Lender**") dated May 1, 2020, wherein the Second Bridge DIP Lender agreed to loan the maximum principal amount of $500,000 to Green Relief (the "**Second Bridge DIP Facility**"), subject to the terms and conditions prescribed therein;

(c) granting a super-priority charge over Green Relief's Property (as defined in the Initial Order) in favour of the Second Bridge DIP Lender (the "**Second DIP Lender's Charge**"); and

(d) sealing Confidential Exhibit "C" to this Affidavit, which contains commercially sensitive and personal information, until further Order of the Court.

## II. BACKGROUND

7. Green Relief is a licensed producer of cannabis in accordance with the *Cannabis Act* (the "**Act**") and the *Cannabis Regulations* (the "**Regulations**"). The principal activities of Green Relief are the production and distribution of cannabis oil for medicinal use (the "**Cannabis Products**").

8. As a result of its liquidity crisis, the Applicant filed a Notice of Intention to Make a Proposal on March 11, 2020 (the "**NOI**"), and PricewaterhouseCoopers Inc., LIT ("**PwC**") was appointed as the proposal trustee in the proceeding commenced pursuant to the NOI (the "**NOI Proceeding**").

9. Pursuant to the Initial Order of Mr. Justice Koehnen dated April 8, 2020, Green Relief continued its NOI Proceeding under the CCAA in order to, among other things: (i) maintain going concern value and the *status quo*; (ii) preserve jobs for its employees; (iii) continue negotiations with a confidential individual investor (the "**Plan Sponsor**") regarding Take-out DIP Financing, with a view to recapitalizing the company; and (iv) navigate and resolve on an expedited basis in the context of the CCAA proceedings, the various disputes with the Founders while restructuring for the benefit of all stakeholders.

10. PwC was appointed as monitor of the Applicant (in such capacity, the "**Monitor**").

11. On April 17, 2020, Mr. Justice Koehnen granted the Amended and Restated Initial Order after the comeback hearing, pursuant to which, among other things, the stay of proceedings was extended up to and including May 8, 2020.

## III. ACTIVITIES SINCE THE AMENDED AND RESTATED INITIAL ORDER

12. Since the granting of the Amended and Restated Initial Order, the Applicant has continued carrying on business in the ordinary course. In addition, the Applicant has, among other things:

(a) continued negotiations with the Plan Sponsor regarding the Take-out DIP Financing, and has entered into a Memorandum of Understanding dated April 29, 2020 (the "**MOU**") with the Plan Sponsor. The MOU outlines the process, and the terms and conditions under which the Plan Sponsor has conditionally agreed to loan the principal amounts of $20,000,000 to Green Relief and $10,000,000 to Green Relief Innovations Inc. ("**GRI**"), a subsidiary of Green Relief formerly known as Bodhi Research & Development Inc.;

(b) continued to work extensively with its counsel and the Monitor to develop a restructuring plan for the benefit of all stakeholders;

(c) continued to work extensively with its advisors and the Monitor to gather all relevant documents and information related to the various ongoing disputes with the Founders, including the Land Dispute; and

(d) provided regular updates regarding the status of the CCAA proceeding to its shareholders.

13. I have been advised that the Monitor will provide the Court with an update on its activities since the comeback motion in the Second Report of the Monitor (the "**Second Report**"), which will be filed in connection with the within motion.

## IV. STAY EXTENSION

14. The Applicant seeks an extension of the Stay Period up to and including June 19, 2020.

15. The stay extension is required in order to allow the Applicant to continue operating in the ordinary course while it continues to develop and implement its restructuring plan, and finalize the Take-out DIP Financing with the Plan Sponsor. The stay extension will also provide the Applicant with sufficient breathing room to continue to prepare and expedite the litigation in connection with the ongoing litigation involving the Founders, including the Land Dispute.

16. The Applicant, with the assistance of the Monitor, has prepared a forecast of the projected cash flows (the "**Cash Flow Forecast**") demonstrating that, if the Second Bridge DIP Term Sheet is approved, the Applicant will have sufficient liquidity to operate its business and meet its obligations during the proposed extension of the Stay Period. A copy of the Cash Flow Forecast is attached hereto as **Exhibit "A"**.

17. The Applicant has acted and continues to act in good faith and with due diligence during the course of this CCAA proceeding. I am advised by counsel that the Monitor supports the proposed extension of the Stay Period.

## V. SECOND BRIDGE DIP TERM SHEET & MEMORANDUM OF UNDERSTANDING

18. As described above, the MOU entered into between the Applicant and the Plan Sponsor outlines the general process, and the general terms and conditions under which the Plan Sponsor has expressed interest in loaning the principal amounts of $20,000,000 to Green Relief (the "**Take-out DIP Facility**") and $10,000,000 to GRI (the "**GRI Facility**"). A redacted version of the MOU is attached hereto as **Exhibit "B"**. An unredacted version is attached as **Confidential Exhibit "C"**.

19. The Applicant issued a press release announcing the MOU on April 30, 2020 (the "**Press Release**"). A copy of the Press Release, which is appended to the MOU, is attached hereto as **Exhibit "D"**.

20. Due to some of the logistical and administrative challenges flowing from the COVID-19 pandemic, among other things, the Plan Sponsor has advised that the funds contemplated pursuant to the Take-out DIP Facility and the GRI Facility will not be available to be advanced to Green Relief and GRI, respectively, until June 2020.

21. As indicated in the Cash Flow Forecast, it is anticipated that Green Relief will exhaust its liquidity by the week ending May 15, 2020. Accordingly, without a second bridge interim financing pending the availability of the Take-out DIP Facility, Green Relief will be unable to fund its operations, including making payroll, and remain in business, to the detriment of all stakeholders.

22. In addition to the $250,000 bridge interim financing that Green Relief obtained pursuant to the term sheet (the "**First Bridge DIP Term Sheet**") entered into between Green Relief and Antonio Battaglia (the "**First Bridge DIP Lender**") dated April 5, 2020, which was approved pursuant to the Initial Order, Green Relief seeks a second bridge interim financing facility.

23. On May 1, 2020, Green Relief entered into the Second Bridge DIP Term Sheet with the Second Bridge DIP Lender, pursuant to which the Second Bridge DIP Lender agreed to loan the maximum principal amount of $500,000 to Green Relief, subject to the terms and conditions prescribed therein. A copy of the Second Bridge DIP Term Sheet is attached hereto as **Exhibit "E"**.

24. The key terms of the Second Bridge DIP Term Sheet, which are substantially similar to the terms of the First Bridge DIP Term Sheet, are as follows:

(a) advances will be made available to Green Relief up to the maximum principal amount of $500,000, in minimum tranches of $50,000;

(b) all indebtedness thereunder is repayable on demand;

(c) interest accrues on the outstanding indebtedness at a rate of five percent (5%) per annum, and shall be payable monthly in arrears;

(d) all indebtedness thereunder shall be secured by a court-ordered charge on Green Relief's Property that shall rank subordinate only to the Administration Charge, the Directors' Charge, any valid purchase money security interests, and any existing security granted by the Applicant in favour of the Rescom Parties, and shall rank *pari passu* to the DIP Charge granted in favour of First Bridge DIP Lender pursuant to the Initial Order (the "**First DIP Lender's Charge**"). In other words, the amounts advanced under the Second Bridge DIP Term Sheet shall have the same priority as the First DIP Lender's Charge in all respects; and

(e) the Second Bridge DIP Term Sheet is conditional upon court-approval.

25. The Second Bridge DIP Facility is required in order for the Applicant to make payroll, continue operating in the ordinary course and fund certain restructuring costs until such time as the definitive agreement with the Plan Sponsor is finalized and the Take-out DIP Facility becomes available.

26. Green Relief intends to use the Take-out DIP Facility to repay all of its indebtedness under the First and Second Bridge DIP Facilities, once the Take-out DIP Facility becomes available.

27. As an indication of his commitment to finalizing the Take-out DIP Financing and Plan Sponsor Agreement, the Plan Sponsor has agreed to personally guarantee the indebtedness of Green Relief under the First and Second Bridge DIP Term Sheets.

28. The Applicant's access to the Second Bridge DIP Facility is conditional upon an Order of this Court, among other things, approving the Second Bridge DIP Term Sheet and approving a super-priority charge on the Applicant's Property in the amount of $500,000 (the "**Second DIP Lender's Charge**") with the priority described above.

29. The Applicant worked with its counsel and the Monitor in determining the proposed quantum of the Second Bridge DIP Facility and the Second DIP Lender's Charge. I have been advised that the Monitor supports the Second Bridge DIP Term Sheet and the Second DIP Lender's Charge.

## VI. SEALING ORDER

30. As described above, the Applicant seeks a sealing order with respect to Confidential Exhibit "C" hereto, which contain commercially sensitive and personal information, the disclosure of which could adversely impact the Applicant and its stakeholders.

31. The Plan Sponsor has specifically requested that his identity remains confidential at this time. The disclosure of his identity may jeopardize the Applicant's ability to secure the Take-out DIP Facility, which is essential to Green Relief's restructuring.

32. The Applicant is of the view that no stakeholders will be materially prejudiced by sealing the commercially sensitive and personal information contained in Confidential Exhibit "C" hereto.

33. As such, the proposed Order provides that Confidential Exhibit "C" be sealed and not form part of the public record until further order of the Court.

34. I have been advised that the Monitor supports the sealing order sought with respect to the confidential information contained herein.

## VII. CONCLUSION

35. The Applicant seeks an Order extending the Stay Period, approving the Second Bridge DIP Term Sheet, granting the Second DIP Charge, and sealing the Confidential Exhibit hereto until further Order of the Court.

36. This affidavit is sworn in support of the within motion and for no other or improper purpose.

**SWORN** before me at the City of Vaughan, in the Province of Ontario, this 1st day of May, 2020.

Commissioner for Taking Affidavits

**NEILANK JHA**

This is **Exhibit "A"**, referred to in the

Affidavit of Neilank Jha,
sworn before me this 1st day of May, 2020.

_____

A Commissioner for taking Affidavits, etc.

**Green Relief Inc. (the "Company")**
**Cash Flow Forecast for the period April 25 to June 19, 2020**
**($000s), unaudited**

| Week Number | Notes | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | TOTAL |
|---|---|---|---|---|---|---|---|---|---|---|
| Week Ended | | 1/May/20 | 8/May/20 | 15/May/20 | 22/May/20 | 29/May/20 | 5/Jun/20 | 12/Jun/20 | 19/Jun/20 | 8-WEEKS |
| | *1, 2, 3, 19* | | | | | | | | | |
| **RECEIPTS** | | | | | | | | | | |
| Operating receipts-gross | *4* | 12 | 28 | 28 | 28 | 28 | 28 | 28 | 28 | 208 |
| HST refunds | *5* | - | - | - | - | 55 | - | - | - | 55 |
| Other receipts | *6* | - | - | - | - | 85 | - | 83 | - | 167 |
| **Total Receipts** | | **12** | **28** | **28** | **28** | **167** | **28** | **111** | **28** | **430** |
| **DISBURSEMENTS** | | | | | | | | | | |
| Oil Extraction | *7* | 6 | 6 | 8 | 6 | 6 | 6 | 6 | 8 | 53 |
| Excise taxes | *8* | - | - | - | - | 36 | 7 | - | - | 44 |
| Payroll and benefits | *9* | 21 | 47 | 21 | 50 | 18 | 54 | 20 | 53 | 285 |
| Facilities rent | | 2 | - | - | - | 5 | - | - | - | 7 |
| Facilities expense | *10* | 21 | 4 | 4 | 4 | 4 | 24 | 4 | 4 | 68 |
| Utilities | *11* | - | 66 | - | - | 2 | - | 40 | - | 108 |
| Selling, Goods and Administrative expense | *12* | 6 | 4 | 22 | 4 | 4 | 13 | 4 | 22 | 78 |
| Professional fees | *13* | 152 | 1 | 185 | 1 | 131 | 1 | 131 | 1 | 603 |
| Mortgage payment-Rescom-Lyn Bravo Loan | *14* | 21 | - | - | - | - | 21 | - | - | 43 |
| DIP Interest | *17, 18* | | 0 | 0 | 0 | 1 | 1 | 1 | 1 | 4 |
| Other Disbursements | *15* | 17 | - | - | 44 | - | 54 | - | - | 115 |
| **Total Disbursements** | | **245** | **129** | **240** | **110** | **207** | **182** | **206** | **89** | **1,407** |
| **NET CASH FLOW** | | **(233)** | **(101)** | **(212)** | **(82)** | **(40)** | **(154)** | **(95)** | **(61)** | **(977)** |
| | | | | | | | | | | |
| **DIP Rollforward** | | | | | | | | | | |
| Opening DIP Balance | | - | - | 100 | 250 | 500 | 550 | 750 | 750 | - |
| DIP borrowings and (repayments) | *17, 18* | - | 100 | 150 | 250 | 50 | 200 | - | - | 750 |
| **Ending DIP Balance** | | **-** | **100** | **250** | **500** | **550** | **750** | **750** | **750** | **750** |
| | | | | | | | | | | |
| **Cash Rollforward** | | | | | | | | | | |
| Beginning cash | *16* | 298 | 65 | 64 | 2 | 171 | 181 | 227 | 131 | 298 |
| Net Cash flow | | (233) | (101) | (212) | (82) | (40) | (154) | (95) | (61) | (977) |
| First Bridge DIP Lender | *17* | - | 100 | 150 | - | - | - | - | - | 250 |
| Second Bridge DIP Lender | *18* | - | - | - | 250 | 50 | 200 | - | - | 500 |
| **Ending cash** | | **65** | **64** | **2** | **171** | **181** | **227** | **131** | **71** | **71** |

**Dated at Vaughan, Ontario, this 1st day of May 2020. This statement of projected cash flow of Green Relief Inc. is prepared in accordance with the Company's motion (returnable May 8, 2020) to extend the stay period to June 19, 2020 and should be read in conjunction with the Monitor's Report on the Cash Flow Statement.**

Neilank K. Jha
Chief Executive Officer
Green Relief Inc.

Michelle Pickett, LIT
Senior Vice President
Pricewaterhouse Coopers Inc., LIT
Court-Appointed Monitor

**Notes to Green Relief's Cash Flow Forecast for the period April 25, 2020 to June 19, 2020.**

| No. | Item | Notes |
|---|---|---|
| 1 | Cash Flow Forecast | Green Relief Inc. ("**Green Relief**" or the "**Company**") converted the NOI proceeding to a proceeding under the *Companies' Creditors Arrangement Act* ("**CCAA**") pursuant to the Initial Order issued April 8, 2020 and as amended and restated on April 17, 2020. This extended cash flow forecast ("**Extended Cash Flow Forecast**") for the period April 25 to June 19, 2020 ("**Extended Forecast Period**") is prepared pursuant to the Applicant's motion to extend the stay period to June 19, 2020. Management of Green Relief has prepared this Extended Cash Flow Forecast based on the probable and hypothetical assumptions detailed below. Actual results will likely vary from the projections and such variations may be material. |
| 2 | Going Concern Assumption | The statement of projected cash flow has been prepared on a going concern basis as operating activities are assumed to continue at Green Relief. |
| 3 | Supply of essential services and goods | The supply of essential goods and services is expected to continue to be available to Green Relief. Payments to vendors in respect of post CCAA goods and services are assumed to be on cash on delivery terms, other than amounts that may become due to taxing authorities or services typically billed in arrears. |
| 4 | Operating receipts-gross | Operating receipts are based on the previous three months of billings and have been adjusted to reflect a strategic shift to produce and sell primarily cannabis oil products, discontinuing the production and sale of dry cannabis. |
| 5 | HST refunds | HST refunds are in respect of the post-filing period after the filing of the NOI. |
| 6 | Other receipts | Other receipts include the receipt of the wage subsidiary as provided by the Canadian Government under the Canada Emergency Wage Subsidy program due to the effects of COVID-19. |
| 7 | Oil Extraction | Oil extraction expenses include inventory purchases and processing expenses based on current processes and supplies. The volume of production is based on forecast revenue. |
| 8 | Excise taxes | Excise taxes includes payments on amounts previously outstanding to March 31, 2020 and forecast excise taxes payable throughout the Extended Forecast Period. |
| 9 | Payroll and benefits | Payroll and benefits amounts reflect the Company's forecast gross payroll and benefits expense. |
| 10 | Facilities expense | Facilities expense includes all ongoing costs required to ensure that Green Relief remains compliant under Health Canada's Access to Cannabis for Medical Purposes Regulations during the Cash Flow Period. |
| 11 | Utilities | Utility payments consist primarily of hydro costs and include a deposit equal to one month's billings, which is expected to be required by the utility. Hydro and other utility costs are based on historical averages. |
| 12 | Selling, Goods and Administrative expense | Selling, General and Administrative expenses include sales commissions, credit card transaction processing fees and shipping costs. |
| 13 | Professional fees | Professional fees include the forecasted fees and expenses of PwC in its role as Proposal Trustee and Monitor and its legal counsel and the Company's counsel in respect of the NOI and CCAA proceedings. |
| 14 | Rescom Mortgage Interest Payment | Pursuant to the Amended and Restated Initial Order, the Company is required to make the monthly Rescom mortgage payment in the amount of $21,475. |
| 15 | Other Disbursements | Other disbursements include fees paid in respect of various operational and strategic advisory positions including general counsel, business development, chief strategy officer, and the chief financial officer, which are not included in payroll, as well as other miscellaneous expenses. |
| 16 | Beginning cash | The beginning cash balance reflects the Company's general ledger cash balance as at April 25, 2020. |
| 17 | First Bridge DIP Lender | Pursuant to the Amended and Restated Initial Order, the Company is authorized to borrow up to $250,000 in respect of a Bridge DIP Facility, which is forecast to be drawn in the week of May 8 and May 15, 2020. |
| 18 | Second Bridge DIP Lender | The Company is seeking authorization and approval for a second bridge DIP facility as part of the May 8 motion in the amount of $500,000 for the purposes of funding operations throughout the Extended Forecast Period. |
| 19 | Functional Currency | The CFF is denominated in CAD. |

Court File No. CV-20-00639217-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GREEN RELIEF INC. (the "**Applicant**")

MANAGEMENT'S REPORT ON CASH FLOW STATEMENT

In connection with the proceedings commenced by Green Relief Inc. under the *Companies' Creditors Arrangement Act* ("**CCAA**"), the management of Green Relief Inc. (the "**Management**") has prepared the attached cash-flow statement for the period from April 25, 2020 to June 19, 2020 (the "**Extended Cash Flow Forecast**") and the assumptions on which the cash-flow statement is based.

The hypothetical assumptions are reasonable and consistent with the purpose of the projections described in Note 1 to the Extended Cash Flow Forecast, and the probable assumptions are suitably supported and consistent with the plans of the Applicant and provide a reasonable basis for the Extended Cash Flow Forecast. All such assumptions are disclosed in Notes 2 to 19.

Since the projections in the Extended Cash Flow Forecast are based on assumptions regarding future events, actual results will vary form the information presented and variation may be material

The Extended Cash Flow Forecast has been prepared solely for the purpose outlined in Note 1, using a set of hypothetical and probably assumptions set out in Notes 2 to 19. Consequently, readers are cautioned that the Extended Cash Flow Forecast may not be appropriate for other purposes.

DATED at Vaughan this 1st day of May 2020.

**Green Relief Inc.**

_____

**Neilank Jha**
**Chief Executive Officer**

Green Relief

May 1, 2020

PricewaterhouseCoopers Inc.
Court-Appointed Monitor to Green Relief Inc.
18 York Street, Suite 2600
Toronto, ON M5J 0B2

Attn: Michelle Pickett, Senior Vice President

In connection with your monitoring of our business and financial affairs pursuant to our plan of arrangement, we acknowledge that we are responsible for the accuracy of our financial records and the summaries and financial statements that we have prepared and provided to you.

We also represent that since March 12, 2020, to the best of our knowledge and belief:

1. We have made available to you:

    1.1. All financial records;

    1.2. Minutes of meetings of shareholders, directors, and relevant committees, or summaries of action for which minutes have not yet been prepared; and

    1.3. Any other relevant information.

2. We understand that all information disclosed to PricewaterhouseCoopers Inc. in its role as Court-Appointed Monitor in the matter of a plan or compromise or arrangement of Green Relief Inc. ("**Monitor**") may be requested to be disclosed to the Court or creditors.

3. All transactions have been properly recorded in the financial records.

4. We have not sold any assets out of the ordinary course of business, except as disclosed below.

5. There are no liens or encumbrances on any assets except as disclosed below.

6. There are no unrecorded contingencies or claims except as disclosed below.

7. We do not foresee sustaining any loss in the fulfilment of, or from the inability to fulfil, orders on hand, contracts on hand and/or in process, and sales commitments, except as disclosed below.

8. We have complied with all contractual agreements except as disclosed below.

9. All transactions during the reporting period with related parties (directors, officers, shareholders, and affiliated companies) have been disclosed to you.

10. We have responded fully to all enquiries made by you.

11. The probable and hypothetical assumptions used in the cash-flow statement are still valid.

12. We confirm we are acting in good faith and with due diligence in developing our plan of arrangement and are not aware of any reason that we likely would not be able to make a viable plan of arrangement.

Yours truly,

Neilank Jha, Chief Executive Officer

This is **Exhibit "B"**, referred to in the

Affidavit of Neilank Jha,
sworn before me this 1st day of May, 2020.

_____

A Commissioner for taking Affidavits, etc.

# Memorandum of Understanding

## Background

In March 2019 it was discovered that the two principal shareholders of Green Relief Inc. ("GR" or the, "company") had operated GR such that it was on the brink of insolvency despite having raised approximately $55 million for GR's operation. Forensic investigation has uncovered irrefutable evidence that these shareholders not only entered into contracts and investments that were not in the best interests of the company, but also entered into transactions on behalf of the company that appear to be fraudulent. Since that date the current CEO (Dr. Neilank K. Jha), has led a turnaround that now provides the opportunity to revitalize GR and its affiliates, and become a competitive force. To complete this turnaround a further injection of funds is necessary.

A company to be incorporated on behalf of [redacted] ("Hold Co.") has expressed interest in providing a $30MM Convertible Credit Facility (the, "Credit Facility") to Bodhi Research & Development Inc. ("Bodhi") (as to $10MM) to complete the corporate turnaround of GR (as to $20MM).

The Credit Facility and subsequent conversion to equity is conditional on Dr. Jha/his designate agreeing to remain as Chairman and/or CEO of both Bodhi & GR for a minimum of 3 years.

Dr. Jha has stipulated that his turnaround efforts have been centered on protecting the staff, creditors and equity holders of GR that have been misrepresented since 2013.

$20MM of the Credit Facility funds when advanced and converted to equity will provide Hold Co. with 70% of the fully diluted equity of GR and will provide current equity holders to be approved by Hold Co. with the remaining 30%. A proposal to settle the claims of the legitimate creditors of GR will be funded by Hold Co. as part of the $20MM of funding in an amount to be agreed between Hold Co. and GR.

Ultimately, the legitimate creditors' claims will be settled and bona fide equity holders with the approval of Hold Co. will retain 30% in a company that is capitalized.

Bodhi and Hold Co. agree that the remaining $10MM of the Credit Facility when advanced and converted to equity will provide Hold Co. with 30% of the fully diluted equity of Bodhi.

Hold Co. as the majority shareholder of GR will negotiate at its discretion through its CEO, [redacted] compensation for Dr. Jha/his designate agreeing to remain as Chairman and/or CEO of both Bodhi & GR for a minimum of 3 years.

Hold Co. has arrived at this valuation on the basis of:

- The corporate turnaround; and

- Vision & Strategy developed by Dr. Jha for both Bodhi & GR as outlined below.

**Bodhi:**

- IP (Bodhi)
- Global experts in the medical field aligned with Dr. Jha and part of Bodhi with a pathway to build medicines (For example: [redacted] are both world renowned Neurosurgeons with the various professional sports leagues that have joined Dr. Jha at Bodhi)

**GR:**

- Licenses in GR (Cultivation, Sales, Processing & Permit availability for Export)
- Brand of GR with current seed to sale operation and pathway to cash flow positive/profitability in Canadian market
- State of the Art Extraction & Processing for GR Services as a Contract Processor
- Global GR Contracts (potentially Australia, S. Korea, Pakistan, etc.)

**Use of Proceeds:**

The purpose of the investment in the operations of GR and Bodhi and their affiliate companies is as follows:

1. Provide funding to Bodhi to enable the commencement of R & D and clinical trials to develop evidence based treatments for patients utilizing cannabinoid based formulations and commercializing these outcomes.
2. Enable control of Bodhi to pass from GR to arm's length shareholders insulating Bodhi from GR while ongoing litigation and restructuring is taking place.
3. To advance funds to GR to complete a restructuring that will:
    a. Replace the major (founding) shareholders with Hold Co. who will control 70% of the company;
    b. Enable successful pursuit of legal claims against the founding shareholders for their alleged fraud and to recover significant sums, and also return control of assets to GR that were funded by GR; and
    c. Provide an environment for a successful restructuring plan while retaining the services of Dr Jha in the operations of both Bodhi and GR.

## Process

## Bodhi

Hold Co. will provide the Credit Facility of $20MM to GR and $10MM to Bodhi and receive as compensation a lender commitment fee. That fee will be paid by the issuance to Hold Co. of 4 voting shares of Bodhi by GR.

The aforesaid new shares will result in the ownership combination of Hold Co. and Dr. Jha's group to have effective control of Bodhi through the ownership of 51% of Bodhi with the remainder owned by GR (the previous majority holder).

[redacted] of Hold Co. will receive a seat on the board of Bodhi.

## Green Relief

GR will announce that it has obtained a Credit Facility from Hold Co. It will make clear that these funds will be used to exit CCAA protection with the intention of settling all outstanding claims from creditors and furthering its legal claims against both the original majority shareholders and against other third parties who entered into agreements that had no discernible benefit to GR.

GR will announce that it has obtained a commitment to a Debtor in Possession ("DIP") financing from Hold Co. that will allow it to complete a restructuring plan under CCAA that will assist it to emerge from the CCAA process in a viable financial position. The DIP financing will be conditional upon:

- Addressing the legal claims for the alleged fraudulent activity
- Resolving all material litigation against GR
- Successful negotiation with all bona fide creditor claims
- Development of a plan that will demonstrate the ability of GR to emerge from the CCAA process with the ability to be cash flow positive and with a clear strategic vision for future profitability.

It is the clear and unequivocal intention of the current management of GR and the owner of Hold Co. to ensure that the minority shareholders of GR receive as much value as possible. The process described above is designed to provide those shareholders and all future investors with the best opportunity to increase the value of their investment through a strategic plan for the future prosperity of the company.

**General Use of Proceeds Provided by Hold Co.:**

- Corporate Restructuring
- Litigation
- Control of all Assets
- Marketing Expansion
- Utilize BridgeMed for distribution in both Canada and Globally
- Initiatives for Genetics/Seeds
- Cash Flow positive/profitable execution in the CDN Medical Market
- Contract (Extraction & Processing) profitable activities
- Executed Global Green Relief Agreements
- Initiate & Complete Clinical Trials/Commercialization of IP including focus on Fibromyalgia

**Additional Conditions:**

- Hold Co. to be provided a First Right of Refusal on any future funding requirements for GR and Bodhi.

- GR restructuring plan must be approved by Hold Co. in writing prior to GR seeking court approval of same.
- Credit Facility funds must be secured at all times prior to equity conversion.
- All agreements to be subject to documentation satisfactory to both parties.
- Hold Co. completion of due diligence investigations with respect to both GR and Bodhi and satisfaction of Hold Co. in its sole and absolute discretion with respect to the results of such investigations.
- Agreed upon press release in the form attached as Appendix “A”.

| | | | |
|---|---|---|---|
| April 29, 2020 | | April 29, 2020 | |
| **Neilank K. Jha**<br>**CEO, Green Relief Inc.**<br>**Chairman/CEO, Bodhi** | **Date** | [redacted] | **Date** |

APPENDIX “A” – Press Release

Angel Investor Partners with World Renowned Neurosurgeon

Today, an Angel Investor has proposed a conditional $30MM Line of Credit facility to complete the restructuring process of Green Relief that was initiated by Dr. Neilank K. Jha just over a year ago when he assumed office. During this time, Green Relief was on the brink of insolvency and required a new vision and team in order to turn the company around. The management team needed to adjust accordingly as new information was brought to light.

The crucial decision to shift away from cultivation and reposition Green Relief’s focus to developing treatments for patients, active pharmaceutical ingredients and patentable IP is what has attracted investment at a challenging time in the markets.

Green Relief can now play a significant role in the medicinal cannabis space leading to the development of therapeutics that will benefit patients for a wide array of medical conditions.

As a leading expert in the area of traumatic brain injury, Dr. Jha has worked with various professional sports leagues, physicians and researchers in this area. Through his network, Jha has organized a team of doctors to join Bodhi GRx, an affiliate of Green Relief that develops IP.

The focus of the current management team has been to protect the staff, legitimate creditors and genuine equity holders in the process.

Generally, shareholders do not fare well in a restructuring process, however, the Angel Investor has made a commitment to abandon this trend as recognition for Jha’s sacrifices and tireless efforts to protect the shareholders. The investor has made it clear that the funding is contingent on Dr. Jha remaining in his position for a minimum of three years. The proposal will be subject to approval by the various stakeholders within a court governed restructuring process and Jha’s commitment to the Angel Investor to execute the vision he has developed with his team.

As Green Relief formally restructures its business, the company will continue to operate under the direction of the current board and management. The end goal of this restructuring process will be a company that is profitable, sustainable, and well-positioned for long-term growth and success.

This is **Confidential Exhibit "C"**,
referred to in the

Affidavit of Neilank Jha,
sworn before me this 1st day of May, 2020.

_____
A Commissioner for taking Affidavits, etc.

**Court File No.: CV-20-00639217-00CL**

**CONFIDENTIAL EXHIBIT "C"**
**TO THE AFFIDAVIT OF NEILANK JHA**
**(SWORN MAY 1, 2020)**

# TO BE SEALED FROM PUBLIC RECORD PENDING FURTHER ORDER OF THE COURT

This is **Exhibit "D"**, referred to in the

Affidavit of Neilank Jha,
sworn before me this 1st day of May, 2020.

_____

A Commissioner for taking Affidavits, etc.

Green Relief Press Release dated April 30, 2020

Angel Investor Partners with World Renowned Neurosurgeon to Restructure Green Relief Inc.

Green Relief Inc. ("Green Relief") today announces that an Angel Investor has proposed a conditional $30 million credit facility to complete the restructuring process of Green Relief that was initiated by Dr. Neilank K. Jha just over a year ago when he assumed office. During this time, Green Relief was on the brink of insolvency and required a new vision and team in order to turn the company around. The management team needed to adjust accordingly as new information was brought to light.

The crucial decision to shift away from cultivation and reposition Green Relief's focus to developing treatments for patients, active pharmaceutical ingredients and patentable intellectual property ("IP") is what has attracted investment at a challenging time in the markets.

Green Relief can now play a significant role in the medicinal cannabis space leading to the development of therapeutics that will benefit patients for a wide array of medical conditions.

As a leading expert in the area of traumatic brain injury, Dr. Jha has worked with various professional sports leagues, physicians and researchers in this area. Through his network, Dr. Jha has organized a team of doctors to join Bodhi GRx, an affiliate of Green Relief that develops IP.

The focus of the current management team has been to protect the staff, legitimate creditors and genuine equity holders in the process.

Generally, shareholders do not fare well in a restructuring process, however, the Angel Investor has made a commitment to abandon this trend as recognition for Dr. Jha's sacrifices and tireless efforts to protect the shareholders. The investor has made it clear that the funding is contingent on Dr. Jha remaining in his position for a minimum of three years. The proposal will be subject to approval by the various stakeholders within a court-supervised restructuring process and Dr. Jha's commitment to the Angel Investor to execute the vision he has developed with his team.

As Green Relief formally restructures its business, the company will continue to operate under the direction of the current board and management. The end goal of this restructuring process will be a company that is profitable, sustainable, and well-positioned for long-term growth and success.

Jake Kiefer
Jkiefer@greenrelief.ca
Communications, Green Relief
(519) 239-7592

This is **Exhibit "E"**, referred to in the

Affidavit of Neilank Jha,
sworn before me this 1st day of May, 2020.

_____

A Commissioner for taking Affidavits, etc.

**May 1, 2020**

**Green Relief Inc.**
780 Concession 8 West, RR3
Hamilton, ON
N0B 2J0

**Attention: Antonio Battaglia, Chairman of the Board**

**Re: Interim bridge financing of Green Relief Inc.**

WHEREAS Green Relief Inc. (the "**Borrower**") filed for creditor protection under the *Companies' Creditors Arrangement Act* (the "**CCAA**") on April 8, 2020, pursuant to the Initial Order Justice Koehnen, as amended and restated (the "**Initial Order**").

AND WHEREAS the Borrower obtained $250,000 in secured interim bridge financing on April 5, 2020 (the "**First Bridge DIP**"), pursuant to a term sheet entered into between the Borrower and Antonio Battaglia (the "**First Bridge DIP Lender**"), which was approved pursuant to the Initial Order.

AND WHEREAS the Borrower has requested that I, Dr. Neilank Jha (the "**Lender**"), provide the Borrower with $500,000 in additional secured interim bridge financing (the "**Second Bridge DIP**") in order to further assist it through its restructuring under the CCAA until such time as a further financing and plan sponsor agreement can be finalized by and between the Borrower and a confidential individual investor or a nominee corporation controlled by him (the "**Plan Sponsor**");

AND WHEREAS the Plan Sponsor has agreed to personally guarantee all of the Borrower's indebtedness to the Lender pursuant to this Term Sheet; and

AND WHEREAS the Lender hereby agrees to lend up to the maximum additional principal amount of $500,000 in secured interim bridge financing subject to and in accordance with the terms and conditions set out herein on the understanding that the Borrower and the Plan Sponsor will continue to pursue and finalize a definitive financing and plan sponsor agreement, which will take out and replace this Second Bridge DIP and the First Bridge DIP.

NOW THEREFORE in consideration of the foregoing and the mutual covenants and agreements set forth below, and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties hereby agree as follows:

**SUMMARY OF TERMS FOR SECOND INTERIM BRIDGE DIP FACILITY**

| | |
|---|---|
| Borrower: | Green Relief Inc. (the "**Borrower**") |
| Lender: | Dr. Neilank Jha (the "**Lender**"). |
| Maximum DIP Facility: | CAD $500,000 (the "**DIP Facility**"). |
| Purpose: | To provide additional working capital to the Borrower for general operating and restructuring expenses, including professional fees, as set out in the revised cash flow forecast prepared by the Borrower, with the assistance of the Monitor, to be filed in connection with the Borrower's stay extension motion returnable May 8, 2020 (collectively, the "**Expenses**"). |
| Availability Period: | The DIP Facility will be repayable on demand by the Lender. |
| Advances: | Advances under the DIP Facility shall be made in minimum tranches of $50,000 ("**Advances**"), as requested by the Borrower from time-to-time. |
| Repayment: | All outstanding Advances are repayable on demand at any time. |
| Interest: | Interest shall accrue on this indebtedness at a rate of five percent (5%) per annum on the outstanding indebtedness. Interest shall be payable monthly in arrears and due on the first business day of each month, calculated based on the total of all Advances actually outstanding for the previous month. |
| DIP Security: | All sums at any time owing to the Lender in respect of the DIP Facility shall be secured by a charge on the Property of the Borrower (as that term is defined in the Initial Order) pursuant to a court ordered charge in the CCAA proceeding, ranking subordinate only to: (i) the Administration Charge; (ii) the Directors' Charge; (iii) any valid purchase money security interests; and (iv) any existing security granted by the Borrower in favour of the Rescom Parties (each as defined in the Initial Order) (the "**DIP Lender's Charge**"). For greater certainty, the DIP Lender's Charge contemplated herein shall rank *pari passu* with the DIP Charge granted in favour of the First Bridge DIP Lender pursuant to the Initial Order. |
| Costs and Expenses | The Borrower shall pay: (i) all legal expenses incurred by the DIP Lender in connection with the preparation, negotiation and performance of this Term Sheet; and (ii) all of the DIP Lender's |

costs of realization or enforcement on a full indemnity basis in each case in connection with or otherwise related to the DIP Facility, the DIP Lender's Charge, this Term Sheet or the CCAA proceeding (collectively, the "**DIP Fees and Expenses**").

Funding Conditions: Advances under the DIP Facility will be available to the Borrower, subject to all other terms and conditions of this Term Sheet, immediately after the Court issues an order, in form and substance acceptable to the Lender, approving the terms of this DIP Facility and authorizing the Borrower to enter into this Term Sheet.

*Provided, however*, that the Lender shall not be obligated to provide any Advances whatsoever if the CCAA Order approving the facility and creating the DIP Lender's Charge (the "**CCAA/DIP Order**") has been vacated, stayed or otherwise caused to become ineffective or is amended in a manner not acceptable to the Lender (such consent not to be unreasonably withheld where any such amendment does not pertain to the DIP Facility).

The CCAA/DIP Order: The CCAA/DIP Order shall be in form and substance satisfactory to the Lender and shall, without limitation, include:

(i) provisions approving this Term Sheet and the DIP Facility created herein;

(ii) provisions granting to the Lender the DIP Lender's Charge ranking *pari passu* to the DIP Charge granted in favour of the First Bridge DIP Lender pursuant to the Initial Order;

(iii) provisions authorizing the Lender to effect registrations, filings and recordings wherever in its discretion it deems appropriate regarding the DIP Lender's Charge;

(iv) provisions providing that the DIP Lender's Charge shall be valid and effective to secure all of the obligations of the Borrower to the Lender hereunder, without the necessity of the making of any registrations or filings and whether or not any other documents have been executed by the Borrower;

(v) provisions declaring that the granting of the DIP Lender's Charge and all other documents executed and delivered to the Lender as contemplated herein, including, without limitation, all actions taken to perfect, record and register the DIP Lender's Charge, do not constitute conduct meriting an oppression remedy, settlement, fraudulent preference, fraudulent conveyance or other challengeable or reviewable transaction under any applicable federal or provincial legislation; and

(vi) provisions restricting the granting of any additional liens or encumbrances on the assets of the Borrower, other than as permitted herein and in the CCAA/DIP Order.

Covenants: During the Availability Period, the Borrower:

(a) will, promptly on the receipt by the Borrower of the same, give the Lender a copy of any Notice of Motion or Application to vary, supplement, revoke, terminate or discharge the CCAA/DIP Order, including (without limitation) any application to the Court for the granting of new security that will or may have priority over the DIP Lender's Charge, or otherwise for the variation of the priority of the DIP Lender's Charge;

(b) will cause the Monitor to provide to the Lender, on Friday of each week, a weekly cash flow variance analysis;

(c) will cause the Monitor to provide the Lender with any additional financial information reasonably requested by the Lender, to the extent that is readily available;

(d) will not, without the prior written consent of the Lender, incur any borrowings or other secured indebtedness, obligations or liabilities, other than pursuant to the DIP Facility, or create or grant any security (other than the DIP Lender's Charge) over any of the Property, whether ranking in priority to or subordinate to the DIP Lender's Charge, save and except for additional interim financing that repays any obligations owing to the Lender hereunder in full; and

(e) subject to the "Costs and Expenses" provision of this Term Sheet, will pay upon request by the DIP Lender all documented DIP Fees and Expenses, provided, however, that if any DIP Fees and Expenses incurred after the date of this Term Sheet are not paid by the Borrower, the DIP Lender may in its sole discretion, acting reasonably, pay all such DIP Fees and Expenses whereupon such amounts shall be added to and form part of the indebtedness secured by the DIP Charge;

| | |
|---|---|
| Further Assurances: | The Borrower will, at its own expense and promptly on demand by the Lender at any time, do such acts and things and execute and deliver such deeds and documents as the Lender may request to give effect to any other provisions set out hereunder. |
| Assignment: | Neither the Lender nor the Borrower shall assign the benefit of any of the provisions set out herein. |
| Governing Law: | The DIP Facility and the provisions set out herein shall be governed and construed in all respects in accordance with the laws of Ontario and the laws of Canada applicable therein. |
| Acceptance: | The DIP Facility shall not become available to the Borrower until and unless the Borrower returns a copy of this Term Sheet to the Lender (by electronic transmission or personal delivery), countersigned by the Borrower pursuant to the authority granted to the Borrower by the CCAA/DIP Order. |

Dated this ____ day of May, 2020.

NEILANK JHA

WITNESS

ACCEPTANCE

TO: NEILANK JHA

For good and valuable consideration received, Green Relief accepts and agrees to comply with the provisions of the Term Sheet set out above.

Dated this 1st day of May, 2020.

GREEN RELIEF INC.

By: _____

Name: Antonio Battaglia
Title: Chairman of the Board
I have authority to bind the corporation.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **GREEN RELIEF INC.**

Court File No. CV-20-00639217-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

Proceedings commenced at Toronto

**AFFIDAVIT OF NEILANK JHA**

**Thornton Grout Finnigan LLP**
3200 – 100 Wellington Street West
TD West Tower, Toronto-Dominion Centre
Toronto, ON M5K 1K7

**Robert I. Thornton** (LSO# 24266B)
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**Mitchell W. Grossell** (LSO# 69993I)
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Tel: 416-304-1616
Fax: 416-304-1313

Lawyers for Green Relief Inc.

# TAB 32

I.I.C. Ct. Filing 375285626001

Bul River Mineral Corporation, Big Bear Metal Mining Corporation, Earth's Vital Extractors Limited, Fort Steele Mineral Corporation, Fort Steele Metals Corporation, Fused Heat Ltd., Gallowai Metal Mining Corporation, Giant Steeples Mineral Corporation, Grand Mineral Corporation, International Feldspar Ltd., Jao Mine Developers Ltd., Kutteni Diamonds Ltd., Stanfield Mining Group Of Canada Ltd., Sullibin Mineral Corporation, Sullibin Multi Metal Corporation, Super Feldspars Corporation, White Cat Metal Mining Corporation, Zeus Metal Mining Corporation, Zeus Metals Corporation and Zeus Mineral Corporation — **Court File** No. **S113459**
21. **— Order Made after Application, October 13, 2011**

*Bul River Mineral Corporation, Big Bear Metal Mining Corporation, Earth's Vital Extractors Limited, Fort Steele Mineral Corporation, Fort Steele Metals Corporation, Fused Heat Ltd., Gallowai Metal Mining Corporation, Giant Steeples Mineral Corporation, Grand Mineral Corporation, International Feldspar Ltd., Jao Mine Developers Ltd., Kutteni Diamonds Ltd., Stanfield Mining Group Of Canada Ltd., Sullibin Mineral Corporation, Sullibin Multi Metal Corporation, Super Feldspars Corporation, White Cat Metal Mining Corporation, Zeus Metal Mining Corporation, Zeus Metals Corporation and Zeus Mineral Corporation*, **Court File** No. **S113459** (Supreme Court of British Columbia)

**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. 2002, c. 57 and the *Business Corporations Act*, R.S.A. 2000, c. B-9 — and — In the Matter of Bul River Mineral Corporation, Big Bear Metal Mining Corporation, Earth's Vital Extractors Limited, Fort Steele Mineral Corporation, Fort Steele Metals Corporation, Fused Heat Ltd., Gallowai Metal Mining Corporation, Giant Steeples Mineral Corporation, Grand Mineral Corporation, International Feldspar Ltd., Jao Mine Developers Ltd., Kutteni Diamonds Ltd., Stanfield Mining Group of Canada Ltd., Sullibin Mineral Corporation, Sullibin Multi Metal Corporation, Super Feldspars Corporation, White Cat Metal Mining Corporation, Zeus Metal Mining Corporation, Zeus Metals Corporation and Zeus Mineral Corporation Petitioners**

IN THE SUPREME COURT OF BRITISH COLUMBIA

**Order Made after Application**

| | | |
|---|---|---|
| BEFORE THE HONOURABLE | ) | THURSDAY, THE 13TH DAY |
| | ) | |
| MADAM JUSTICE FITZPATRICK | ) | OF OCTOBER, 2011 |

THE APPLICATION of the Petitioners coming on for hearing at Vancouver, British Columbia, on the 13th day of October, 2011; AND ON HEARING Colin D. Brousson, counsel for the Petitioners and other counsel as listed in Schedule "A" hereto; AND UPON READING the material filed, including the 5th Affidavit of G. T. Hewison sworn October 7, 2011; and the Second Report of Deloitte & Touche Inc. in its capacity as monitor of the Petitioners (the "*Monitor*") filed October 12, 2011:

THIS COURT ORDERS AND DECLARES THAT:

1. for the purposes of this Order the following terms shall have the following meanings:

(a) "*Administration Charge*" means the "Administration Charge" as defined in the Initial Order;

(b) "*Commitment Letter*" means the "Commitment Letter" as defined in the DIP Order;

(c) "*Definitive Documents*" means the "Definitive Documents" as defined in the DIP Order;

(d) "*DIP Lender's Charge*" means the "DIP Lender's Charge" as defined in the DIP Order;

(e) "*DIP Order*" means the order made in this Proceeding on June 10, 2011;

 

(f) "*Directors' Charge*" means the "Directors Charge" as defined in the Initial Order;

(g) "*Property*" means the "Property" as defined in the Initial Order;

(h) "*Initial Order*" means the order made in this Proceeding on May 26, 2011;

(i) "*Stay Period*" means the "Stay Period" as defined in the Initial Order;

**Confirmation of Relief and Extension of Stay**

2. The Stay Period is hereby extended to 11:59 p.m. Pacific Time on Friday, January 13, 2012 subject to further order of this Court;

**Secondary DIP Charge**

3. The Petitioners are hereby authorized and empowered to obtain and borrow under a credit facility from Peter Lacey (the "*Secondary DIP Lender*") in order to finance the continuation of the Business and preservation of the Petitioners' Property (as defined in the Initial Order) provided that borrowings under such credit facility shall not exceed $500,000.00 unless permitted by further Order of this Court.

4. Such credit facility shall be on the terms and subject to the conditions set forth in the commitment letter between the Petitioners and the Secondary DIP Lender dated October 7, 2011 (the "*Secondary Commitment Letter*"), filed in these proceedings.

5. The Petitioners are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "*Secondary Definitive Documents*"), as are contemplated by the Secondary Commitment Letter or as may be reasonably required by the Secondary DIP Lender pursuant to the terms thereof, and the Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the Secondary DIP Lender under and pursuant to the Secondary Commitment Letter and the Secondary Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of the Initial Order.

6. The Secondary DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "*Secondary DIP Lender's Charge*") only on such of the Property that is listed and described in *Schedule "A"* attached to the DIP Order (as amended hereafter by this Order) and the proceeds of the Property listed and described in Schedule "A" (as amended), including without limitation, insurance proceeds (the "*DIP Charge Assets*"). Notwithstanding the priority described in paragraphs 34 and 36 of the Initial Order, the Secondary DIP Lender's Charge shall be third in priority over the DIP Charge Assets behind the Administration Charge and the DIP Lender's Charge and ahead of the Directors' Charge and ahead of all other charges including, where permitted by law, any lien, claim, charge, security interest, trust claim, right or encumbrance of any governmental, legislative, or regulatory authority, agency, commission, board or any court, tribunal or other law, regulation or bill making entity having or purporting to have jurisdiction on behalf of any nation, province or city, or other part (whether arising under any statute, law, contract or otherwise).

7. Any security documentation evidencing, or the filing, registration or perfection of the Secondary DIP Lender's Charge shall not be required, and the Secondary DIP Lender's Charge shall be effective as against the DIP Charge Assets and shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered or perfected subsequent to the Secondary DIP Lender's Charge coming into existence, notwithstanding any failure to file, register or perfect the Secondary DIP Lender's Charge.

8. The Secondary DIP Lender's Charge shall constitute a mortgage, security interest, assignment by way of security and charge on the DIP Charge Assets and the Secondary DIP Lender's Charge shall rank in priority to all security interests, trusts, liens, mortgages, charges and encumbrances and claims of secured creditors, statutory or otherwise other than the Administration Charge and the DIP Lender's Charge (collectively "*Encumbrances*"), in favour of any Person as against the DIP Charge Assets.

 

9. Except as otherwise expressly provided herein, or as may be approved by this Court, the Petitioners shall not grant or suffer to exist any Encumbrances over any of the Property that rank in priority to, or *pari passu* with the Secondary DIP Lender's Charge, unless the Petitioners obtain the prior written consent of the Monitor and the Secondary DIP Lender.

10. The Secondary DIP Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the Secondary DIP Lender shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; or (d) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, mortgage, security agreement, debenture, sublease, offer to lease or other agreement (collectively an "*Agreement*") which binds the Petitioners or any of them; and notwithstanding any provision to the contrary in any Agreement:

(a) the creation of the Secondary DIP Lender's Charge shall not create or be deemed to constitute a breach by the Petitioners or any of them of any Agreement to which they or it is a party;

(b) the Secondary DIP Lender shall not have any liability to any Person (as defined in the Initial Order) whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Secondary DIP Lender's Charge; and

(c) the payments made by the Petitioners or any of them pursuant to this Order and the granting of the Secondary DIP Lender's Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

11. Any charge created by this Order over leases of real property, mineral leases, mineral tenures and mineral claims in Canada shall only be a charge on any of the Petitioners' interest(s) in such real property leases, mineral leases, mineral tenures and mineral claims.

12. Notwithstanding any other provision of this Order or the Initial Order as amended:

(a) the Secondary DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Secondary DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under any of the Secondary Definitive Documents or the Secondary DIP Lender's Charge, the Secondary DIP Lender, upon two (2) days notice to the Petitioners and the Monitor, may apply to the Court for leave to enforce the rights and remedies available to it pursuant to Secondary Commitment Letter and the Secondary Definitive Documents and any additional rights and remedies available to it at law or in equity;

(c) the foregoing rights and remedies of the Secondary DIP Lender shall be binding on and enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Petitioners or any of them or the Property and the Secondary DIP Lender's Charge shall stand in priority to any right, title and interest claimed by a trustee in bankruptcy, receiver or receiver-manager appointed after the date of this Order.

13. The Secondary DIP Lender, in such capacity, shall be treated as unaffected in any plan of arrangement or compromise filed by the Petitioners under the CCAA, or any proposal filed by the Petitioners or any of them under the BIA, with respect to any advances made under the Secondary Definitive Documents.

**Limitation on Further Use of DIP Charge**

14. Tallinn Mezzanine Finance Limited Partnership ("*Tallinn*") shall not make any further advances of principal to the Petitioners pursuant to the Commitment Letter or the Definitive Documents, the Petitioner shall not accept any such further advances of principal, and no such further advances of principal shall be secured by the DIP Lender's Charge. For greater certainty all other

 

payments or amounts owing under the Commitment Letter other than advances of principal shall continue to accrue and be paid and shall continue to be secured by the DIP Lender's Charge in priority ahead of the Secondary DIP Lender's Charge.

15. None of the Secondary DIP Lender's Charge, The Secondary Commitment Letter nor the Secondary Definitive Documents shall impair or alter in any way the ability of Tallinn to exercise its security granted in the DIP Order, the Commitment Letter and the Definitive Documents.

16. Tallinn shall not have a right of first refusal to provide further interim (DIP) financing to the Petitioners ("*ROFR*") and shall not purport to exercise such a ROFR.

**Increase in the Administration Charge**

17. The limit on the Administration Charge shall be and is hereby increased to $350,000.00.

**Amendment to DIP Order and Exclusion of Certain Equipment from the DIP Charge Assets**

18. Schedule "A" to the DIP Order is hereby amended by deleting:

(a) Item #185 Alimac Raise Climber System, 2 man with 8 foot by 8 foot deck, 3 lines air, water & air, 500 feet of rail on the surface, 1000 feet in mine; and

(b) item #204 Simmax Generator diesel Kubota on single axle trailer, 8163 hours, model EGCKM, serial no. V1691

(together the "*Excluded Equipment*")

which Excluded Equipment shall be for greater certainty excluded from the DIP Charge Assets and shall not be charged by the DIP Lender's Charge nor the Secondary DIP Lender's Charge.

19. The Petitioners shall be and are hereby authorized to sell or otherwise deal with the Excluded Equipment with the approval of the Monitor.

THE APPROVAL OF COUNSEL SET OUT IN SCHEDULE "A" OF THIS ORDER IS HEREBY DISPENSED WITH:

Signature of [_] Party [×] Lawyer for the Petitioners

For Colin D. Brousson

BY THE COURT

REGISTRAR

**Schedule "A" — List of Counsel**

| **COUNSEL** | **ACT FOR:** |
|---|---|
| Robert A. Millar<br>Jordan Schultz | Tallinn Mezzanine Finance Limited Partnership<br>Deloitte & Touche Inc. in its capacity as monitor of the Petitioners |
| Kieran E. Siddall<br>Jonathan L. Williams | Mr. Peter Lacey<br>Estate of John Carniel |
| — | |
| — | |
| — | |
| — | |
| — | |

  

**End of Document**

# TAB 33

I.I.C. Ct. Filing 374332947002

Bul River Mineral Corporation, Big Bear Metal Mining Corporation, Earth's Vital Extractors Limited, Fort Steele Mineral Corporation, Fort Steele Metals Corporation, Fused Heat Ltd., Gallowai Metal Mining Corporation, Giant Steeples Mineral Corporation, Grand Mineral Corporation, International Feldspar Ltd., Jao Mine Developers Ltd., Kutteni Diamonds Ltd., Stanfield Mining Group Of Canada Ltd., Sullibin Mineral Corporation, Sullibin Multi Metal Corporation, Super Feldspars Corporation, White Cat Metal Mining Corporation, Zeus Metal Mining Corporation, Zeus Metals Corporation and Zeus Mineral Corporation — Court File No. S113459

19. **— Notice of Application, October 7, 2011**

*Bul River Mineral Corporation, Big Bear Metal Mining Corporation, Earth's Vital Extractors Limited, Fort Steele Mineral Corporation, Fort Steele Metals Corporation, Fused Heat Ltd., Gallowai Metal Mining Corporation, Giant Steeples Mineral Corporation, Grand Mineral Corporation, International Feldspar Ltd., Jao Mine Developers Ltd., Kutteni Diamonds Ltd., Stanfield Mining Group Of Canada Ltd., Sullibin Mineral Corporation, Sullibin Multi Metal Corporation, Super Feldspars Corporation, White Cat Metal Mining Corporation, Zeus Metal Mining Corporation, Zeus Metals Corporation and Zeus Mineral Corporation*, Court File No. S113459 (Supreme Court of British Columbia)

**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. 2002, c. 57 and the *Business Corporations Act*, R.S.A. 2000, c. B-9 — and — In the Matter of Bul River Mineral Corporation, Big Bear Metal Mining Corporation, Earth's Vital Extractors Limited, Fort Steele Mineral Corporation, Fort Steele Metals Corporation, Fused Heat Ltd., Gallowai Metal Mining Corporation, Giant Steeples Mineral Corporation, Grand Mineral Corporation, International Feldspar Ltd., Jao Mine Developers Ltd., Kutteni Diamonds Ltd., Stanfield Mining Group of Canada Ltd., Sullibin Mineral Corporation, Sullibin Multi Metal Corporation, Super Feldspars Corporation, White Cat Metal Mining Corporation, Zeus Metal Mining Corporation, Zeus Metals Corporation and Zeus Mineral Corporation Petitioners**

Form 32 (Rule 8-1(4))

Vancouver Registry

*IN THE SUPREME COURT OF BRITISH COLUMBIA*

**Notice of Application**

*Names of applicants: The Petitioners c/o Suite 2300, 550 Burrard Street, Vancouver, British Columbia V6C 2B5, Attention Colin D. Brousson*.

To: All Parties on the Service List maintained by Deloitte & Touche Inc., the Court-Appointed Monitor:

TAKE NOTICE that an application will be made by the applicants to the Honourable Madam Justice Fitzpatrick, as arranged through Trial Division, at the courthouse at 800 Smithe Street, Vancouver, British Columbia, V6Z 2E1 on Thursday, October 13, 2011 at 9:00 a.m. for the orders set out in Part 1 below.

**Part 1: Order(s) Sought**

1. An order substantially in the form attached as Schedule "A" to this Notice of Application:

(a) extending the stay period (the "*Stay Period*") pronounced in the order made in these proceedings on May 23, 2011 (the "*Initial Order*") to January 13, 2011;

(b) approving Secondary DIP (Interim) Financing and a charge to secure that Secondary DIP Financing;

 

(c) increasing the Administration Charge created by and pronounced in the Initial Order to a maximum of $350,000.00.

**Part 2: Factual Basis**

***Extension of Stay***

1. On May 26, 2011 Madam Justice Fitzpatrick granted the Stay Period in the Initial Order to stay all proceedings against the Petitioners until midnight June 23, 2011 subject to further extension by the court.

2. On June 23, 2011 Madam Justice Fitzpatrick extended the Stay Period to expire on October 13, 2011 subject to further extension by the court (the "*First Extension*").

3. Since the First Extension the Petitioners have diligently pursued the creation and negotiation of a plan of arrangement and have achieved significant progress in that regard.

4. The plan of arrangement that is being developed involves:

(a) a potential merger of the Petitioners with a third party (the "*Third Party*"); and

(b) a new larger DIP facility that would:

(i) pay out both the existing DIP facility and the new DIP facility for which approval is now being sought; and

(ii) provide sufficient cash for the Petitioners to complete the restructuring in these proceedings.

5. The Petitioners have signed a letter of intent with the Third Party and are in the process of drawing up agreements in regard to the merger and the larger DIP facility.

6. Within a few weeks the Petitioners hope to have the agreements with the Third Party finalized subject to various conditions such as the approval of the stakeholders, the Monitor, the Court and appropriate regulatory bodies.

7. At the same time as the Petitioners have been pursuing and developing this plan of arrangement, the Petitioners have had the independent contractor (the "*Contractor*" as defined in my Affidavit #3) on the mine site and conducting the work required to complete an NI 43-101 compliant mineral resource estimate for the Gallowai Bul River Mine (the "*Resource Estimate Work*").

8. As of the date of this Affidavit the Contractor has conducted all of the on-site sampling and has provided the samples to the laboratory for assaying some time ago. The Contractor has received some of the assay results from the laboratory and expects all assay results to be received by the end of October. When the assay results are received they will be inserted into a geological model and forwarded to Rosco Postle Associates Inc. for consideration in the completion of a NI 43-101 compliant mineral resource estimate.

9. The Petitioners have also been cooperating with the Monitor and the Petitioners' legal counsel to comply with the claims process put in place by the order made in these proceedings on August 19, 2011 (the "*Claims Process*").

10. The Petitioners believe that a further extension of the Stay Period to January 13, 2011 will allow sufficient time for the finalization of the plan of arrangement, the completion of the NI 43-101 report, the completion of the Claims Process, and possibly for the holding of a meeting of stakeholders to vote on the plan of arrangement.

***Secondary DIP Lender's Charge***

11. Tallinn Mezzanine Finance Limited Partnership ("*Tallinn*") has advanced approximately $750,000.00 in DIP financing to the Petitioners since June, 2011. Tallinn prefers not to advance any further funds to the Petitioners.

12. The Petitioners' cash flow is such that additional funds are required to continue with the restructuring.

 

13. The Petitioners have arranged for new DIP financing to be provide by Mr. Peter Lacey. Mr. Lacey has agreed to provide up to $500,000.00 in secondary DIP financing pursuant to his agreement with the Petitioners (the "*Secondary DIP Funding*").

14. Tallinn is agreeable to Mr. Lacey providing the Secondary DIP Funding provided the security for the Secondary DIP Funding is subsequent in priority to Tallinn's security over the DIP Charge Assets (as defined in the order made in these proceedings on June 10, 2011).

***Increase in the Administration Charge***

15. The fees payable to the Petitioners' counsel, the Monitor and the Monitor's counsel (the "*Administrators*") are approaching the limit of the Administration Charge provided for in the Initial Order. It is the Petitioners' view that this charge should be increased to $350,000.00 (from the original $250,000.00) so that the fees of the Administrators can continue to be secured and the Petitioners can continue to work towards a plan of arrangement.

**Part 3: Legal Basis**

1. *Companies' Creditors Arrangement Act*, R.S.C. 1995, c. C-36, as amended; and

2. Rules 1-3, 4-4, 8-1, 8-5, 22-1 and 22-4 of the *Supreme Court Civil Rules*; and

3. The inherent jurisdiction of this Honourable Court.

**Part 4: Material to Be Relied On**

1. Affidavit of G.T. Hewison # 5 sworn and filed October 7, 2011;

The applicants estimate that the application will take 1 hour.

[_] This matter is within the jurisdiction of a master.

[×] This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33,

(b) file the original of every affidavit, and of every other document, that

(i) you intend to refer to at the hearing of this application, and

(ii) has not already been filed in the proceeding, and

(c) serve on the applicant 2 copies of the following, and on every other party one copy of the following:

(i) a copy of the filed application response;

(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: October 7, 2011

 

Signature of lawyer for applicants

Colin D. Brousson

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs • of Part 1 of this notice of application

[ ] with the following variations and additional terms:

.....

.....

.....

Date: .....

Signature of [_] Judge [_] Master

**Appendix**

*THIS APPLICATION INVOLVES THE FOLLOWING:*

[_] discovery: comply with demand for documents

[_] discovery: production of additional documents

[_] other matters concerning document discovery

[_] extend oral discovery

[_] other matter concerning oral discovery

[_] amend pleadings

[_] add/change parties

[_] summary judgment

[_] summary trial

[_] service

[_] mediation

[_] adjournments

[_] proceedings at trial

[_] case plan orders: amend

[_] case plan orders: other

 

[_] experts

**Schedule "A"**

**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. 2002, c. 57 and the *Business Corporations Act*, R.S.A. 2000, c. B-9 — and — In the Matter of Bul River Mineral Corporation, Big Bear Metal Mining Corporation, Earth's Vital Extractors Limited, Fort Steele Mineral Corporation, Fort Steele Metals Corporation, Fused Heat Ltd., Gallowai Metal Mining Corporation, Giant Steeples Mineral Corporation, Grand Mineral Corporation, International Feldspar Ltd., Jao Mine Developers Ltd., Kutteni Diamonds Ltd., Stanfield Mining Group of Canada Ltd., Sullibin Mineral Corporation, Sullibin Multi Metal Corporation, Super Feldspars Corporation, White Cat Metal Mining Corporation, Zeus Metal Mining Corporation, Zeus Metals Corporation and Zeus Mineral Corporation Petitioners**

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

**Order Made after Application**

| | | |
|---|---|---|
| BEFORE THE HONOURABLE | ) | THURSDAY, THE 13TH DAY |
| | ) | |
| MADAM JUSTICE FITZPATRICK | ) | OF OCTOBER, 2011 |

THE APPLICATION of the Petitioners coming on for hearing at Vancouver, British Columbia, on the 13th day of October, 2011; AND ON HEARING Colin D. Brousson, counsel for the Petitioners and other counsel as listed in Schedule "A" hereto; AND UPON READING the material filed, including the 5th Affidavit of G. T. Hewison sworn October 7, 2011; and the Second Report of Deloitte & Touche Inc. in its capacity as monitor of the Petitioners (the "*Monitor*") filed .....

THIS COURT ORDERS AND DECLARES THAT:

1. for the purposes of this Order the following terms shall have the following meanings:

(a) "*Administration Charge*" means the "Administration Charge" as defined in the Initial Order;

(b) "*DIP Lender's Charge*" means the "DIP Lender's Charge" as defined in the DIP Order;

(c) "*DIP Order*" means the order made in this Proceeding on June 10, 2011;

(d) "*Directors' Charge*" means the "Directors Charge" as defined in the Initial Order;

(e) "*Property*" means the "Property" as defined in the Initial Order;

(f) "*Initial Order*" means the order made in this Proceeding on May 26, 2011;

(g) "*Stay Period*" means the "Stay Period" as defined in the Initial Order;

**Confirmation of Relief and Extension of Stay**

2. The Stay Period is hereby extended to 11:59 p.m. Pacific Time on Friday, January 13, 2011 subject to further order of this Court;

**Secondary DIP Charge**

 

3. The Petitioners are hereby authorized and empowered to obtain and borrow under a credit facility from Peter Lacey (the "*Secondary DIP Lender*") in order to finance the continuation of the Business and preservation of the Petitioners' Property (as defined in the Initial Order) provided that borrowings under such credit facility shall not exceed $500,000.00 unless permitted by further Order of this Court.

4. Such credit facility shall be on the terms and subject to the conditions set forth in the commitment letter between the Petitioners and the Secondary DIP Lender dated October 7, 2011 (the "*Secondary Commitment Letter*"), filed in these proceedings.

5. The Petitioners are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "*Secondary Definitive Documents*"), as are contemplated by the Secondary Commitment Letter or as may be reasonably required by the Secondary DIP Lender pursuant to the terms thereof, and the Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the Secondary DIP Lender under and pursuant to the Secondary Commitment Letter and the Secondary Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of the Initial Order.

6. The Secondary DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "*Secondary DIP Lender's Charge*") only on such of the Property that is listed and described in *Schedule "A"* attached to this Order and the proceeds of the Property listed and described in Schedule "A", including without limitation, insurance proceeds (the "*DIP Charge Assets*"). The Secondary DIP Lender's Charge shall not secure an obligation that exists before this Order is made. Notwithstanding the priority described in paragraphs 34 and 36 of the Initial Order, the Secondary DIP Lender's Charge shall be third in priority over the DIP Charge Assets behind the Administration Charge and the DIP Lender's Charge and ahead of the Directors' Charge and ahead of all other charges including, where permitted by law, any lien, claim, charge, security interest, trust claim, right or encumbrance of any governmental, legislative, or regulatory authority, agency, commission, board or any court, tribunal or other law, regulation or bill making entity having or purporting to have jurisdiction on behalf of any nation, province or city, or other part (whether arising under any statute, law, contract or otherwise).

7. Any security documentation evidencing, or the filing, registration or perfection of the Secondary DIP Lender's Charge shall not be required, and the Secondary DIP Lender's Charge shall be effective as against the DIP Charge Assets and shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered or perfected subsequent to the Secondary DIP Lender's Charge coming into existence, notwithstanding any failure to file, register or perfect the Secondary DIP Lender's Charge.

8. The Secondary DIP Lender's Charge shall constitute a mortgage, security interest, assignment by way of security and charge on the DIP Charge Assets and the Secondary DIP Lender's Charge shall rank in priority to all security interests, trusts, liens, mortgages, charges and encumbrances and claims of secured creditors, statutory or otherwise other than the Administration Charge and the DIP Lender's Charge (collectively "*Encumbrances*"), in favour of any Person as against the DIP Charge Assets.

9. Except as otherwise expressly provided herein, or as may be approved by this Court, the Petitioners shall not grant or suffer to exist any Encumbrances over any of the Property that rank in priority to, or *pari passu* with the Secondary DIP Lender's Charge, unless the Petitioners obtain the prior written consent of the Monitor and the Secondary DIP Lender.

10. The Secondary DIP Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the Secondary DIP Lender shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; or (d) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, mortgage, security agreement, debenture, sublease, offer to lease or other agreement (collectively an "*Agreement*") which binds the Petitioners or any of them; and notwithstanding any provision to the contrary in any Agreement:

 

(a) the creation of the Secondary DIP Lender's Charge shall not create or be deemed to constitute a breach by the Petitioners or any of them of any Agreement to which they or it is a party;

(b) the Secondary DIP Lender shall not have any liability to any Person (as defined in the Initial Order) whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Secondary DIP Lender's Charge; and

(c) the payments made by the Petitioners or any of them pursuant to this Order and the granting of the Secondary DIP Lender's Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

11. Any charge created by this Order over leases of real property, mineral leases, mineral tenures and mineral claims in Canada shall only be a charge on any of the Petitioners' interest(s) in such real property leases, mineral leases, mineral tenures and mineral claims.

12. Notwithstanding any other provision of this Order or the Initial Order as amended:

(a) the Secondary DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Secondary DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under any of the Secondary Definitive Documents or the Secondary DIP Lender's Charge, the Secondary DIP Lender, upon two (2) days notice to the Petitioners and the Monitor, may apply to the Court for leave to enforce the rights and remedies available to it pursuant to Secondary Commitment Letter and the Secondary Definitive Documents and any additional rights and remedies available to it at law or in equity;

(c) the foregoing rights and remedies of the Secondary DIP Lender shall be binding on and enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Petitioners or any of them or the Property and the Secondary DIP Lender's Charge shall stand in priority to any right, title and interest claimed by a trustee in bankruptcy, receiver or receiver-manager appointed after the date of this Order.

13. The Secondary DIP Lender, in such capacity, shall be treated as unaffected in any plan of arrangement or compromise filed by the Petitioners under the CCAA, or any proposal filed by the Petitioners or any of them under the BIA, with respect to any advances made under the Secondary Definitive Documents.

**Limitation on Further Use of DIP Charge**

14. Tallinn Mezzanine Finance Limited Partnership shall not make any further advances of funds to the Petitioners pursuant to the Commitment Letter or the Definitive Documents (each as defined in the DIP Order), the Petitioner shall not accept any such further advances, and no such further advances shall be secured by the DIP Lender's Charge.

15. Tallinn Mezzanine Finance Limited Partnership shall not have a right of first refusal to provide further interim (DIP) financing to the Petitioners ("*ROFR*") and shall not purport to exercise such a ROFR.

**Increase in the Administration Charge**

16. The limit on the Administration Charge shall be and is hereby increased to $350,000.00.

THE APPROVAL OF COUNSEL SET OUT IN SCHEDULE "A" OF THIS ORDER IS HEREBY DISPENSED WITH:

Signature of

[_] Party [check] Lawyer for the Petitioners

Colin D. Brousson

 

BY THE COURT

REGISTRAR

**End of Document**

# TAB 34

# SUPERIOR COURT

**(Commercial Division)**
**The Companies' Creditors Arrangement Act,**
**R.S.C. 1985, c. C-36 (the "CCAA")**

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-038474-108

DATE: March 25, 2010

---

**UNDER THE PRESIDENCY OF: THE HONOURABLE ROBERT MONGEON, J.S.C.**

---

IN THE MATTER OF PLAN OF ARRANGEMENT AND COMPROMISE OF:

**WHITE BIRCH PAPER HOLDING COMPANY**
**and**
**WHITE BIRCH PAPER COMPANY**
**and**
**STADACONA GENERAL PARTNER INC.**
**and**
**BLACK SPRUCE PAPER INC.**
**and**
**F.F. SOUCY GENERAL LPARTNER INC.**
**and**
**3120772 NOVA SCOTIA COMPANY**
**and**
**ARRIMAGE DE GROS CACOUNA INC.**
**and**
**PAPIER MASSON LTÉE**

Debtors

**and**
**ERNST & YOUNG INC.**

Monitor

**and**
**DUNE CAPITAL LP, DUNE CAPITAL INTERNATIONAL LTD AND WTA DUNE LIMITED**

Petitioners

---

JUDGMENT ON PETITIONERS' AMENDED MOTION
TO REVISE THE INITIAL ORDER AND THE INTERIM FINANCING
AND TO OBTAIN OTHER RELIEFS
(articles 2, 20 and 46 of the *Code of Civil Procedure*, R.S.Q., c. C-25
and Sections 9 and following CCAA)

---

JM1838

[1] Dune Capital LP, Dune Capital International Ltd and WTA Dune Limited (collectively "Dune") are lenders under that certain Second Amended and Restated Second Term Loan Credit Agreement among White Birch Paper Holding company, White Birch Paper Company (two of the Debtors herein) as borrowers, and several lenders from time to time parties thereto. Credit Suisse Securities (USA) LLC is the Sole Lead Arranger, sole Bookrunner, Syndication Agent and Documentation Agent, while Credit Suisse Cayman Islands Branch is the US collateral Agent and Administrative Agent.[1] Crédit Suisse Toronto Branch (C.S. Toronto) is the Canadian Collateral Agent and Administrative Agent. This Second Lien Term Loan is dated April 8, 2005 and was amended and restated on January 27, 2006 and on May 2007.

[2] This loan is for a total amount of US100 000 000,00$

[3] Dune is a "Majority Lender" under the said Second Lien Term Loan, to the extent of US$61.5 million.

[4] Dune is therefore an important secured creditor of the Debtors.

[5] On February 24, 2010, I granted the Debtors' Motion for the Issuance of an Initial Order pursuant to Sections 11 and following of the Companies' Creditors Arrangement Act (the "CCAA").

[6] The Initial Order provides for the usual terms and conditions, as well as Interim financing in the amount of US$140 million together with the usual Interim Financing Charge, ranking immediately after the Administration Charge the D&O Charge, but ahead of all other mortgages, hypothecs and other secured debts of the Debtors, including any secured debts under the Second Lien Term Loan.

[7] Dune's first contention is that its position as a secured lender of US$61.5 million is most definitely affected by the Initial Order and Interim Financing Charge.

[8] Dune alleges that it was not notified of the Originating Motion and claims that the Debtors did not respect both the letter and spirit of section 11.2(1) CCAA which reads as follows:

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

[1] See Exhibit CS-1

**(emphasis added)**

[9] This is a serious allegation. The whole substance of the CCAA is based upon the principle of having and maintaining a "level playing field' among the various stakeholders involved in a restructuring process, especially when the restructuring will seriously affect the rights of lenders, suppliers and other creditors of a company seeking the protection of the CCAA. As a result, Dune takes the position that the Interim Financing Agreement should be rescinded or, alternatively limited to US$115 million. Conclusions [D], [E], [F] and [G] of its Amended Motion dated march 18, 2010 read as follows:

...

**[D] RESCIND (1) the interim financing agreement provided in the Initial Order, (ii) paragraphs 28 to 36 of the Initial Order and (iii) all references to the Interim Financing, DIP, Interim Financing Documents, Interim Lenders Expenses and Interim Financing Charge in the Initial Order;**

**ALTERNATIVELY, but without prejudice to the foregoing:**

**AMEND para 28 of the Initial Order as follows:**

> **ORDERS that, notwithstanding any other provision of this Order but subject to paragraph 38, the Petitioners and the Partnership be and are hereby authorized to borrow from the interim Lenders such amounts from time to time as the Petitioners and Partnerships may consider necessary or desirable, up to a maximum combined principal amount of USD$[...]115 million, on the terms and conditions set forth in the Interim Financing Credit Agreement, attached hereto in draft form as Exhibit P-3 (subject to such amendments and modifications as the parties may agree with, provided such amendments or modifications are approved by the Monitor and do not conflict with the provisions of this Order) and in the Interim Financing Documents (as defined hereinafter), to fund firstly, full repayment of all amounts outstanding under the Revolving ABL Financing and thereafter, the ongoing expenditures of the Petitioners and Partnerships and to pay such other amounts as are permitted by the terms of this Order, the Interim Financing Credit Agreement and the Interim Financing Documents (as defined hereinafter).**

**[E] ORDER a further hearing on or before April 23, 2010 as to the appropriateness to authorize further credit on the Interim Financing;**

**[F] REDUCE the Interim Financing Charge to the aggregate amount of $115 million and AMEND paragraph 32 of the Initial Order accordingly;**

**[G] ORDER the payment of the interests under the Interim Financing Agreement on the same basis than the First Lien Agreement;**

[10] Dune seeks this conclusion not only because it allegedly did not get proper prior notice and was deprived from its right to make representations prior to the issuance of the Initial Order and DIP Loan but also because, over the last several months, it has allegedly been denied access to important information which, as a result, has allegedly deprived it from the possibility of entering into forbearance and/or waiver agreements with the Debtors, with respect to the latter's obligations. Furthermore, Dune complains that throughout the period of September 2009 until February 2010, the Second Lien Lenders have been left out of restructuring discussions between the First Lien Lenders and the Debtors to a point where the proposed restructuring will be detrimental to Dune's position. In other words, Dune was not given the opportunity to adequately protect its position in the current process.

[11] For a better understanding of Dune's position and to avoid any risk of misinterpreting its representation of the facts, I reproduce below the most important excerpts of Dune's Amended Motion:

...

**19. On September 22, 2009, for the first time, WB requested a comprehensive forbearance of its obligations to pay interest due on September, 30, 2009 under the Second Lien Agreement. WB also requested that such forbearance be executed by no later than September 29, 2009.**

**20. On September 25, 2009, the Majority Lenders (i.e. Dune) called CS Toronto (i.e. Crédit Suisse Toronto), in its capacity as Administrative Agent under the Second Lien Agreement, to obtain a copy of the Register of the lenders, as defined at Section 10.5(d) of the Second Lien Agreement (the "Register"), in order to organize the Second Lien Agreement lenders in connection with the Debtors' request for a forbearance. CS Toronto then requested a written request prior to providing any information, including the Register.**

**21. The Majority Lenders' US counsel then sent to CS Toronto a written request to obtain the Register, the whole as appears from a copy of a letter dated September 25, 2009 communicated in support hereof as Exhibit R-1.**

**22. As appears from Exhibit R-1, the Majority Lenders' US counsel also emphasized, given the deadline of September 29, 2009 imposed by the Debtors to conclude a forbearance, that "[a]*ny delay on the part of the Administrative Agent in producing the Register could seriously prejudice the Second Lien Lenders' ability to consider the Borrower's proposal and further compromise the Second Lien Lenders' substantial rights under the Agreement*".**

**23. On September 29, 2009, the day of the deadline imposed by the Debtors to execute the forbearance, the Majority Lenders' US counsel wrote to WB, WB**

Holding and CS Toronto's US counsel to advise them that despite several requests to obtain the Register, it never obtained it, the whole as appears from a copy of a letter dated September 29, 2009 communicated in support hereof as Exhibit R-2.

24. In Exhibit R-2, the Majority Lenders' US counsel also noted the following :

> As a result of the Agent's refusal to comply with this simple request, the Second Lien Lenders have been deprived of any meaningful opportunity to consider the Borrower's last-minute request for a comprehensive waiver/forbearance of its interest payment obligations. In contrast, we understand that the Agent has been in substantial contact with the first Lien Lenders for weeks (including an organized lender call last week) regarding the Borrower's proposed restructuring - a consideration yet to be extended to the Second Lien Lenders - and that the First Lien Lenders have already retained counsel and financial advisors in connection therewith. Given that the First Lien Lenders have hired both counsel and financial advisors, the Second Lien Lenders anticipate having to do so as well. While the First Lien Lenders have been actively involved in discussions concerning the proposed restructuring, the Second Lien Lenders have been deliberately excluded from any such discussions and denied even the most fundamental information necessary for the Second Lien Lenders to confer with one another. Engaging with the First Lien Lenders while stonewalling the Second Lien Lenders is not only improper but wholly inconsistent with a party acting in good faith to exact considerable concessions from the Second Lien Lenders in an effort to avoid an Event of Default.
>
> We hereby again request a copy of the Register immediately. Any further delay on the part of the Borrower or Agent may further and substantially prejudice the Second Lien Lenders' substantial rights under the Agreement. Any and all rights the Second Lien Lenders may have in connection with the Borrower's or Agent's actions or inactions to date or in the future are hereby expressly reserved.
>
> [our emphasis]

25. On September 30, 2009, the Majority Lenders' US counsel wrote to CS Toronto's US counsel the following :

> On our call yesterday afternoon, we learned for the first time that your client, Credit Suisse (i.e., the Second Lien Lenders' Agent in connection with the above-referenced Agreement), has withheld from the Second Lien Lenders potentially material information regarding the Borrower or the Borrower's proposed restructuring discussions with the First Lien Lenders. During our call, we requested all material information provided to the First Lien Lenders that is relevant to the Borrower's current financial condition and proposed restructuring. In response, you proposed to put us in touch with Borrower's counsel so that we can seek such information directly from them. While we appreciate your assistance (albeit belatedly) in putting us in

> touch with counsel for the Borrower, we remind you that your client remains the Agent for the Second Lien Lenders. Accordingly, the Second Lien Lenders reiterate their demand that the Agent turn over all relevant information relating to the Borrower's current financial condition and proposed restructuring. We further request that the Agent provide us with a detailed description of the actions it has taken - if any - in the last 90 days to protect the rights of the Second Lien Lenders and provide us with proposals for how to maximize Second Lien Lenders' recovery going forward.
>
> [our emphasis]

the whole as appears from a copy of a letter dated September 30, 2009 communicated in support hereof as Exhibit R-3.

26. On the same day, but after the Majority Lenders' US counsel sent Exhibit R-3, CS Toronto and CS Cayman advised the Second Lien Agreement lenders that they immediately respectively resigned as Administrative Agent, Canadian Collateral Agent and US Collateral Agent under the Second Lien Agreement, the whole as appears from a copy of a letter dated September 30, 2009 communicated in support hereof as Exhibit R-4.

27. In Exhibit R-4, CS Toronto and CS Cayman also specified that they had already advised WB of their resignation.

28. However, CS Toronto and CS Cayman did not resign as Administrative Agent, Canadian Collateral Agent and US Collateral Agent under the First Lien Agreement.

29. On October 1, 2009, CS Toronto and CS Cayman's US counsel advised the Majority Lenders' US counsel that its clients resigned as Administrative Agent, Canadian Collateral Agent and US Collateral Agent under the Second Lien Agreement, the whole as appears from a copy of a letter dated October 1, 2009 communicated in support hereof as Exhibit R-5.

30. On the same day, the Majority Lenders' US counsel advised CS Toronto and CS Cayman's counsel that they could not resign immediately as Administrative Agent, Canadian Collateral Agent and US Collateral Agent given that the Second Lien Agreement provides, at Section 9.9, that the agent must give a "30 days' notice to the Lenders and the Borrower" (our emphasis) of its resignation, the whole as appears from a copy of a letter dated October 1, 2009 communicated in support hereof as Exhibit R-6.

31. On October 7, 2009, the Majority Lenders' US counsel with the support of two other lenders under the Second Lien Agreement, namely Caspian Capital Partners, L.P. and Caspian Select Credit Master Fund, Ltd., sent to CS USA and CS Toronto a notice of default dealing with WB's failure to make the interest payment due on September 30, 2009 under the Second Lien Agreement, the

whole as appears from a copy of a letter dated October 7, 2009 communicated in support hereof as Exhibit R-7.

32. On October 8, 2009, CS Toronto notified WB and WB Holding of (i) its resignation as Administrative Agent and Canadian Collateral Agent under the Second Lien Agreement and (ii) the resignation of CS Cayman as US Collateral Agent under the Second Lien Agreement as follows:

> As you are aware, we have notified you pursuant to that certain letter dated as of September 30, 2009 of our resignation as Administrative Agent and as Canadian Collateral Agent under the Second Lien Credit Agreement, and of the resignation of Credit Suisse, Cayman Islands Branch, as US Collateral Agent under the Second Lien Credit Agreement, which resignations will be effective on October 30, 2009.
>
> [our emphasis]

the whole as appears from a copy of a letter dated October 8, 2009 communicated in support hereof as Exhibit R-8.

33. Afterwards the Majority Lenders, through their US counsel, for some time tried to conclude a forbearance agreement with the Debtors. However, such agreement never materialized given that the Debtors systematically refused to assume (i) the fees of Wells as Administrative Agent under the Second Lien Agreement and (ii) the Majority Lenders' legal fees. In a nutshell, the Debtors wanted the Majority Lenders to agree to forbear certain defaults, but were not ready to grant any consideration whatsoever to the Second Lien Agreement lenders.

34. During the last week of December 2009, the Majority Lenders reached out to CS Toronto on two occasions via phone so as to confirm the contact information for audit confirmations. The Majority Lenders did not get any response from CS Toronto.

35. On January 5, 2010, the Majority Lenders spoke with a representative of CS Toronto, namely Edith Chan, who informed them that CS Toronto was no longer the Administrative Agent under the Second Lien Agreement and that it could not comment or help out with any of the Majority Lenders' requests.

36. On January 26, 2010, the Majority Lenders contacted a representative from WB, namely Ed Sherrick, to confirm their year-end position, but were told that he could not help them.

37. On February 24, 2010, the Debtors served and presented their Petition for an Initial Order. As appears from the Notice of Presentation to said petition (the "Notice of Presentation"), neither the Majority Lenders nor any lenders under the Second Lien Agreement were served. However, as appears from, *inter alia*, paras. 23 and 32 herein and Exhibits R-2 and R-8, the Debtors clearly knew (i) that the Majority Lenders were represented by counsel and (ii) that CS

Toronto and CS Cayman had resigned as Administrative Agent, Canadian Collateral Agent and US Collateral Agent under the Second Lien Agreement as of October 30, 2009.

38. Although Credit Suisse, CS USA and CS Toronto received the Notice of Presentation, they never, verbally or otherwise, notified the Majority Lenders of the presentation of the Petition for an Initial Order.

39. On February 24, 2010, this Court issued the Initial Order which provided for an Interim Financing of up to a maximum combined principal amount of USD$140 million (para. 28 of the Initial Order). The Administrative Agent and Canadian Collateral Agent under the Interim Financing Agreement is also CS Toronto as mentioned above, the whole as appears from a copy of said Interim Financing Credit Agreement communicated in support hereof as Exhibit R-9.

40. After midday on February 24, 2010, the Majority Lenders learned, through the newswires, that the Debtors filed their Petition for an Initial Order. The Majority Lenders learned the Initial Order had been entered when it was posted by the proposed Monitor several hours later.

41. On March 4, 2010, the Majority Lenders' Canadian counsel wrote to the Debtors' Canadian counsel to advise it that the Majority Lenders never received proper notice of the Petition for an Initial Order, the whole as appears from a copy of a letter dated March 4, 2010 communicated in support hereof as Exhibit R-10.

42. In Exhibit R-10, the Majority Lenders' Canadian counsel also requested, *inter alia*, the following:

    (i) a copy of the Register or other confirmation of each of the Lenders' loan position as of year-end 2009;

    (ii) an unconditional undertaking from the Debtors to pay for the legal fees that the Majority Lenders will incur to intervene in the *CCAA* Proceedings and the relevant proceedings in the United States, as required to protect their position, the whole as provided for, *inter alia*, at Section 10.4(b) of the Second Lien Agreement; and

    (iii) the acceptance by the Debtors to the appointment of Wells or any of its affiliates, branches or subsidiaries as Administrative Agent, Canadian Collateral Agent and US Collateral Agent under the Second Lien Agreement, as well as an undertaking that the Debtors will do everything that is required to render effective such appointment.

43. On March 5, 2010, the Debtors' Canadian counsel answered to the Majority Lenders' Canadian counsel. In a nutshell, the position of the Debtors' Canadian counsel was that:

(i) **the Majority Lenders received proper notice given that CS Toronto, the Administrative Agent under the Second Lien Agreement, received notice, despite CS Toronto's resignation, given that the latter would still act as a *de facto* agent;**

(ii) **the Majority Lenders did not need to obtain notice of the Interim Financing given that only the "*secured creditors who are likely to be affected by the security*" need notification and the Majority Lenders are not such creditors;**

(iii) **it would not disclose the Register or other confirmation of each of the lenders' loan position and that the Majority Lenders should seek such information from other parties;**

(iv) **the Debtors will not pay for the legal fees that the Majority Lenders will incur to intervene in the *CCAA* Proceedings and the relevant proceedings in the United States; and**

(v) **the Debtors would not contest the appointment of Wells as Administrative Agent, Canadian Collateral Agent and US Collateral Agent, but will not pay the fees and costs of Wells;**

**the whole as appears from a copy of a letter dated March 5, 2010 communicated in support hereof as Exhibit R-11.**

44. **On March 11, the Majority Lenders' Canadian counsel wrote to the Debtors' Canadian counsel to respond to the latter's letter, the whole as appears from a copy of a letter dated March 11, 2010 communicated in support hereof as Exhibit R-12. In said letter, the Majority Lenders expressed their disagreement with the position expressed by the Debtors in the March 5 letter. In addition, the Majority Lenders advised the Debtors of the conclusion they would be seeking in the present Motion.**

[12] In summary, the foregoing raises the following issues:

- the refusal to furnish copy of the Register to Dune;
- the consequences of not including Dune in the restructuring discussions in September/October 2009;
- the consequences of the resignation of CS Toronto as Canadian Administrative Agent and its replacement by Wells Fargo Inc;
- the payment of fees, disbursements and other charges including fees of legal advisors for both Dune and Wells Fargo Inc.;
- the lack of Notice of presentation of the Motion of Issuance of the Initial Order;
- Access to certain financial information.

[13] These facts give rise to the following additional conclusions:

**[H] ORDER the Debtors to pay for the legal fees of the Majority Lenders, both before and after the issuance of the Initial Order, to intervene in the *CCAA* Proceedings and the relevant proceedings in the United States, as is required to protect their position, the whole as provided for, *inter alia*, at Section 10.4(b) of the Second Lien Agreement;**

**[I] APPOINT Wells or any sub-agent of its choosing as Administrative Agent, Canadian Collateral Agent and US collateral agent under the Second Lien Agreement;**

**[J] ORDER the Debtors to pay all the fees and disbursements, both before and after the issuance of the Initial Order, including legal fees, of Wells as Administrative Agent, Canadian Collateral Agent and US Collateral Agent under the Second Lien Agreement as provided for in said agreement;**

**[K] AMEND para. 51 of the Initial Order as follows:**

> **DECLARE that, as security for the reasonable fees, charges and disbursements incurred both before and after the making of this Order in respect of these proceedings, the Plan and the Restructuring, the Petitioners' and Partnerships' legal and financial advisors, the Monitor, [...]the Monitor's legal counsel, Wells Fargo, the Majority Lenders' (namely Dune Capital LP, Dune Capital International Ltd. and WTA Dune Limited) legal counsel and Wells Fargo's legal counsel be entitled to the benefit of and are hereby granted a hypothec on, mortgage of, lien on, and security interest in the Property to the extent of the aggregate amount of $3,000,000 (the "Administration Charge") having the priority established by paragraphs 52 and 53 hereof.**

**[L] ORDER the Debtors to provide the following financial information by no later than 5:00 p.m. on March 23, 2010**

> **(i) the Debtors' financial statements for the fourth quarter of 2009;**
>
> **(ii) the Debtors' annual financial statements for the 2009 fiscal year;**
>
> **(iii) financial statements for each of WB and WB Holding subsidiaries (quarterly and annual for the past 5 yrs);**
>
> **(iv) the Debtors' company budget for 2010;**
>
> **(v) all of the sources and uses of the Interim Financing;**

**(vi) fees paid to-date to advisors and lawyers, broken down between the Debtors, [...] First Lien Agreement lenders, agents, Interim Lenders and others;**

**(vii) unpaid fees, if any, to advisors and lawyers, broken down between the Debtors and First Lien Agreement lenders;**

**(viii) weekly report, on an ongoing basis, of fees paid or to be paid to advisors and lawyers, broken down between the Debtors and First Lien Agreement lenders;**

**(ix) the Debtors' most current working capital balances;**

**(x) weekly update of the Debtors' 13-week Cash Flow forecasts;**

**(xi) an accounting of all of the management fees paid by the Debtors to Brant Paper, Inc. for the last five years and weekly updates, on an ongoing basis, of same; [...]**

**(xii) the quarterly and annual financial statements for SP Newsprint Co. for the last five (5) years;**

**(xiii) all information provided to Interim Lenders, as and when such information is provided, whether verbally, in writing, by electronic access, by Intralink or otherwise; and**

**(xiv) all drawing notices by the Debtors under the Interim Financing Agreement.**

**[M] THE WHOLE with costs against any contesting party.**

[14] I shall deal, firstly with Dune's request to rescind and/or amend the DIP Financing and DIP Financing Charge.

[15] Confronted with Dune's allegation that it was not advised of, nor served with the Motion, the Debtors strongly object.

[16] The Debtors take the position that Crédit Suisse Toronto, as Canadian Administrative Agent, continues to act as "*de facto*" Agent for the Second Lien Lenders until they are replaced as per the terms of the Second Lien Loan Agreement (CS-1). As a result, by effecting service upon C.S. Toronto, service of the Originating Motion was completed in accordance with the Law. The Debtors further add that the name of Crédit Suisse Toronto still appears as the holder of the security resulting from the publication of the Second Lien Term Loan Agreement. Consequently, inasmuch as the name of the holder of the security remains unchanged at the Registre des droits personnels et réels mobiliers (see Exhibit I), service upon Crédit Suisse Toronto remains valid.

[17] The Debtors further add that in any event, neither Dune nor any other Second Lien Lender had to be served, because the DIP loan and DIP charge were not likely to affect their security by reason of the other prior ranking charges affecting the fixed assets upon which Dune's security is granted.

[18] As for C.S. Toronto, although this entity was represented by counsel at both hearings (February 24 and March 18, 2010) before me, it had no explanation to offer either on the question of service of the Originating Motion, or on the question of what it did (or did not do) with the notice, once it was received. What seems to be clear, however, is that C.S. Toronto did not see appropriate to forward the notice of Originating Motion to its former principals, the Second Lien Lenders in general and Dune in particular. Such behaviour is surprising, given the serious consequences.

[19] Dune submits that the DIP should not have been granted without proper notice and representations on its part. Dune adds that if, nonetheless, the granting of a DIP was in order, it should have been limited to an amount necessary to "keep the lights on", as stated by Blair J. in Re: *Royal Oak Mines Inc.* [1999] 6 CBR (4th) 314 (Ont. Sc.) and by Gascon J. in Re: *Boutiques San Francisco Inc.* [2003] QJ. No 18940 (QL) Que. J.C.).

[20] However, Dune does not raise any additional argument to rescind the DIP, save the fact that it did not get notice. Dune adds, however, that the Debtors' argument suggesting that notice was in any event not called for because of the fact that Dune's security had no value and, consequently, that Dune's rights were unaffected by the DIP, is ill-founded.

[21] Dune further argues that it is currently not in a position to assess the appropriateness of the DIP nor is it in a position to determine the value of its security without the financial information which, as at March 18, 2010 was still unavailable to it. During the hearing of Dune's Motion on March 18, I was informed that Dune had reached an agreement in principle with the Debtors with respect to the financial information to be furnished. This agreement will be ratified once it is reduced to writing and forwarded to me.

[22] It appears, therefore, that Dune does not wish to see a DIP charge of US$140 million rank ahead of its own security but having been deprived of financial information, it cannot really assess the Debtors' financial position. In other words, Dune is still in the process of analysing the financial situation of the Debtors.

[23] For the foregoing facts, I draw the following conclusions:

a) the Debtors did not give notice to Dune, a "secured creditor likely to be affected by the security or charge "contemplated" in section 11.2(1) CCAA.

b) Notice to Crédit Suisse Toronto was insufficient within the context of this particular matter, in that the Debtors knew that the latter had resigned and, by virtue of section 9.9[2] of the Second Lien Term Loan Agreement, one of the Lenders (if appointed by Dune as Successor Administrating Agent) or all the Lenders were successor(s) to C.S. Toronto.

c) Crédit Suisse Toronto, although it had resigned its function as Administrative Agent, should, if not legally obliged to do so but at least as a basic courtesy, have forwarded the said Notice to the lenders instead of ignoring it. In so doing, CS Toronto should have realized that it was putting its former principals in a delicate situation.

d) Dune did not take any steps to ensure that the Second Lien Lenders would be adequately represented, following the resignation of Crédit Suisse Toronto. Dune had an obligation to cause a successor agent to be appointed among the Second Lien Lenders and if it was unable to find one willing to accept the function, it should have appointed itself. Dune's inaction most certainly did not help establishing a proper channel of communications between the Debtors and the Second Lien Lenders. Moreover, by insisting upon an undertaking of the Debtors to pay its fees and disbursements as well as those of Wells before any successor agent was appointed, given the precarious financial position of the Debtors already in default of paying interest under the First and Second Lien Loans, was a sure way to cause severe disruptions in communications.

[24] Finally, I cannot avoid mentioning that both counsel for the Debtors and counsel for the DIP Lender and CS Toronto should have informed me of the problem at the hearing of February 24. Instead, they chose to ask the Court for a declaration that proper and sufficient notice had been given to all interested stakeholders although both knew that service had been effected upon the Second Lien Lenders through an Agent which had resigned and without ensuring that such agent was taking or, alternatively, had not taken steps to forward the notice to the said Lenders. As for the argument that there was in any event no need to serve notice to the Second Lien Lenders because they were supposedly not affected by the DIP loan and charge, this is rather specious in the absence of a complete and thorough evaluation of all the assets and liabilities of the Debtors. To rely strictly upon the calculation of fixed assets calculated on the basis of cost less accumulated depreciation is, to say the least, not the most sophisticated way to determine a value of said assets. In other words, I am far from being convinced that the rights of the Second Lien Lenders are not likely to be affected by the DIP Loan.

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[2] This section is cited in part below. It provides for the replacement of the Administrative Agent, once the latter resigns. The procedure is clearly outlined and there is no apparent reason not to follow it.

[25] Once, as I am convinced, it appears evident that the Second Lien Lenders, in general and Dune in particular, have not been notified as they had a right to be, what should be done to try to correct the situation?

[26] Dune argues that it should be allowed to attend a new hearing where the whole issue of the opportunity of granting a DIP loan and corresponding super-priority should be debated "*de novo*". Given the above-noted facts, I agree with Dune's submission.

[27] In order to ensure the protection of the rights of all concerned, this debate took place on March 18, 2010. The Monitor was examined and cross-examined on the contents of his two Reports[3]. A representative of the Debtors, Mr Jay Epstein also testified and was cross-examined. Finally, a representative of Dune, Mr. Andrew M. Cohen was cross-examined on the contents of his Affidavit of March 12, 2010.

[28] I am now in a position to re-consider the whole question of whether a DIP Loan and corresponding super-priority should be varied, modified, rescinded or maintained on the same basis as it was authorized on February 24, 2010.

[29] Firstly, the CCAA now clearly identifies the principal criteria to be considered by this Court when a DIP Loan and Corresponding charge are required. Section 11.2(4) CCAA reads as follows:

> **11.2(4) Factors to be considered – In deciding whether to make an order, the court is to consider, among other things,**
>
> **a) the period during which the company is expected to be subject to proceedings under this Act;**
>
> **b) how the company's business and financial affairs are to be managed during the proceedings;**
>
> **c) whether the company's management has the confidence of its major creditors,**
>
> **d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;**
>
> **e) the nature and value of the company's property;**
>
> **f) whether any creditor would be materially prejudiced as a result of the security or charge; and**
>
> **g) the monitor's report referred to in paragraph 23(1)(b), if any.**

[3] A first pre-filing preliminary Report was filed at the hearing of February 24, 2010 and a second Report was filed in the context of the hearing of the present Motion

[30] After hearing the Monitor and the representative of the Debtors, I am satisfied that a DIP Loan and corresponding charge are required to ensure that the business enterprise of the Debtors will continue to operate as a going concern while it undergoes restructuring.

[31] I am also satisfied that the Debtors are likely to be subject to proceedings under the CCAA for several months and the Court's duty is to ensure that the Debtors will enjoy enough cash flow to go through with the restructuring.

[32] I also believe that the DIP Loan will not only enhance the prospects of a viable compromise but I also believe that without this loan, the Debtors will not be able to survive.

[33] Even if certain creditors will be materially affected by the DIP loan, -and that may include the Petitioners herein -, I have to look at the broader picture as it is presented to me by the Monitor, and conclude that the compromise which Dune may have to accept is outweighed by the positive effects of the DIP Loan on the total business enterprise of the Debtors.

[34] The only discordant note is that of the Petitioners herein, who suggest that they might do better with the recuperation of their investment if the Debtors go bankrupt.

[35] The above cited criteria appear to have been taken into account by the Monitor in its first two reports. It should be added that the Court need not consider all of the said criteria nor is it compelled to read an affirmative conclusion on all seven criteria. This list is neither mandatory nor limitative. One thing is sure: the Monitor has adequately demonstrated that the Debtors need the US$140 million in Interim Financing and without this money, there is a strong likelyhood that the Debtors would not survive for long, jeopardizing the livelyhood of more than a thousand employees.

[36] In addition, although the amount of US$140 million is mentioned in terms of the total DIP Loan, a substantial portion, thereof, does not seriously affect the financial position of Dune.

[37] The Monitor has clearly outlined the projected use and allocation of the US$140 million in its Report dated March 17, 2000[4]:

> **20. The process used to seek out a lender for the Interim Financing, the negotiations thereof, the financing needs and the significant terms of the credit negotiated with the Black Diamond Group are all described in the report of the Monitor, dated February 23, 2010. The contents of this report, as regards these issues, are still relevant.**

[4] Report of the Monitor – March 17, 2010. This is, in fact, the second Report filed. A first Report identified as a preliminary pre-filing Report was filed at the hearing of February 24, 2010.

**21. As indicated earlier in this Report, the Interim Financing was authorized by the Initial Order, and by a provisional order made in the U.S. Court (Appendix B). The credit agreement and related guarantees, security and pledge agreements necessary to document the Interim Financing were executed on March 1, 2010.**

**22. Contemporaneously with the execution of these documents, WB Group received a first draw against the delayed draw term loan, of US$86.5 million. The proceeds from this first draw were used to repay the indebtedness to General Electric Capital Corporation (US$51.2 million), to pay interest accrued on the GE indebtedness (US$330,000) and to pay the fees provided for in the agreement that were payable at closing[5] (US$7.1 million). The balance of the funds, or US$27.8 million, was retained to enhance the cash on hand in anticipation of having to fund negative cash flow, as provided in the WB Group's cash flow projections.[6]**

**23. An additional draw of US$6.5 million was made on March 8, 2010, and these funds were retained to enhance the cash on hand in anticipation of having to fund negative cash flow. The two draws made to date represent total borrowings under the Interim Financing of US$93 million.**

[38] The Monitor further adds the following to justify the balance of unused funds (as at March 18, 2010):

**27. In view of the favourable variance in results as compared with the projections prepared by WB Group concurrently with the inception of the restructuring process (Appendix D), and the fact that to date, two draws were made, a portion of which was used to enhance the cash position in anticipation of having to fund negative cash flow, WB Group's cash on hand currently stands at approximately US$61.4 million, as at March 12, 2010.**

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[5] These are the fees described in the Monitor's report dated February 23, 2010, as the arranger's fee of 2.5% of the committed funds, the initial fee of 2.5% of the committed funds and the administrative fee of US$100,000 payable at closing. These fees are described in paragraphs 41.4.2, 41.4.3 and 41.4.7 of the said report.

28. We consider that the amount of cash reserves is reasonable in the circumstances, for the following reasons:

28.1 As indicated in paragraph Erreur ! Source du renvoi introuvable. above, we consider that the favourable variance between the projected and actual cash flow, to date, is attributable in large part to timing differences. The reversal of these timing differences, when they occur, could cause a substantial drawdown of US$39.5 million in the cash reserves.

28.2 The activities of WB Group are subject to large variations in the cash balances, from one day to the next, due to the size of the transactions with some of the customers and suppliers. For example, over a two day period in the week ended March 5, 2010, the cash position decreased by approximately $13.5 million.

28.3 There are restrictions in the Interim Financing credit agreement, regarding the amounts that can be borrowed, and the advance notice period to effect a draw. Under the Interim Financing credit agreement, WB Group must notify the lender 10 days in advance, when it intends to draw funds under the Interim Financing credit facility. In view of the long delay and the need to have cash immediately available to pay for goods and services or to provide deposits to suppliers, WB Group must retain a large cash reserve, to enable it to continue making payments if there is a temporary slowdown in cash receipts from customers. Based on WB Group's cash flow projections (Appendix D), 10 days' worth of disbursements could represent between US$15 million and US$43 million, and average US$28 million.

28.4 The Interim Financing credit facility is structured as a term loan, while the funding needs of the WB Group are periodic or temporary. Since the funds cannot be drawn again if there is a repayment under the term loan, the excess funds have to be retained as a cash reserve, if the excess fund situation is expected to be temporary. In the present case, the majority of the funds were drawn very early on in the process, before management of WB Group could ascertain that favourable variances would occur as compared with the projections. This led to the excess funds situation, and the excess funds cannot be returned as management of WB Group expects that the excess funds situation is only temporary.

29. Management provided us with an updated cash flow projection for WB Group, for the 13 weeks ending June 4, 2010, and these cash flow

**projections are attached to this report as Appendix F[7]. The opening cash position, on these cash flow projections, represents the actual cash on hand as of March 5, 2010, and the projection for the week of March 6-12, 2010 reflects the actual draw of $6.5 million against the credit facility. The remainder of the amounts presented for the week of March 12, 2010 represent a projection, as the projections have not yet been updated to reflect the actual results for the week ended March 12, 2010. The actual results for that week will still present a favourable variance, since the projection reflects cash on hand of US$53.5 million, while the actual cash on hand was US$61.4 million. As indicated earlier herein, we consider these variances are, for the most part, a timing difference.**

**30. These projections (Appendix F) suggest that WB Group will need to make further draws against the credit facility in the near future, in order to maintain cash reserves sufficient to support the on-going operations. The projections (Appendix F) suggest that notwithstanding the fact that WB Group currently has a large cash balance, additional funds will be required as early as late March 2010, and that the term loan will be fully drawn (i.e. borrowings of $122 million, taking into consideration the reserves and carved out amounts) by the end of April 2010. The projections (Appendix F) indicate that based on the expected receipts and disbursements activity, the cash reserves of WB Group would be completely depleted at the end of April 2010 without additional drawings under the Interim Financing credit facility and that even with the additional borrowings, the cash reserves will decrease to US$18.5 million by June 4, 2010.**

**31. The projections (Appendix F) suggest that during the projection period, the gross carrying value of accounts receivable and inventories is expected to vary from US$155.9 million (as at March 5, 2010) to US$169.2 million as at June 4, 2010. As such, the projections (Appendix F) suggest that some of the cash flow is necessary to finance an increase in accounts receivable and inventories, of approximately US$13.3 million.**

**32. In view of the above comments, the Monitor still believes that the Interim Financing is warranted and required, in an amount and on terms consistent with that described in the Monitor's report dated February 23, 2010.**

[39] In contrast, Dune is not really concerned with the viability of the Debtors. It has only one interest: its own, as it is reflected in a comment outlined by the Monitor at paragraph 8 of his Report of March 17, 2010:

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[7] Management has also provided us with an updated cash flow projection for WB Canada, for the 13 week period ending June 4, 2010, extracted from the above-mentioned projection for the WB Group, and prepared on the same basis. This cash flow projection is attached as Appendix G.

**8. On March 15, 2010, a statement was filed by the Dune Group in the proceedings under the Code in respect of Bear Island, in view of the hearing scheduled to take place on March 22, 2010. The statement filed in the context of the proceedings in the U.S. Court in this respect is attached as Appendix C. In the said statement, at paragraph 11 thereof, the Dune Group states that:**

> **"The Majority Second Lien Lenders do not oppose the Debtor's request to use cash collateral or obtain the DIP Loan. Moreover, the Majority Second Lien Lenders do not object to this Court's grant of adequate protection to the First Lien Lenders. The Majority Second Lien Lenders simply demand additional adequate protection for their own interests."**

**In essence, the statement seeks the disclosure of additional information, an increased level of "adequate protection" and/or the payment of fees and expenses incurred and to be incurred by the lenders under the Second Term Loan, and in consequence seeking modifications to the interim financing credit agreement.**

[40] On balance and having reconsidered the whole question of the DIP financing and DIP Charge as requested by Dune, I conclude that there is no reason to vary or change the Initial Order of February 24, 2010 on this issue.

[41] Accordingly, conclusions [D], [E], [F] and [G] of Dune's Motion must be dismissed.

[42] Dune also seeks the payment of its professional fees, costs and expenses during the Stay period.

[43] During the hearing of March 18, 2010, I questioned the legal basis upon which Dune relies to seek these reliefs. In my opinion and with respect for the contrary view, I must say that I found none, nor was I presented with one.

[44] Dune argues that theses fees, costs and expenses are due under the terms and conditions of the Second Lien Term Loan. That may be so but inasmuch as the Stay Order of February 24, 2010, suspends the Debtors' obligation to pay principal and interest under the said Loan Agreement, it follows that incidental additional costs due by the Debtors under the same Agreement are also suspended.

[45] Otherwise, there would be little or no interest in seeking and obtaining protection under the CCAA.[8]

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[8] See Janis Sarra, .Rescue! The Companies' Creditors Arrangement Act, Thorson Carswell 2007, pages 33 and 34.

A Stay Order.... Allow[s] the debtor respite from litigation and enforcement of various contractual obligations during the proceeding.... Furthermore, a Stay Order ...[has] the ability to suspend actions

[46] Sections 11, 11.01 and 11.02 CCAA are quite clear. The only exception to this general rule is the protection of rights of suppliers under Section 11.02 when payment for goods and services provided after the Stay Order, or requiring the further advance of money or credit. Clearly, the fees, costs and expenses of Dune do not fall within this exception. Dune does not ask for payment for goods and/or services sold, delivered or rendered after the Initial Order. It is asking for the payment of a pre-filing obligation, i.e. to pay for certain expenses incurred or to be incurred by Dune for its own benefit and advantage, including but without limitation, the costs of acting against the interests of the Debtors and for the sole interests of Dune.

[47] These requests of Dune simply cannot be granted.

[48] In addition, Dune is seeking an Order appointing Wells Fargo ("Wells") as Administrative Agent, Canadian Collateral Agent and US Collateral Agent under the Second Lien Loan Agreement, together with an Order for the payment of the professional fees costs and expenses of Wells.

[49] This demand cannot be granted unless all of the parties thereto consent.

[50] At this point, the consent of all concerned is not available. Some of the Second Lien Lenders are not before me. In addition, the Debtors, although they have no objection to the appointment of Wells, are not prepared to consent to all of the conditions of said proposed appointment, namely the payment of costs fees and expenses of Wells. Furthermore, the Second Lien Loan Agreement contains specific provisions governing the appointment of a successor to Crédit Suisse Toronto, which provisions must, and shall, govern such appointment in the absence of proper consent. These provisions read as follows (page 106 of Exhibit CS-1):

> 9.9 **Successor Agents. (a) The Administrative Agent, the US Collateral Agent and the Canadian Collateral Agent may resign as Administrative Agent, US collateral Agent or Canadian collateral Agent, respectively, upon 30 days' notice to the Lenders and the Borrower. If the Administrative Agent, US Collateral Agent or Canadian Collateral Agent shall resign as Administrative Agent, US Collateral Agent or Canadian Collateral Agent, as applicable, under this Agreement and the other Loan Documents, then the Majority Lenders shall appoint from among the Lenders a successor agent for the Lenders, which successor agent shall (unless an Event of Default shall have occurred and be continuing) be subject to approval by the Borrower (which approval shall not be unreasonably withheld or delayed), whereupon such successor agent shall succeed to the rights, powers and duties of the Administrative Agent, the US Collateral Agent or the Canadian collateral Agent, as applicable, and the term "Administrative Agent",**

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against the Debtor while discussions towards a restructuring.are continuing, to avoid a race of the swiftest creditors that would deplete the debtors' assets. ,...

> **"US Collateral Agent" or "Canadian Collateral Agent", as applicable, shall mean such successor agent effective upon such appointment and approval, and the former Agent's rights powers and duties as Administrative Agent, US Collateral Agent or Canadian collateral Agent, as applicable, shall be terminated, without any other or further act or deed on the part of such former Agent or any of the parties to this Agreement or nay holders of the Loans. If no successor agent has accepted appointment as Administrative Agent, US a Agent or Canadian Collateral Agent, as applicable, by the date that is 30 days following a retiring Agent's notice of resignation, the retiring Agent's resignation shall nevertheless thereupon become effective, and the Lenders shall assume and perform all of the duties of the Administrative Agent, US collateral Agent or Canadian collateral Agent, as applicable, hereunder until such time, if any, as the Majority Lenders appoint a successor agent as provided for above.**
>
> **(emphasis added)**

[51] My understanding of the above citation is that in the event of resignation of the Administrative Agent, such resignation must be preceded by a 30-day notice and then, the "Majority Lenders" under the said Second Lien Loan Agreement, namely Dune, shall appoint a successor from among the Lenders a successor agent. Wells is not a Lender and cannot be so appointed unless all parties consent, including all Lenders. If the majority Lenders (i.e. Dune) does not appoint either itself or another Lender, then all of the Lenders, acting together are obliged to perform all the duties of the Administrative Agent.

[52] In the context of CCAA proceedings and once again, in the absence of a consent of all parties concerned, I have no reason to substitute my decision to the clear and unambiguous contractual dispositions cited above. It is up to Dune as a "Majority Lender" to act and not for me to impose Wells to parties who are not prepared to agree to all the terms and conditions of its appointment.

[53] As for the payment of fees, expenses and costs of the Administrative Agent, its successor and/or replacement, be it Wells, Dune, another Lender or anyone else, my comments are the same as those expressed previously on the same issue.

[54] In the end result, this Motion is dismissed, but without costs, except for the ratification of the forthcoming agreement of the parties with respect to the production of documents and financial information.

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Date of hearing: March 18, 2010