COURT OF APPEAL OF ALBERTA

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STATUS ON APPEAL:	APPELLANT
DEFENDANT/RESPONDENT:	CANADIAN NATURAL RESOURCES LIMITED
STATUS ON APPEAL:	RESPONDENT
DOCUMENT:	**FACTUM**

Appeal from the Decision of
The Honourable Justice M.H. Bourque
Dated the 26th day of January, 2026
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FACTUM OF THE RESPONDENT, CANADIAN NATURAL RESOURCES LIMITED

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PART I. FACTS

A. INTRODUCTION

1. Blue Sky Resources Ltd. ("**Blue Sky**") is an oil and gas company that filed a proposal proceeding under the *Bankruptcy and Insolvency Act*[1] on September 24, 2025 (the "**NOI Proceedings**").[2] The following day, Alberta Energy delivered a Gas Royalty Arrears: Leaseholder Recourse Default Letter (the "**Royalty Default Notice**") to all third party leaseholders (collectively, the "**Lessees**") registered on petroleum and natural gas leases ("**PNG Leases**") from which Blue Sky received gas production and failed to pay associated royalties (the "**Royalty Arrears**"). Instead of first advancing its claim for the Royalty Arrears in the NOI Proceedings, Alberta Energy defaulted all Lessees on applicable PNG Leases and required that they pay the Royalty Arrears or face draconian consequences, including termination of the PNG Leases.

2. By Reasons for Decision issued January 26, 2026,[3] the Honourable Justice Bourque (the "**Chambers Judge**") held that Alberta Energy was not permitted to circumvent the NOI Proceedings. Like all stakeholders, Alberta Energy was required to first advance its claims in the NOI Proceedings prior to seeking any recoveries from Lessees. If any Royalty Arrears remained in the Blue Sky estate at termination or expiration of the stay of proceedings (the "**Stay**"), such Royalty Arrears were Lessee obligations. The Chambers Judge's decision was fully supported by the evidence, based on a plain and ordinary reading of the *Mines and Minerals Act*[4] and applicable Regulations,[5] and is a proper application of the single proceeding model. There are no errors in the Chambers Judge's Decision. Alberta Energy's appeal should be dismissed.

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[1] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("**BIA**").

[2] The Stay in the NOI Proceedings expires on March 24, 2026. On March 20, 2026, ACES Canada SPV III ULC filed an application for appointment of a Receiver over Blue Sky. At the time of filing this Factum, the application is scheduled to be heard by the Honourable Justice Little on March 23, 2026.

[3] Reasons for Decision, issued January 26, 2026 ("**Reasons for Decision**" or the "**Decision**") [Appeal Record, p. 018-028].

[4] *Mines and Minerals Act*, RSA 2000, c M-17 ("**MMA**").

[5] *Natural Gas Royalty Regulation*, 2009, Alta Reg 221/2008 ("**2009 NGRR**"); *Natural Gas Royalty Regulation*, 2017, Alta Reg 211/2016 ("**2017 NGRR**" and together with the 2009 NGRR, the "**Regulations**").

B. FACTS

(i) *The Parties*

3. Canadian Natural Resources Limited ("**Canadian Natural**") is a corporation incorporated pursuant to the laws of the Province of Alberta, with an office in Calgary, Alberta. Canadian Natural is one of the largest natural gas and heavy crude producers in Canada and royalty payors in Alberta (and elsewhere).[6]

4. Alberta Energy is a department within the Government of Alberta which administers, manages and regulates non-renewable resources, including petroleum and natural gas mineral rights, in the Province of Alberta.[7]

5. Blue Sky is a corporation incorporated pursuant to the laws of the Province of Alberta, with an office in Calgary, Alberta. Blue Sky is a private oil and gas exploration company with assets in Alberta, British Columbia and Saskatchewan.[8]

(ii) *Blue Sky's NOI Proceedings*

6. On or about September 24, 2025, Blue Sky filed the NOI Proceedings and KSV Restructuring Inc. was appointed Proposal Trustee (the "**Proposal Trustee**").[9]

7. On November 21, 2025, the Honourable Justice Johnston granted an Order (Approval of Sale and Investment Solicitation Process) approving a sale and investment solicitation process in the NOI Proceedings (the "**SISP**").[10] As at the date of this Factum, six transactions have been approved by the Court in the NOI Proceedings.[11]

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[6] Affidavit of Erin Lunn, sworn November 14, 2025 ("**Lunn Affidavit**") at paras 3-4 and Exhibit A [Appellant's Extracts of Key Evidence ("**AEKE**"), pp. 008, 027-031].

[7] Lunn Affidavit at para 7 [AEKE, p. 009]; Affidavit of Wayne Taljit, sworn December 12, 2025 ("**Taljit Affidavit**") at para 5. [AEKE, p. 009].

[8] Lunn Affidavit at para 8 and Exhibit B [AEKE, pp. 009, 033-035].

[9] Lunn Affidavit at para 9 and Exhibit C [AEKE, pp. 009, 037]; Reasons for Decision at p. 1:34-38 [Appeal Record, p. 20].

[10] Reasons for Decision at p. 1:38 – 2:3 [Appeal Record, pp. 020-021].

[11] Approval and Vesting Orders have been granted by the Court approving transactions with Spur Petroleum Ltd., Tamarack Valley Energy Ltd., Obsidian Energy Ltd., Peyto Exploration & Development Corp., Baytex Energy Ltd., and Canadian Natural. See the Proposal Trustee's website for copies of Approval and Vesting Orders: https://www.ksvadvisory.com/experience/case/blue-sky-resources-ltd.

(iii) ***Royalty Default Notice***

8. On September 25, 2025, following commencement by Blue Sky of the NOI Proceedings, Canadian Natural and other Lessees on PNG Leases with Blue Sky received the Royalty Default Notice from Alberta Energy. The Royalty Default Notice advised that:

(a) Blue Sky's gas royalty account no. G94 166910 (the "**Blue Sky Royalty Account**") has an outstanding balance of $1,872,563.84, including interest calculated to October 31, 2025 (defined above as the Royalty Arrears), and in respect of which Alberta Energy may pursue all available recourse to remedy the Royalty Arrears;

(b) all registered lessees on the PNG Leases are jointly responsible for the full amount of the Royalty Arrears, regardless of their proportionate interest in a lease;

(c) unless the Royalty Arrears are paid in full, Alberta Energy may exercise remedies against any lessee, regardless of whether such lessee has an interest in the PNG Lease from which the applicable Royalty Arrears relate; and

(d) unless full payment of the Royalty Arrears was remitted to Alberta Energy on or before October 31, 2025, Alberta Energy may pursue various remedies, including cancelling the affected PNG Leases.[12]

9. Canadian Natural reviewed the Royalty Default Notice and had concerns about the issuance of it during the pendency of the NOI Proceedings. Canadian Natural accordingly requested that Alberta Energy agree to stay any enforcement of the debts noted in the Royalty Default Notice until the issue had been fully determined by the Court.[13] Numerous other lessees expressed similar concerns to Alberta Energy, including Cenovus Energy Inc. ("**Cenovus**"), Ovintiv Canada ULC ("**Ovintiv**"), Whitecap Resources Inc. and Sinopec Canada Energy Ltd.[14] Alberta Energy declined to stay enforcement of the Royalty Arrears.

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[12] Lunn Affidavit at para 11 and Exhibit E [AEKE, pp. 009-010, 046-048]; Taljit Affidavit at para 37 and Exhibit I [AEKE, pp. 277, 318-320]; Reasons for Decision at p. 2:16-21 [Appeal Record, p. 021].

[13] Lunn Affidavit at para 13 and Exhibit G [AEKE, pp. 011, 052-054]; Taljit Affidavit at para 39 and Exhibit L [AEKE, pp. 277, 323-325]; Reasons for Decision at p. 2:27-33 [Appeal Record, p. 021].

[14] Lunn Affidavit at para 15 and Exhibits I to L [AEKE, pp. 011-013, 060-070]; Reasons for Decision at p. 2:27-33 [Appeal Record, p. 021].

10. In light of Alberta Energy's refusal to stay enforcement of the Royalty Arrears, on October 31, 2025, Canadian Natural remitted payment to Alberta Energy under protest of its proportionate share of the Royalty Arrears. Twenty-one other companies also remitted their proportionate share of the Royalty Arrears to Alberta Energy, many under protest.[15]

11. Canadian Natural also filed an Application seeking declarations from the Court responding to Alberta Energy's attempts to circumvent the NOI Proceedings and recover the Royalty Arrears directly from the Lessees without first advancing its claims within the NOI Proceedings.[16]

(iv) ***Hearing of the Application and Reasons for Decision***

12. The Application was heard by the Chambers Judge on January 14, 2026. Canadian Natural was supported in its position by Ovintiv and Cenovus. Indian Oil and Gas Canada ("**IOGC**") made submissions in support of Alberta Energy.

13. On January 26, 2026, the Chambers Judge delivered his Reasons for Decision, granting Canadian Natural's Application (including all declarations sought) and holding that:

(a) the Royalty Default Notice, and all demands for payment by Alberta Energy contained therein, constitutes a claim provable in bankruptcy against Blue Sky or exercise of a remedy by Alberta Energy against Blue Sky's property, which must be advanced by Alberta Energy in the NOI Proceedings prior to seeking any recoveries from Canadian Natural or any other Lessee;

(b) the Royalty Default Notice, and all demands for payment by Alberta Energy contained therein, were subject to the Stay imposed by section 69 of the *BIA* in the NOI Proceedings; and

(c) Alberta Energy was precluded from collecting any payments related to the Royalty Arrears until such time as the Stay is terminated or expires, following which Alberta Energy is entitled to proceed in the normal course to recover any Royalty Arrears

[15] Lunn Affidavit at paras 25 and 26 [AEKE, pp. 016-017]; Taljit Affidavit at para 42 [AEKE, p. 278]; Reasons for Decision at p. 2:35-40 [Appeal Record, p. 021].

[16] Application of Canadian Natural, filed November 27, 2025 [Appeal Record, pp. 005-016].

> relating to the PNG Leases remaining in the Blue Sky estate, which have not been assigned to a purchaser in the NOI Proceedings, and which are not otherwise payable as "cure costs" pursuant to the terms of an Approval and Vesting Order, Reverse Vesting Order or such further or other order as may be granted by the Court in the NOI Proceedings.[17]

14. The Chambers Judge also made various directions relating to the disclosure of information by Alberta Energy to Lessees with respect to the Royalty Arrears.[18]

15. On February 4, 2026, Alberta Energy filed a Notice of Appeal with respect to the whole of the Decision and seeking a reversal thereof. Notwithstanding the all-inclusive scope of the Notice of Appeal, no submissions were made by Alberta Energy in the ABE Factum[19] regarding the Chambers Judge's directions on information disclosure. Canadian Natural accordingly confirmed with Alberta Energy that it was no longer pursuing this portion of the Appeal.

PART II. GROUNDS OF APPEAL

16. Canadian Natural does not take issue with the grounds of appeal at paragraphs 27 and 28 of the ABE Factum.

17. Canadian Natural submits that the grounds of appeal at paragraphs 25 and 26 of the ABE Factum were not findings made by the Chambers Judge.

18. With respect to paragraph 25, the Chambers Judge's finding was narrower than stated by Alberta Energy. The Chambers Judge held that Alberta Energy's claims against Blue Sky (not the Lessees) were claims provable in bankruptcy and, as such, subject to the statutory stay under the BIA. This was a stand alone finding made by the Chambers Judge and does not speak to why Alberta Energy's claims against the Lessees must also be stayed. The Chambers Judge stayed Alberta Energy's claims against the Lessees based on the single proceeding model and the language of the MMA and Regulations.

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[17] Reasons for Decision at pp: 3:1-17 and 4:41 – 5:5 [Appeal Record, pp. 018-026]; Order at paras 1-4 [Appeal Record, pp. 029-033].

[18] Reasons for Decision at pp: 5:29 – 6:10 [Appeal Record, pp. 024-025]; Order at para 6 [Appeal Record, p. 031].

[19] Factum of Alberta Energy, filed February 27, 2026 ("**ABE Factum**")

19. With respect to paragraph 26, the Chambers Judge held that Alberta Energy was required to advance its claims in the NOI Proceedings because of the single proceeding model. Alberta Energy's ability to recover cure costs supported this conclusion as the claim was determined to be "particularly apt for resolution" under the single proceeding model.[20] However, it was not the reason for the Chambers Judge's determination. Any appeal of the Chambers Judge's consideration of cure costs is subsumed in the ground of appeal at paragraph 25 of the ABE Factum (as modified above).

PART III. STANDARD OF REVIEW

20. Canadian Natural agrees that the standard of review applicable to the interpretation of the MMA, the Regulations, and the PNG Leases is correctness.

21. Canadian Natural submits that, contrary to Alberta Energy's submissions, the highly deferential standard of review applicable "when an appellate court is reviewing the exercise of discretion by a supervising judge in the bankruptcy context"[21] applies to the Chambers Judge's determinations regarding the scope of the stay of proceedings and the application of the single proceeding model. Both are exercises of the Chambers Judge's broad discretion in managing the NOI Proceedings. As stated by the Supreme Court of Canada in *Callidus Capital*, a high degree of deference is owed to discretionary decisions made by judges supervising insolvency proceedings. Appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably.[22] Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's.[23]

22. Determinations regarding the scope of a stay of proceedings is a quintessential exercise of judicial discretion. As noted by Justice Lederman in *Golden Griddle Corp. v Fort Erie Truck &*

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[20] Reasons for Decision, p: 3:23 [Appeal Record, p. 022].

[21] *Harmon International Industries Inc. (Re),* 2020 SKCA 95 ("***Harmon International***") at paras. 40-41. See also: *Invico Diversified Income Limited Partnership v Newgrange Energy Inc*., 2025 ABCA 392 at para. 21.

[22] *9354-9186 Québec inc. v Callidus Capital Corp*., 2020 SCC 10 ("***Callidus Capital***") at para 53. While the Supreme Court made this comment in the context of CCAA proceedings, the same principles apply to other types of insolvency proceedings, including proceedings under the BIA. See, for example, *Harmon International* at paras 40-41 in which the Saskatchewan Court of Appeal applied the deferential standard of review articulated by the Supreme Court to proceedings under the BIA, finding that "[b]ankruptcy and insolvency matters [..] are governed by their own standard of review, which accords considerable deference to the Chambers judge."

[23] *Callidus Capital* at para 53.

Travel Plaza Inc., and repeatedly cited in subsequent jurisprudence, the scope of the stay "should be approached contextually on a case-by-case basis and the remedy sought should be considered in terms of its impact on the objectives of the statutory stay provision. It is the impact rather than the generic nature of the relief sought which should govern."[24] As the impact of the stay in any given case will differ based on the circumstances therein, determinations regarding the scope of the stay have repeatedly been found to warrant significant deference. Both this Court in *Weinrich Contracting Ltd v Wiebe*[25] and the British Columbia Court of Appeal in *Paladin Labs Inc. v British Columbia*[26] have held that interpretation of the scope of the stay by an insolvency court is entitled to deference.

23. Similarly, the Chambers Judge's application of the single proceeding model is a discretionary determination which is owed the same high level of deference by this Court. In *Petrowest*, the Supreme Court, in discussing the single proceeding model, noted that section 183(1) of the BIA grants bankruptcy courts a "broad scope of authority" to deal with bankruptcy disputes within a single proceeding, as anything less would "unnecessarily complicate and undermine" the underlying purpose of insolvency proceedings.[27] The Supreme Court further held that determination regarding whether to apply this authority in a specific case is "necessarily a highly factual one" which requires, among other things, a consideration of "the policy imperatives underpinning bankruptcy and insolvency law."[28]

24. In the case of both the stay of proceedings and the single proceeding model, the Chambers Judge was clearly alive to the fact-specific considerations in the NOI Proceedings, finding that the single proceeding model was "particularly apt for resolution of Alberta Energy's claims," given the nature of the underlying debt and Alberta Energy's privileged position, and that bypassing the single proceeding model would "[upset] the delicate balancing of creditor rights within the NOI

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[24] *Golden Griddle Corp. v Fort Erie Truck & Travel Plaza Inc*., 2005 CanLII 81263 (ON SC) at para 12. See also: *Blade Energy Services Corp (Re)*, 2024 ABKB 100 at para 22, appeal dismissed on grounds of mootness 2025 ABCA 14; *1635623 Alberta Ltd (Adrenaline Diesel and Bonnie's Equipment Services Ltd.) (Re)*, 2022 ABQB 361 at para 22; *Re Emergency Door Service Inc*., 2016 ONSC 5284 at paras 29-31.

[25] *Weinrich Contracting Ltd v Wiebe*, 2022 ABCA 176 at paras 19, 22, 23 and 33.

[26] *Paladin Labs Inc. v British Columbia*, 2022 BCCA 365 at paras 28 – 30.

[27] *Peace River Hydro Partners v Petrowest Corp*., 2022 SCC 41 at paras. 54-55 ("***Petrowest***"), citing *Eagle River International Ltd. (Re)*, 2001 SCC 92 at para 38

[28] *Petrowest* at paras 72-74.

proceedings."[29] In making such determinations, the Chambers Judge was exercising his broad authority to interpret the scope of the Stay and deal with disputes within the NOI Proceedings. Such holdings are entitled to significant deference by this Court.

PART IV. ARGUMENT

A. The Royalty Arrears are Claims Provable in Bankruptcy

25. The Chambers Judge correctly found that Alberta Energy's claims for the Royalty Arrears are "claims provable in bankruptcy" pursuant to sections 2 and 121 of the BIA.[30] There was no error in this holding. It is supported by:

(a) the details of the Royalty Arrears and the process Alberta Energy followed for recovery thereof, including that the Royalty Arrears (i) exist in the Blue Sky Royalty Account (not the royalty accounts of any Lessee), (ii) relate to gas production taken by Blue Sky, from which Blue Sky benefitted and in respect of which Blue Sky was liable to pay associated royalties, and (iii) were invoiced by Alberta Energy to Blue Sky;

(b) a grammatical and ordinary reading of the MMA and Regulations which, as noted by the Chambers Judge, establishes an ordering of liability to ensure the party who benefited from the production bears the burden for associated royalty obligations in first instance; and

(c) the provisions of section 20(2.1) of the MMA which establish joint liability for the Royalty Arrears, not joint and several liability as argued by Alberta Energy.

Each of these matters is addressed below.

(i) The Blue Sky Royalty Arrears

26. The Chambers found that the Royalty Arrears are "an amount owed by Blue Sky to Alberta

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[29] Reasons for Decision. p. 3:22-25, 32-33 [Appeal Record, p. 022].

[30] BIA at ss. 2 (definition of "claim provable in bankruptcy") and 121.

Energy" and that they "represent a debt that was incurred by Blue Sky".[31] The Chambers Judge further found that Blue Sky "took the Crown's share of the production".[32] There was abundant evidence before the Chambers Judge to make these findings and, as discussed further below, they align squarely with industry practice and with the structure of the MMA and the Regulations. There is no error in the Chamber Judge's finding on this issue.

27. First, and most fundamentally, the Royalty Arrears relate specifically to gas production taken in kind by, or gas production revenues paid to, Blue Sky.[33] Blue Sky benefitted from the receipt of gas production, and was liable for payment of associated royalties. None of the Lessees benefitted from the gas production giving rise to the Royalty Arrears.

28. Second, and as discussed further below with respect to the MMA and Regulations, royalties are calculated on production, not on registered ownership in a PNG Lease.[34] On June 30, 2025, Alberta Energy issued Invoice No. 00000550886 (the "**Royalty Invoice**") to Blue Sky in the amount of $1,941,823.05 for royalties payable on gas production it received during the April 2025 billing period.[35] The Royalty Invoice reflected the status of the Blue Sky Royalty Account, showing the royalties payable by Blue Sky for production it received, together with available credits and adjustments existing in the Blue Sky Royalty Account. The Royalty Invoice was specific to Blue Sky, and Blue Sky was the only noted addressee and recipient thereof.

29. When Blue Sky failed to pay the $1,941,823.05 provided in the Royalty Invoice, Alberta Energy issued a collection notice to Blue Sky on July 10, 2025 advising that, "[y]our account is past due."[36] A further letter was issued by Alberta Energy to Blue Sky on August 12, 2025, advising that "[t]he royalty balance on this account remains outstanding despite out requests to have it brought to a current status." The letter further noted (reflecting the ordering of liability found by the Chambers Judge) that if Blue Sky was "unable or unwilling to pay the outstanding

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[31] Reasons for Decision at p. 3:14-15 [Appeal Record, p. 022].

[32] Reasons for Decision at p. 5:9 [Appeal Record, p. 024]

[33] Reasons for Decision at p. 3:13-17 and 5:7-17 [Appeal Record, pp. 022 and 024]; Lunn Affidavit at paras 18, 19, 21, 22 [AEKE, pp. 013-015].

[34] Lunn Affidavit at paras 18, 19, 21, 22 [AEKE, pp. 013-015]; Taljit Affidavit at para 30 [AEKE, p. 276]; 2009 NGRR at ss. 1(1)(xx), 15 and Schedule 1; 2017 NGRR at ss. 1(1)(bbb), 16 and Schedule 1; Reasons for Decision at p. 3:13-17 and 5:7-21 [Appeal Record, pp.022 and 024].

[35] Taljit Affidavit at para 35 and Exhibit E [AEKE, pp. 277 and 313].

[36] Taljit Affidavit at para 35 and Exhibit F [AEKE, pp. 277 and 314].

royalty balance, [Alberta Energy] will use the recourses available to the Crown to clear those balances. Failure to remit payment by the time specified may result in, but is not limited to, pursuing payment through all current leaseholders."[37] A final demand letter was issued to Blue Sky by Alberta Energy on September 23, 2025, again advising, "[a] review of our records indicates that Blue Sky Resources Ltd. have *[sic]* outstanding debts owed to Alberta Energy and Minerals."[38] The following day, Blue Sky filed the NOI Proceedings.[39]

30. Third, the nature of the interests giving rise to the Royalty Arrears is important, particularly when considered in the context of the provisions of the MMA and the Regulations. PNG Leases provide the holder thereof with the right to drill for, and recover, minerals within the specified location.[40] A PNG Lease may have one or more lessees registered with Alberta Energy as the holder thereof.[41] A company's status as a registered lessee on a PNG Lease does not mean that such company has an interest in all wells drilled on the PNG Lease, or in all production produced from the PNG Lease.[42] Each well drilled on a PNG Lease will have working interest holders who may, or may not, hold a registered interest in the PNG Lease.[43] The working interest holders in each well receive their proportionate share of the production from that well, thereby giving rise to royalty obligations.[44] Royalties are calculated on production received by working interest holders, not on the registered interests held by lessees on a PNG Lease.[45]

31. Here, Blue Sky held a working interest in all PNG Leases giving rise to the Royalty Arrears, as it received production from each PNG Lease. It also was a registered lessee on PNG Leases.[46]

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[37] Taljit Affidavit at para 35 and Exhibit G [AEKE, pp. 277 and 315].

[38] Taljit Affidavit at para 35 and Exhibit H [AEKE, pp. 277 and 316-317].

[39] Reasons for Decision at p. 1:37-38 [Appeal Record, p. 020]; Lunn Affidavit at para 9 and Exhibit C [AEKE, pp. 009 and 037].

[40] Taljit Affidavit at para 8 [AEKE, p. 273].

[41] Taljit Affidavit at paras 7-8 [AEKE, p. 273].

[42] Lunn Affidavit at para 22 [AEKE, p. 015].

[43] Lunn Affidavit at para 22 [AEKE, p. 015].

[44] Lunn Affidavit at paras 18, 19, 21, 22 [AEKE, pp. 013-015]; Taljit Affidavit at para 30 [AEKE, p. 276]; 2009 NGRR at ss. 1(1)(xx), 15 and Schedule 1; 2017 NGRR at ss. 1(1)(bbb), 16 and Schedule 1; Reasons for Decision at p. 3:13-17 and 5:7-21 [Appeal Record, pp.022 and 024].

[45] Lunn Affidavit at paras 18, 19, 21, 22 [AEKE, pp. 013-015]; Taljit Affidavit at para 30 [AEKE, p. 276]; 2009 NGRR at ss. 1(1)(xx), 15 and Schedule 1; 2017 NGRR at ss. 1(1)(bbb), 16 and Schedule 1; Reasons for Decision at p. 3:13-17 and 5:7-21 [Appeal Record, pp.022 and 024].

[46] Lunn Affidavit at paras 18-19, 21-22 [AEKE, pp. 013-015]; Supplemental Affidavit of Wayne Taljit, sworn on January 8, 2026 at para 6 [AEKE, p. 385].

As discussed further below, the distinction between working interest holder and registered lessee becomes important when viewed within the context of the MMA and the Regulations. The structure established therein for allocation, invoicing and liability reflects this distinction and mirrors industry practice. Both make Blue Sky (as owner of the gas production (i.e. a working interest holder)) liable in first instance for the Royalty Arrears, with Lessees serving only as a statutory backstop to this otherwise third party payment obligation.

32. This distinction is also important with respect to the suggestions in the ABE Factum that Blue Sky "did not hold an ownership interest" in PNG Leases on which it was not registered and that "a sizable portion of the Outstanding Royalties accrued under Crown Leases where Blue Sky has *no interest*, other than being designated a royalty client."[47] There is no merit to Alberta Energy's suggestion that a working interest is not an ownership interest. As this Court confirmed in *IFP Technologies* "'working interest' in relation to mineral substances *in situ* is a particular kind of property right or interest in land. When the owner of minerals *in situ* (the Crown in this case) leases the right to extract these minerals…the right to extract is known as a 'working interest'… simply stated, 'working interest' constitutes the *percentage of ownership* that an owner has to explore, drill and produce minerals from the lands in question."[48] This Court further noted:

> When PCR signed leases with the Crown to extract petroleum substances from the lands included in Eyehill Creek, it obtained a 100% working interest in those oil and gas leases with the sole right to extract the resources therein. Therefore, when PCR in turn agreed to dispose of 20% of its working interest in Eyehill Creek to IFP, that "working interest" constituted a proportionate share of PCR's right to extract the minerals under the oil and gas leases, whether Crown or freehold, that it held in Eyehill Creek....[49]

33. There is also no merit to Alberta Energy's suggestion that Blue Sky received production under PNG Leases in which it held *no interest*. The evidence before the Chambers Judge (and the Chambers Judge's finding) was that the Royalty Arrears all arise from, and relate to, production

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[47] ABE Factum at paras 40 and 59. With respect to Alberta Energy's reference to a "sizeable portion", there was no evidence before the Chambers Judge regarding the quantum (sizeable or otherwise) of Royalty Arrears owing under any given PNG Lease. Alberta Energy refused to provide this information to Lessees, notwithstanding their requests for same. See: Lunn Affidavit at para 24 [AEKE, p. 015-016].

[48] *IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing*, 2017 ABCA 157 ("***IFP Technologies***") at para 98, leave to appeal dismissed 2018 CanLII 28111 (SCC). [Emphasis in original]

[49] *IFP Technologies* at para 100.

received by Blue Sky.[50] Blue Sky didn't receive gas production because it is a stranger to the PNG Leases. It received production because it has a working interest therein.[51]

34. With that background on the Chambers Judge's findings regarding the substance of the Royalty Arrears, the provisions of the MMA and Regulations can be considered.

(ii) The MMA and Regulations

35. The Chambers Judge held that the MMA and the Regulations set up a mechanism that ensures that the Crown's royalty share is paid in first instance by the party who took the Crown's share of production.[52] No error exists in this interpretation of the MMA and the Regulations.

36. The starting point for analyzing the nature of royalty obligations in Alberta is the MMA, specifically, sections 33 and 35. Section 33 of the MMA reserves a royalty to the Crown on any minerals recovered in Alberta.[53] Section 35(1) of the MMA confirms the Crown's ownership of mineral rights governed by the MMA:

> 35(1) The Crown in right of Alberta is the owner of its royalty share of the mineral at all times until that royalty share is disposed of by or on behalf of the Crown or until the Crown's title to that royalty share is transferred to a lessee or other person pursuant to the regulations, notwithstanding that its share is commingled with and indistinguishable from the lessee's share prior to or at the time of the disposal or transfer of title.[54]

37. Blue Sky's Royalty Arrears are governed by the 2009 NGRR and/or the 2017 NGRR. Section 15 of the 2009 NGRR and section 16 of the 2017 NGRR are identical and define liability for the payment of royalty compensation relating to the production of natural gas. Both are aptly entitled "*Liability for royalty compensation*" and provide:

> (1) The Crown's title to the Crown's royalty share of natural gas and gas products is automatically transferred
>
> a) at the point immediately downstream from the royalty calculation point for the natural gas or gas products, or

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[50] Reasons for Decision at p. 3:13-17 and 5:7-17 [Appeal Record, pp. 022 and 024]; Lunn Affidavit at paras 18, 21, 22 [AEKE, pp. 013-015].

[51] Lunn Affidavit at paras 18-19, 21-22 [AEKE, pp. 013-015].

[52] Reasons for Decision at p 5:7-9 [Appeal Record, p. 024].

[53] MMA at section 33: "A royalty determined under this Act is reserved to the Crown in right of Alberta on any mineral recovered pursuant to an agreement."

[54] MMA at section 35. [emphasis added]

> b) in the case of sulphur …
>
> to the person who is, in relation to that royalty share, the owner of the lessee's share of the natural gas or gas products.
>
> (2) When the Crown's title to the Crown's royalty share of natural gas or a gas product is transferred pursuant to subsection (1), royalty compensation is payable to the Crown in accordance with this Regulation in respect of that royalty share.[55]

38. When read together with sections 33 and 35(1) of the MMA, there are three key aspects to section 15 of the 2009 NGRR and section 16 of the 2017 NGRR.

39. First, when natural gas is produced in Alberta pursuant to a PNG Lease, the Crown retains title to, and an ownership interest in, the portion of production equal to its specific royalty entitlement (i.e. the Crown's "royalty share of the mineral") until such time as title to that royalty share is transferred in accordance with the 2009 NGRR or the 2017 NGRR. Section 15 of the 2009 NGRR and section 16 of the 2017 NGRR define that title transfer point as "the point immediately downstream from the royalty calculation point for the natural gas." The "royalty calculation point" is defined in section 9 of the 2009 NGRR and in section 10 of the 2017 NGRR.[56]

40. Second, liability for payment of royalty compensation is triggered at the point of title transfer of the Crown's royalty share of the mineral.

41. Third, and most importantly, the person taking a transfer of title of the Crown's royalty share of natural gas, thereby triggering the obligation to pay royalty compensation, is the "owner of the lessee's share of the natural gas." Sometimes the owner is a lessee; sometimes the owner is a working interest participant with a contractual, but not a registered interest, in the PNG Lease.[57] In all cases, section 15 of the 2009 NGRR and section 16 of the 2017 NGRR defines "[l]iability for royalty compensation" as being triggered by, and an obligation of, "the owner of the lessee's share of the natural gas."[58]

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[55] 2009 NGRR at section 15; 2017 NGRR at section 16.

[56] Defined as (i) the last point of measurement before the natural gas is delivered from the gathering system in which it is transported, or (ii) the point of delivery under the disposition, if the natural gas is disposed of and the point of delivery is upstream from the point referred to in subclause (i).

[57] Lunn Affidavit at paras 17-19 [AEKE, pp. 013-014].

[58] 2009 NGRR at section 15; 2017 NGRR at section 16.

42. Here, the "owner of the lessee's share of the natural gas" was Blue Sky. Blue Sky received a title transfer of the Crown's royalty share of gas and was required to pay applicable royalty compensation to Alberta Energy. It failed to do so, thereby giving rise to the Royalty Arrears. While, as discussed further below, section 20(2.1) of the MMA may extend liability for such Royalty Arrears to other registered Lessees on the PNG Leases, it does not create the underlying liability. Under the Regulations, the liability is, first and foremost, a liability of Blue Sky.

43. Alberta Energy suggests that the Chambers Judge erred by interpreting the MMA based on the Regulations, while failing to point to any provisions of the MMA that establish royalty liability.[59] Alberta Energy's failure to point to any such provision is because no such provision exists. The MMA defines "royalty compensation" as the "money payable to the Crown in right of Alberta as compensation *pursuant to the regulations* made under section 36(2)(i)."[60] Section 36(2)(i) of the MMA permits the Lieutenant Governor in Council to make regulations "respecting the determination and payment to the Crown of compensation in respect of the Crown's royalty share of a mineral".[61] Section 36(2)(h) further permits the Lieutenant Governor in Counsel to make regulations respecting "the transfer of title to the Crown's royalty share of a mineral to the lessee *or any other person* after the recovery of the mineral."[62]

44. The MMA provides that a royalty is reserved to the Crown on any mineral recovered pursuant to a PNG Lease, but otherwise leaves the scope, calculation, allocation, title transfer mechanism, payment obligation, invoicing mechanics, and all other matters to the Regulations. It is not a coincidence that section 15 of the 2009 NGRR and section 16 of the 2017 NGRR are entitled "*Liability for royalty compensation*" as the MMA specifically refers such matter to the Regulations. Contrary to the submissions of Alberta Energy, the Chambers Judge did not alter or override the provisions of the MMA with the Regulations, but read the two harmoniously, in their entire context and in their grammatical and ordinary sense.[63]

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[59] ABE Factum at para 107.

[60] MMA at section 1(1)(y).

[61] MMA at section 36(2)(i).

[62] MMA at section 36(2)(h).

[63] *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC) at para 21.

45. Alberta Energy further submits that the Chambers Judge erred by ignoring section 2 of the Regulations, submitting that such section "confirms the Minister's intention that nothing in the Regulations circumscribes the joint and several liability imposed by the MMA on lessees."[64] Again, no such error exists in the Chambers Judge's Decision. First, nowhere in section 2 is the MMA even mentioned, much less section 20(2.1) thereof. Second, the predecessor of the 2009 NGRR[65], which predates the introduction of section 20(2.1) into the MMA, contained almost identical language to current section 2, thereby refuting any alleged connection. Third, no one is attempting to "be relieved" of their royalty obligations. As noted by the Chambers Judge: "all of the energy companies making submissions on this application acknowledge their liability in that regard [i.e. under section 20(2.1) of the MMA] in the event that the unpaid royalties are not fully recovered through these proceedings."[66] As discussed further below, the issue before the Chambers Judge was not the entitlement of Alberta Energy to recover the Royalty Arrears under section 20(2.1) of the MMA. The issue was whether Alberta Energy had to advance its claim for the Royalty Arrears first in the NOI Proceedings prior to looking to Lessees for reimbursement. Alberta Energy's entitlement to recover the Royalty Arrears was never (and is not) in issue.

46. The structure of the Regulations is not surprising. It follows the general legal maxim: *Qui sentit commodum, sentire debet et onus* – he who enjoys the benefit ought also to bear the burden.[67] It defies fundamental principles of property law (benefit and burden) and basic principles of commerciality to suggest, as Alberta Energy does, that in the normal course, one party can take the benefits of gas production, while another unrelated third party can be held liable *in first instance* for the royalties relating to such production. It is non-sensical at its most fundamental level.

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[64] ABE Factum at paras 108-109.

[65] *Natural Gas Royalty Regulation*, 2002, Alta Reg 220/2002 at section 8: Nothing in this Regulation operates to relieve a lessee from (a) the lessee's liability to the Crown under an agreement for the payment of royalty, or (b) the lessee's liability under this Regulation to pay to the Crown the royalty compensation in respect of the Crown's royalty share of natural gas, gas products or field condensate.

[66] Reasons for Decision at p. 5:5-5 [Appeal Record, p. 024].

[67] *Gardner v Kloepfer*, 1888 CanLII 6 (SCC) at para 9. See also: *Amack v AW Holdings Corp*, 2014 ABQB 623 at para 72.

47. The Regulations also follow what the Supreme Court of Canada termed the "general law principle" that "no one is liable for the debts of another."[68] As Blue Sky (as "owner") received title to, and the benefits of, the natural gas production, it also bore the burdens of such production, namely, the payment of royalty compensation to the Crown. Section 15 of the 2009 NGRR and section 16 of the 2017 NGRR expressly tie receipt of the benefit (i.e. the transfer of title of the Crown's royalty share of natural gas) to imposition of the obligation (i.e. the requirement to pay royalty compensation).

48. The structure also accords with the process prescribed under section 16 of the 2009 NGRR and section 17 of the 2017 NGRR for the invoicing and payment of royalty compensation to the Crown. Both sections require that Alberta Energy establish for each "royalty client" an account called a "royalty client account" that reflects the amounts debited and credited to the account.[69] On or before the last day of the 2nd month following a production month, Alberta Energy must issue an invoice to each "royalty client" showing, among other things, the royalty compensation payable.[70] On receipt of a royalty invoice, the "royalty client [must] pay the Crown the net amount shown in the invoice".[71] Importantly, the payment requirement in the NGRRs is prescriptive and party specific: "On receipt of a royalty invoice in respect of a production month, the royalty client shall pay the Crown the net amount shown in the invoice."[72] The payment obligation exists in the individual party's royalty account. It is not a general obligation of all Lessees.

49. Contrary to Alberta Energy's submissions, there is nothing about the terms of the PNG Leases that change the foregoing. As admitted by Alberta Energy, "[a]ll Crown Leases expressly incorporate the provisions of the *Mines and Minerals Act*".[73] Compliance with the provisions of the MMA and Regulations is compliance with the terms of the PNG Leases.

50. At its core, Alberta Energy's position appears to be that the MMA and Regulations exist in a vacuum separate and apart from the customs and practices of the industry governed thereunder.

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[68] *Barrette v Crabtree Estate*, 1993 CanLII 127 (SCC), [1993] 1 SCR 1027 ("***Barrette***") at para 32.
[69] 2009 NGRR at section 16; 2017 NGRR at section 17.
[70] 2009 NGRR at section 16; 2017 NGRR at section 17.
[71] 2009 NGRR at section 16(3); 2017 NGRR at section 17(3).
[72] 2009 NGRR at section 16(3); 2017 NGRR at section 17(3).
[73] ABE Factum at paras 4 and 36.

The transfer of liability for royalty compensation to the owner under the Regulations could not, according to Alberta Energy, be a reflection of the structure of the oil and gas industry in Alberta in which working interest partners own, and enjoy the benefit of, the natural gas production giving rise to the royalty. Nor could the existence of liability in the owner's (as royalty client) royalty account under the Regulations reflect the tying of right and obligation together with respect to the natural gas production. Alberta Energy rejects the interpretation of the Regulations that aligns with, and reflects the structure, customs, and practices of the Alberta oil and gas industry.

51. However, as noted by this Court in *Brick Protection Corporation v Alberta (Provincial Treasurer)*, "[t]he Legislature must be presumed to legislate with reference to what actually occurs in the real world, not to theoretical nonexistent possibilities."[74] The legislature is presumed to have knowledge of practical affairs. It understands commercial practices and is familiar with the problems its legislation is meant to address.[75] The interpretation of the MMA and Regulations that aligns with industry practice and customs is clearly preferable to one that does not.

52. Finally, the structure of the MMA and Regulations aligns with existing jurisprudence under the MMA, including Justice Romaine's decision in *Terra Energy Corp. (Re)*[76] In that case, Justice Romaine was considering section 91.1 of the MMA, a provision closely analogous to section 20(2.1). Alberta Energy submitted that a subsequent lessee was liable pursuant to section 91.1 of the MMA for royalty obligations in circumstances where the owner had been petitioned into bankruptcy.[77] In considering the scope of section 91.1, Justice Romaine determined that the section resulted in a third party (the lessee) being held liable for the obligations of another (Terra Energy, as owner and recipient of the production), citing "to the more general law principles that no one is liable for the debts of another."[78]

53. The foregoing context is critical to the proper framing of section 20(2.1) of the MMA (discussed further below). Unlike the suggestions in the ABE Factum, leaseholders are not responsible in first instance for the payment of royalty compensation except to the extent that they

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[74] *Brick Protection Corporation v Alberta (Provincial Treasurer)*, 2011 ABCA 214 at para 18.

[75] Ruth Sullivan, The Construction of Statutes, 7th ed, (Markham, On: LexisNexis, 2022) at §8.02 [**TAB 2**].

[76] *Terra Energy Corp (Re)*, 2023 ABKB 236 ("***Terra Energy***").

[77] *Terra Energy* at paras 12, 16, 17 and 49.

[78] *Terra Energy* at paras 76 – 79.

are also an owner of the production giving rise to the specific royalty obligations. Accrued royalties do not simply exist in the ether as some notional obligation of all lessees that a nominee may pay from its royalty account for administrative efficiency, nor is the process for invoicing and paying royalties "a discretionary policy choice by Alberta Energy designed to encourage efficiency and reduce regulatory burden."[79] The Chambers Judge properly rejected these submissions by Alberta Energy. The creation of the royalty liability, the crystallization of the royalty obligation in the owner's royalty account, and the process for invoicing and payment are all prescribed by the Regulations. Royalties are owner obligations. They exist in the owner's royalty account with Alberta Energy. The owner receives the benefit of the natural gas production and is liable for the payment of associated royalties.

54. Leaseholders are involuntary, statutory obligors of *another's* obligation. They are made liable by section 20(2.1) of the MMA for the obligations of the owner who takes the benefit of production but fails to pay associated liabilities. Leaseholders are not liable in first instance; they are a statutory backstop for the obligations of another. The Chamber's Judge's holding in this respect, namely, that the MMA and the Regulations "set up a mechanism that ensures that the Crown's royalty share is paid in the first instance by the party who took the Crown's share of the production" and that "[p]aragraph 20(2.1)(b) implies an ordering of the Crown's avenues of relief between the party responsible for payment of the Crown's royalty share in the first instance, and a co-lessee who may be called upon to satisfy that party's lability in the event of default"[80] is correct and fully supported by the language of the MMA and the Regulations.

(iii) Section 20(2.1) of the MMA

(i) ***Interpretation of and Values underlying Section 20(2.1)***

55. Section 20(2.1) of the MMA provides:

> 20(2.1) Where 2 or more persons are recorded with the Department as lessees of an agreement,
>
> (a) those lessees in relation to the Crown are jointly responsible for the obligations and liabilities that arise under that agreement, notwithstanding that the agreement was issued before, on or after the coming into force of this subsection, and

[79] Taljit Affidavit at para 34 [AEKE, p. 277].

[80] Reasons for Decision at p 5:7-12 [Appeal Record, p. 024].

> (b) a judgment in favour of the Crown against one or more of those lessees or a release by the Crown in favour of one or more of those lessees does not preclude the Crown from obtaining judgment against the other lessees in the same or a separate proceeding.

56. As discussed above, liability for royalty obligations in first instance are addressed under the Regulations. Section 20(2.1) of the MMA extends liability for obligations under a PNG Lease to all leaseholders. It does not create the obligation. Such obligations already exist in the royalty account of the owner who received the benefit of the gas production.[81]

57. As such, section 20(2.1) is a statutory exception to the general law principle that no one is liable for the debts of another. As noted repeatedly by the Supreme Court of Canada[82] and by Justice Romaine in *Terra Energy*, "[h]olding a third party liable for the obligations of another is a statutory exception to established legal principles, and as such, should be strictly construed."[83] An exception to a general law principle should not be construed more widely than is necessary to fulfill the values that support it.[84]

58. Alberta Energy describes the values that underlie section 20(2.1) in the ABE Factum: "to ensure that Albertan's receive a fair return for the development of their resources."[85] The same "values" were noted by the Court in *Terra Energy*: "the object of the MMA is to see that all Albertans benefit through the recovery of Crown royalties by Alberta Energy."[86] These "values" are not disputed by Canadian Natural. However, the expansive scope of section 20(2.1) advocated by Alberta Energy is not necessary to fulfill such values.

59. As noted by the Chambers Judge, Alberta Energy occupies a privileged position within Blue Sky's NOI Proceedings.[87] It has a statutory right to recover all of Blue Sky's Royalty Arrears

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[81] IOGC relies on the provisions of the *Indian Oil and Gas Regulations* to suggest that the Chambers Judge erred in his interpretation of the MMA and Regulations. The *Indian Oil and Gas Regulations* were not considered by the Chambers Judge, are not at issue in the Application, and have no bearing on the Decision.

[82] *Barrette* at para 32; *Air Canada v British Columbia*, 1989 CanLII 95 (SCC), [1989] 1 SCR 1161 at p. 94; *National Trust Co. v Mead*, [1990] S.C.J. No. 76, [1990] 2 S.C.R. 410 at para. 26; *Waldick v Malcolm*, [1991] S.C.J. No. 55, [1991] S.C.R. 456 at para 48.

[83] *Terra Energy* at para 77.

[84] *Terra Energy* at para 78.

[85] ABE Factum at para 74.

[86] *Terra Energy* at para 79.

[87] Reasons for Decision at p. 3:22-25 [Appeal Record, p. 022].

under any PNG Leases transferred to a purchaser within the NOI Proceedings since, in all cases, Alberta Energy must approve the transfer of the PNG Lease. Section 18(2) of the MMA, and section 5(1)(g) of the *Crown Minerals Registration Regulation*[88], permit Alberta Energy to refuse the transfer of a PNG Lease where arrears are owing under the PNG Lease.

60. Accordingly, and as found by the Chambers Judge, within the NOI Proceedings, Alberta Energy may refuse the transfer of any PNG Lease until all of the Royalty Arrears existing thereunder are paid in full.[89] For PNG Leases in which Blue Sky holds only a working, and not a registered, interest, the Lessees thereon can facilitate payment of all royalty arrears.[90] If Blue Sky or the purchaser sought a forced assignment of a PNG Lease under section 84.1 of the BIA, all of the Royalty Arrears would still necessarily have to be paid in order to comply with section 84.1(5) of the BIA.[91] In all cases, Alberta Energy has a statutory right to be made whole.

61. The converse is not true. As found by the Chambers Judge, the Lessees who pay the Royalty Arrears to Alberta Energy have no ability to require a priority distribution from the Blue Sky estate.[92] They are left as unsecured creditors within the NOI Proceedings trying to advance unsecured claims for the Royalty Arrears to the extent all secured and priority claims are satisfied in full. While the same amount remains outstanding by Blue Sky, the claim has changed hands from Alberta Energy to third party lessees who, unlike Alberta Energy, have no ability to recover amounts paid other than as unsecured creditors.

62. The party who stands to benefit from Alberta Energy's approach is the purchaser of PNG Leases within the NOI Proceedings who is now free to take an assignment of Blue Sky's interests in PNG Leases without the payment of outstanding arrears. Its liability for the payment of cure costs (i.e. the Royalty Arrears owing under a purchased PNG Lease) will have been satisfied by one or more Lessees. Alberta Energy's approach effectively requires third party lessees to

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[88] *Crown Minerals Registration Regulation*, Alta Reg 264/1997 at section 5(1)(g).

[89] Reasons for Decision at p. 3:25-30 [Appeal Record, p. 022].

[90] See, for example, Exhibits X and Y to the Lunn Affidavit in which Canadian Natural is attempting to facilitate payment of outstanding arrears to Alberta Energy by the purchaser of a working interest in SanLing Energy Ltd's insolvency proceeding. [AEKE, pp: 215-224].

[91] Section 84.1(5) of the BIA provides: The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the person's bankruptcy, insolvency or failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

[92] Reasons for Decision at p. 4:1-18 [Appeal Record, p. 023].

subsidize the NOI Proceedings, contrary to the "fundamental principle of insolvency law" of "equality among ordinary creditors" and the "fair and equitable treatment of claims made against a debtor."[93] It also flips the holding of Justice Feasby in *Cleo Energy Corp (Re)* on its head:

> I must pause here to address the question of fairness. Is the payment of cure costs to Alberta Energy fair to the Purchaser and to creditors of Cleo? Yes, it is. The reason that the Purchaser is buying Cleo is because it has Crown oil and gas rights and, in turn, that is why consideration is flowing to creditors. The only reason that Cleo has oil and gas rights is because it has the Mineral Leases. There is nothing unfair about requiring the Purchaser to pay cure costs to maintain the Mineral Leases.[94]

63. An interpretation of section 20(2.1) of the MMA that facilitates this result also contradicts the requirement that section 20(2.1) be interpreted only as widely as necessary to fulfill the values that support it. Canadian Natural (and all other participants in the application) acknowledged their liability for the Royalty Arrears to the extent not addressed within Blue Sky's insolvency process. The suggestions by Alberta Energy in the ABE Factum that it faces recovery risk without the expansive interpretation of section 20(2.1) of the MMA are incorrect and should be disregarded.

(ii) *Interpretation of Section 20(2.1) of the MMA*

64. The Chambers Judge held that section 20(2.1) of the MMA implied "an ordering of the Crown's avenues of relief between the party responsible for payment of the Crown's royalty share in the first instance, and a co-lessee who may be called upon to satisfy that party's liability in the event of default."[95] This conclusion is fully supported by the MMA and Regulations.

65. It is also supported on a plain reading of section 20(2.1) of the MMA. Under section 20(2.1) of the MMA, the liability of lessees for the owner's share of royalty compensation is joint – not joint and several. This distinction is key. Joint liability is one liability shared by two or more people. It is not divisible. Staying or addressing the debt with respect to one person stays or addresses the debt with respect to all.[96]

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[93] *Montréal (City) v Deloitte Restructuring Inc.*, 2021 SCC 53 at para 71.

[94] *Cleo Energy Corp (Re)*, 2025 ABKB 621 at para 35.

[95] Reasons for Decision at p. 5:7-21 [Appeal Record, p. 024].

[96] *Royal Bank of Canada v. Riverbanks Gourmet Café & Market Inc.*, 2002 ABQB 50 ("**Riverbanks**") at paras 24 to 27; See also: *Royal Bank of Canada v. King*, 1982 CanLII 1177 (AB KB) at para 18 ("**King**"); Law Reform Commission of British Columbia, Report on Shared Liability (LRC 88, August 1986) ("**LRC Report**") at Chapters 2.A.1 and 2.B.2 [**TAB 3**].

66. The situation is different with respect to joint and several liability. If liability is joint and several, the liability is divisible. The creditor may proceed against one, some, or all of the persons sharing liability as each is independently, or "severally", liable for the debt.[97]

67. The obligations of lessees under section 20(2.1) of the MMA are expressly and unequivocally *joint*, not joint and several. Nowhere in section 20(2.1) is the word "several" included. Where the legislature seeks to impose joint and several liability, it does so explicitly.[98] In fact, the legislature often uses both terms within the same legislation, clearly demonstrating an awareness of the legal distinction between the terms. For example, in the *Environmental Protection and Enhancement Act*, section 215 provides that "all persons named in the [enforcement] order are jointly responsible for carrying out the terms of the order and are jointly and severally liable for payment of the costs of doing so."[99]

68. Alberta Energy suggests in the ABE Factum that the legislature established joint liability by name (under section 20(2.1)(a)), but established several liability not by name, but by listing some (but not all) of the characteristics of several liability (under section 20(2.1)(b)). Such an interpretation defies the modern approach to statutory interpretation. There is nothing grammatical or ordinary about this interpretation. By deliberately using the phrase "jointly responsible," the legislature must be taken to have meant what it said – liability is joint, not joint and several.

69. Alberta Energy argues in the ABE Factum that "[s]ection 20(2.1) was added to the MMA in 2003 to codify joint and several liability of co-lessees." There is no evidence supporting this statement. In fact, a review of the relevant Hansard contradicts it. The two references to liability

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[97] *Riverbanks* at paras 24 to 27; King at para 18; LRC Report at Chapters 2.A.1 and 2.B.2.

[98] See, for example, *Business Corporations Act*, RSA 2000, c B-9, at s. 15.2(1), which establishes that the liability of shareholders in an unlimited liability corporation is "unlimited in extent and joint and several in nature," and ss.118 and 119, which establishes circumstances in which directors are jointly and severally liable to the corporation or employees. See also: *Franchises Act*, RSA 2000, c F-23 at section 12; *Securities Act*, RSA 2000, c S-4 at sections 203(0.1)(10) and (13.1), 204(7) and (8), 205(8) and (10.1), 207(8), 211.06(3); *Employment Standards Code*, RSA 2000, c E-9 at sections 81 and 112; *Contributory Negligence Act*, RSA 2000, c C-27 at section 2(2).

[99] *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 at section 215. See also section 11(2) of the *Partnership Act*, RSA 2000, c P-3 which provides that, "[e]ach partner in a firm is liable jointly with the other partners for debts and obligations of the firm", while section 15 in turn establishes joint and several liability for specified obligations: "each partner is liable jointly with the partner's co partners and also severally for everything for which the firm while the partner is a partner in it becomes liable under section 13 or 14." See also section 15(5) *Business Corporations Act*, RSA 2000, c B-9 which permits a party to a pre-incorporation contract to apply to the Court for an order "fixing obligations under the contract as joint or joint and several."

in the Hansard state: "[t]his bill will codify *joint liability* of Crown leases" and "[i]t codifies *joint liability* so that the Crown will not have to argue the common-law precedents in every case where a lessee defaults on a royalty payment."[100]

70. Contrary to Alberta Energy's suggestions, section 20(2.1)(b) of the MMA provides a limited modification to the common law position regarding joint liability by permitting Alberta Energy to obtain judgment against other lessees notwithstanding a previous judgment for, or release of, an individual lessee. A statutory modification to common law principles is not uncommon. The article cited by Alberta Energy before the Chambers Judge[101] listed three examples of such modifications in British Columbia with respect to joint liability, including the following:

> The common law position has been altered by the *Law and Equity Act*, which provides as follows:
>
> 48. (2) The obtaining of an order against any one person jointly liable does not release any other jointly liable who have been sued in the proceeding, whether the others have been served with process or not.[102]

71. Section 20(2.1)(b) is the Alberta equivalent with respect to PNG Leases. Lessees are jointly liable for obligations under a PNG Lease. The characteristics of such joint liability are subject to a limited statutory modification under section 20(2.1)(b) of the MMA. Such limited modification does not transform the joint liability into something different; it simply provides a limited modification to its usual characteristics.

72. In addition to complying with the modern approach to statutory interpretation, the foregoing interpretation aligns with the principle that a statutory exception to a general law principle must be strictly construed and interpreted only as widely as necessary to fulfill the values that support it.[103] Here, as found by the Chambers Judge, the values that support section 20(2.1) of the MMA are fulfilled – the Alberta public is compensated for use of their minerals – as the Royalty Arrears are addressed within the NOI Proceeding through the payment of "cure costs" for

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[100] Alberta Legislative Assembly, Alberta Hansard, Legislature 25, Session 3 (2003-2004), (March 27, 2003) at 795 and (May 5, 2003) at 1430. [Emphasis added] [**TAB 6**]

[101] LRC Report at Chapter 2.B.2.

[102] LRC Report at Chapter 2.B.2.

[103] *Terra Energy* at paras 77-78.

any sold PNG Leases and, to the extent any PNG Leases are unsold at conclusion of the insolvency process, through payment by the Lessees.[104] The net impact to the Alberta public is consistent: full payment of the Royalty Arrears. It is a fair and equitable result which recognizes the limited role of Lessees as statutory backstops to the payment obligations of those benefitting from ownership and receipt of production under the PNG Lease.

73. There are no errors in the Chambers Judge's interpretation of section 20(2.1) of the MMA.

B. The Blue Sky Royalty Arrears are Subject to the Stay

74. Section 69 of the BIA provides that on the filing of a notice of intention by an insolvent person, 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.[105] The Chambers Judge found that both requirements were met, namely that Alberta Energy's claims for the Royalty Arrears constituted a remedy against Blue Sky or its property, and that such claims comprised a "claim provable in bankruptcy."[106] Both of these findings are fully supported on the evidence before the Chambers Judge.

75. First, as noted above, all of the Royalty Arrears arise from gas production received by Blue Sky.[107] Such gas production was taken from PNG Leases in which Blue Sky held a working interest, a registered interest, or both.[108] Both working interests and registered interests are ownership interests in the applicable PNG Lease and the rights granted thereunder.[109] Blue Sky received gas production from the PNG Leases because it held an ownership interest therein.

76. Each PNG Lease is singular. Enforcement against the Lessees' interest in a PNG Lease is enforcement against Blue Sky's interest. Termination of a PNG Lease terminates the interests of

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[104] Reasons for Decision at p. 3:19-30, 4:41 – 5:5 [Appeal Record, p.022 – 024].

[105] The ABE Factum refers to the stay of proceedings under section 69.1 of the BIA. Canadian Natural assumes this statutory reference is a typographical error as the stay of proceedings in the NOI Proceeding and considered by the Chambers Judge in his Reasons for Decision arises pursuant to section 69 (not 69.1) of the BIA.

[106] Reasons for Decision at p. 3:13-17 [Appeal Record, p. 022].

[107] Reasons for Decision at p. 3:13-17 and 5:7-17 [Appeal Record, pp. 022 and 024]; Lunn Affidavit at paras 18, 19, 21, 22 [AEKE, pp. 013-015].

[108] Lunn Affidavit at paras 18, 19, 21, 22 [AEKE, pp. 013-015].

[109] *IFP Technologies* at para 98; Taljit Affidavit at para 11 [AEKE, p. 273].

all Lessees in that PNG Lease.[110] While the Royalty Default Notice threatened Lessees that "[i]f payment is not made Alberta Energy may, without further notice, cancel Petroleum and Natural Gas Mineral agreements associated with this debt", such action is not capable of exercise because of the Stay. [111] The exercise of a remedy against a Lessee's interest in a PNG Lease is the exercise of a remedy against Blue Sky's interest in the PNG Lease. Alberta Energy's claims for the Royalty Arrears, and the remedies threatened with respect thereto, are clearly exercise of a remedy against Blue Sky's property, in contravention of section 69 of the BIA.

77. Second, and more fundamentally, the Lessees' liability for the Royalty Arrears pursuant to section 20(2.1) of the MMA is *joint*, not joint and several. It is indivisible and, as such, staying the claim with respect to *one person* (Blue Sky) stays the claim with respect to *all persons* (the Lessees). In admitting that its claims for the Royalty Arrears are stayed with respect to Blue Sky as a "claim provable in bankruptcy", Alberta Energy necessarily admits that its claims are stayed as against all Lessees.[112]

78. Alberta Energy cites to the Ontario Court of Appeal's decision in *Toronto Dominion Bank v Phillips*[113] in support of the contention that "[w]here one party invokes the BIA, the remaining debtor can be left with the entire responsibility.[114] Such a proposition is a misstatement of the Court's holding which, in turn, was based on facts readily distinguishable from those at hand. The Court in *Phillips* was considering how to allocate funds from the sale of a home following the breakdown of a marriage.[115] Bank of Montreal held a writ of execution against the husband and wife, *jointly and severally*.[116] The wife filed a consumer proposal which was accepted by creditors and, as a result, all claims against her were compromised and discharged.[117] The Court found that it was appropriate to sever the joint tenancy of the spouses in the home, thereby resulting in a 50%

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[110] MMA at section 45.

[111] Reasons for Decision at p. 2:16-40 [Appeal Record, p. 021]; Lunn Affidavit at para 11 and Exhibit E [AEKE, pp. 009-010 and 046-048]; Taljit Affidavit at para 37 and Exhibit I [AEKE, pp. 277 and 318-320].

[112] ABE Factum at para 41.

[113] *Toronto-Dominion Bank v Phillips*, 2014 ONCA 613 ("***Phillips***").

[114] ABE Factum at para 42.

[115] *Phillips* at paras 17-18.

[116] *TD Bank v Phillips et al*, 2013 ONSC 7016 at paras 12 and 26.

[117] *Phillips* at para 11.

allocation of the sale proceeds to each spouse.[118] As the wife had successfully advanced a consumer proposal, the Court found that it had no jurisdiction "to effect ostensible equitable readjustments to the allocation of the funds in issue."[119] As such, the Court held that only the husband's 50% share of the proceeds was available to satisfy Bank of Montreal's judgment.[120] None of which has any application to the current case, nor does it stand for the broad proposition cited by Alberta Energy.

79. Finally, Alberta Energy suggests in the ABE Factum that the Chambers Judge required "Alberta Energy to postpone its claims against the Lessees…in favour of participation in the insolvency process."[121] The statement misconstrues the Chambers Judge's Decision. Nothing in the Decision postponed Alberta Energy's claims. The Chambers Judge made clear in his Reasons for Decision that "nothing in these reasons should be interpreted as limiting Alberta Energy's ability to recover any unpaid royalties through the section 20(2.1) mechanism in the *Mines and Minerals Act* upon the conclusion of Blue Sky's insolvency proceedings."[122] Alberta Energy's claims for the Royalty Arrears are not postponed, they are temporarily stayed under the BIA as a result of the NOI Proceedings in the same manner as all other stakeholders of Blue Sky. There is nothing unfair or deleterious to Alberta Energy with respect to the Stay.

C. The Single Proceeding Model Applies

80. The single proceeding model has long been recognized as a core tenet of Canadian insolvency law.[123] It "favours the enforcement of stakeholder rights through a centralized judicial process."[124] As the Supreme Court of Canada confirmed in *Petrowest*, "[t]he legislative policy in favour of 'single control' is reflected in Canadian bankruptcy, insolvency, and winding-up legislation. The single proceeding model is intended to mitigate the inefficiency and chaos that would result if each stakeholder in an insolvency initiated a separate claim to enforce its rights."[125]

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[118] *Phillips* at para 45.

[119] *Phillips* at para 46.

[120] *Phillips* at para 45.

[121] ABE Factum at para 19.

[122] Reasons for Decision at p. 4:41 – 5:2 [Appeal Record, p. 023-024].

[123] Wood, Roderick, Bankruptcy & Insolvency Law, 3rd ed (Toronto: University of Toronto Press, 2025) at p. 3 [**TAB 5**].

[124] *Petrowest* at para 55.

[125] *Petrowest* at para 55.

81. Reflected in the single proceeding model is the central role of courts in ensuring the equitable and orderly resolution of insolvency disputes.[126] Section 183 of the BIA "confers a 'broad scope of authority' on superior courts to deal with most bankruptcy disputes, as '[a]nything less would unnecessarily complicate and undermine the economical and expeditious winding up of the bankrupt's affairs'."[127]

82. During insolvency proceedings, supervising judges are often not dealing with "matters which are neatly organized and operating under predictable discipline"; instead, proceedings carry their own "internal seeds of chaos, unpredictability and instability."[128] Courts supervising a proposal under the BIA require flexibility to balance the interests of stakeholders and to craft solutions to unanticipated problems.[129] As noted by Justice Morawetz (as he then was) in *Re Kitchener Frame Ltd*, proposal proceeding under the BIA "offer debtors an opportunity to carry out a going concern or value maximizing restructuring in order to avoid a bankruptcy and related liquidation and that these purposes justify taking a broad, flexible and purposive approach to the interpretation of the relevant provisions."[130] He further remarked:

> In this respect, it seems to me, that the governing statutes should not be technically or stringently interpreted in the insolvency context but, rather, should be interpreted in a manner that is flexible rather than technical and literal, in order to deal with the numerous situations and variations which arise from time to time. Further, taking a technical approach to the interpretation of the BIA would defeat the purpose of the legislation.[131]

83. The single proceeding model is one fundamental tool in the insolvency process by which courts can control their process and respond to the unique facts and circumstances facing the debtor company and its stakeholders in any given proceeding. It is not, as suggested by both Alberta Energy and the IOGC, inflexible, static, technical and limited in scope to claims against the debtor company.[132] Such an interpretation would stand alone in its application amongst the otherwise

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[126] *Petrowest* at para 54.

[127] *Petrowest* at para 55, citing *Sam Lévy & Associés Inc. v Azco Mining Inc.*, 2001 SCC 92.

[128] Eamonn Watson, Gray Monczka and Jordan Schultz, *Anything You Can Do, I Can Do Better: Does the CCAA Provide Broader Discretionary Relief than the BIA?*, 2022 20 Annual Review of Insolvency Law, 2022 CanLIIDocs 4309 ("**ARIL Article**") [**TAB 3**], citing *Canada (Minister of Indian Affairs & Northern Development) v Curragh Inc* (1994), 1994 CanLII 7468 (ON SC) at para 16.

[129] *Petrowest* at paras 47-50.

[130] *Kitchener Frame Limited (Re)*, 2012 ONSC 234 ("***Kitchener Frames***") at para 53.

[131] *Kitchener Frames* at para 46.

[132] ABE Factum at para3 53-54.

recognized need in BIA and other insolvency processes for flexibility and a purposive approach.[133] Not surprisingly, Alberta Energy's and IOGC's positions are contradicted by the jurisprudence. For example:

(a) In *U.S. Steel Canada Inc. (Re)*, Justice Wilton-Siegel held that the CCAA Court had jurisdiction to address inter-creditor claims pursuant to the single proceeding model if it was in furtherance of the legislation's remedial purposes.[134]

(b) In *Alderbridge Way GP Ltd. (Re)*, Justice Fitzpatrick stated the following:

> GEC and the CCAA Debtors/Guarantors assert that the single proceeding model requires that the proceeding focus on claims against the debtor and the debtor's assets only, and not claims by the debtor or connected in some fashion to either.
>
> The case authorities, however, do not support the narrow scope of the single proceeding model asserted by GEC and the CCAA Debtors/Guarantors.
> …
> In my view, the conclusions of Wilton-Siegel J. in U.S. Steel SC are entirely consistent with the single proceeding model and the benefits that are intended by that model. It is undeniably the case that the CCAA court is attuned to providing a means by which claims can be adjudicated, as they relate to the restructuring proceeding, in an efficient manner and in a manner that is fair to all stakeholders.
>
> I agree that it will not always be the case that other claims are appropriately brought into the CCAA umbrella for adjudication. However, I adopt the reasoning and result in U.S. Steel SC in concluding that, if the circumstances are such that bringing other claims into the CCAA proceeding will assist in the restructuring process and further the remedial purposes of the CCAA, that may ground the exercise of the court's jurisdiction to grant such an order under s. 11 of the CCAA.[135]

(c) In *National Bank of Canada v Sunterra Food Corporation*, Justice Lema noted that disputes between parties other than the debtor company may be subject to the single proceeding model and brought within the scope of the insolvency process where the resolution of such disputes is inextricably connected to the process.[136]

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[133] IOGC argues in its Written Representations that the "single proceeding model does not extend to staying a creditor's right to pursue third parties for debts that are simply related to a debt for which proofs of claims have been filed". No claims process was conducted in the NOI Proceedings and so no proofs of claim were ever filed. The basis of IOGC's statement is accordingly unclear.

[134] *U.S. Steel Canada Inc. (Re)*, 2015 ONSC 5103 at para 84 [**TAB 1**], affirmed 2016 ONCA 662.

[135] *Alderbridge Way GP Ltd. (Re)*, 2023 BCSC 1718 at paras 48, 49, 55 and 56.

[136] *National Bank of Canada v Sunterra Food Corporation*, 2025 ABKB 599 at para 13.

84. In addition (and potentially in the alternative) to its position that the single proceeding model is limited to claims involving the debtor, Alberta Energy argues that the Chambers Judge failed to consider whether its claims are inextricably connected to the NOI Process and suggests that there was no evidence before the Chambers Judge on this issue.[137] Both arguments are belied on the face of the Reasons for Decision. It is apparent in the Reasons for Decision that the Chambers Judge is doing exactly what is intended under the single proceeding model - exercising his discretion to balance the interests of stakeholders and advance the NOI Proceedings in an equitable and orderly manner. The Chambers Judge found that permitting Alberta Energy to pursue the Royalty Arrears against Lessees during the pendency of the Stay would, among other things:

(a) unnecessarily upset the delicate balancing of creditor rights within the NOI Proceedings;[138]

(b) introduce unnecessary uncertainty into the NOI Proceedings by:

(i) causing the claim for Royalty Arrears to change hands from Alberta Energy (who has an ability to be paid the Royalty Arrears as "cure costs") to third party Lessees (who have no ability to require a priority distribution and are instead left to recover as unsecured creditors);[139] and

(ii) potentially create additional recoveries for *other* stakeholders because funds which would be paid by purchasers as cure costs will be redirected to Blue Sky (i.e. based on the Lessees' subsidization of the NOI Proceedings through payment of the Royalty Arrears);[140] and

(c) oblige otherwise unaffected third parties to participate in the NOI Proceeding "at high costs, both monetary and through the deployment of human resources"; here, "introducing 32 additional parties to this litigation… potentially 32 involuntary, unsecured lenders."[141]

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[137] ABE Factum at paras 57-58. Alberta Energy also argues that there is no evidence that its claims need to be included in Blue Sky's NOI proceeding at the risk of the restructuring failing, which, of course, is not the test.

[138] Reasons for Decision at p. 3:32-33 and 4:17-18 [Appeal Record, pp. 022-023].

[139] Reasons for Decision at p. 4:1-7 [Appeal Record, p. 023].

[140] Reasons for Decision at p. 4:7-15 [Appeal Record, p. 023].

[141] Reasons for Decision at p. 4:20-29 [Appeal Record, p. 023].

85. All of the foregoing assessments are firmly supported on the evidence before the Chambers Judge, and all go to the heart of his exercise of discretion in overseeing and managing the NOI Proceedings to ensure a transparent and fair process that balances stakeholder interests and advances Blue Sky's restructuring efforts. The Chambers Judge's findings with respect to the application of the single proceeding model are entitled to significant deference by this Court.

86. Indicative of the issues in Alberta Energy's position (should it be accepted with respect to the single proceeding model), Alberta Energy suggests that increased realizations for *other* creditors because of the Lessees' payment of the Royalty Arrears is beneficial to the NOI Proceedings and advances the objectives of the BIA.[142] Such a concept could not be more antithetical to fundamental principles of fairness in Canadian insolvency law. As noted by the Supreme Court of Canada in *Callidus Capital*, "[t]he Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation."[143]

87. More generally, the result requested by Alberta Energy in these proceedings is unfair. It was rightfully rejected by the Chambers Judge. It seeks to introduce a broad, unbounded scope of liability on Lessees under section 20(2.1) of the MMA which allows, in the normal course, one party to realize a benefit while unloading the liability on another. It is an interpretation which, even outside the insolvency context, offends basic concepts of fairness and is foreign to Canadian law. It is wholly antithetical to the insolvency process and is not necessary to achieve the values of the MMA or section 20(2.1) thereof.

PART V. RELIEF SOUGHT

88. Canadian Natural respectfully requests that this Honourable Court dismiss Alberta Energy's appeal with costs to Canadian Natural.

Estimate of time required for oral argument: 45 minutes.

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[142] ABE Factum at para 62.

[143] *Callidus Capital* at para 75, citing Sarra, Janis P. The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law, in Janis P. Sarra and Barbara Romaine, eds., Annual Review of Insolvency Law 2016. Toronto: Thomson Reuters, 2017, 9.

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TAB 1

CITATION: U.S. Steel Canada Inc. (Re), 2015 ONSC 5103
COURT FILE NO.: CV-14-10695-00CL
DATE: 20150813

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36 AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO U.S. STEEL CANADA INC.

BEFORE: Mr. Justice H. Wilton-Siegel

COUNSEL: *M. Barrack, J. Willis* and *M. Shapiro*, for United States Steel Corporation

R. Paul Steep and *S. Kour*, for the Applicant

A. Mark, R. Chadwick and *T. Jackson,* for the Province of Ontario

G. Capern, L. Harmer and *D. Cooney,* for the United Steel Workers Union and USW Local 8782

S. White, for the United Steel Workers Union, Local 1005

C. Kopach, for Robert and Sharon Milbourne

A. Hatnay and *B. Walancik,* for the Non-unionized active employees and retirees

R. Staley and *K. Zych* for the Monitor

HEARD: May 5, 2015

ENDORSEMENT

[1] This was a motion to schedule the timing of the hearing of a motion brought by United States Steel Corporation ("USS") to determine the amount and status of its claims in these proceedings. In particular, the motion sought directions on the extent and nature of production and discovery in respect of certain objections brought by the Province of Ontario (the "Province"), the United Steel Workers, USW Local 8782 and USW Local 1005 (collectively, the "USW"), and Robert and Sharon Milbourne (collectively, the "Milbournes"). The objections raise fundamental issues regarding the determination of claims for which the objecting parties seek an order of "equitable subordination" in proceedings brought under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA").

[2] The Province, the USW and the Milbournes seek a reduction or a subordination of the USS Claims (as defined below) to the claims of the other creditors of USSC for all purposes of the CCAA proceedings. In particular, they seek such subordination for purposes of determination of

the amount that USS may bid in any credit bid and for purposes of voting to approve any restructuring plan that may be proposed.

[3] At the conclusion of the hearing, the Court advised that, for written reasons to follow, the claims of the Province would be determined pursuant to the Claims Process Order within these CCAA proceedings and established a schedule for the next steps in that determination process. The Court also concluded that the claims of the USW, and of the Milbournes, other than their debt re-characterization claims, were not to be determined pursuant to the Claims Process Order and, after discussion with counsel, scheduled submissions by the parties regarding the appropriate forum for the determination of these claims. This Endorsement sets out the reasons for the Court's decision that the claims of the USW and the Milbournes, other than their debt re-characterization claims, are to be determined outside of the Claims Process Order, as well as the Court's decision regarding the forum for determination of such claims.

Background

[4] On September 16, 2014, U.S. Steel Canada Inc. ("USSC" or the "Applicant") was granted protection under the CCAA pursuant to an initial order of Morawetz R.S.J. (as amended and restated from time to time, the "Initial Order").

[5] USSC's objective in the CCAA process is to restructure its business by implementing either (i) a consensual CCAA restructuring plan, or (ii) one or more sales of its assets and business as a going concern pursuant to a sale and restructuring/recapitalization process that it has commenced and which was approved by the Court pursuant to an order dated April 2, 2015 (the "SARP").

[6] On November 13, 2014, the Court granted a claims process order (the "Claims Process Order") setting out, among other things, the procedure for the filing of proofs of claim, the Monitor's role in the review of claims, and the procedure for the resolution of claims.

[7] The Claims Process Order set out a specific procedure (the "USS Claims Determination Process") for the review and determination of the claims of USS, U.S. Steel Holdings, Inc., U.S. Steel Canada Limited Partnership, and any affiliates of USS, other than USSC or a subsidiary of USSC (the "USS Claims").

[8] The USS Claims Determination Process contemplated that the Monitor would prepare a report detailing its review of the USS Claims and then promptly seek a hearing to schedule a motion to determine such USS Claims. The Claims Process Order provided that the USS Claims would not be determined to be Proven Claims (as defined in the Claims Process Order) without Court approval.

[9] In accordance with the USS Claims Determination Process, USS and its subsidiaries filed 14 proofs of claim with the Monitor, some of which have since been amended. In aggregate, the proofs of claim set out a non-contingent secured claim in the amount of U.S. $122,471,525, non-contingent unsecured claims in the aggregate amounts of U.S. $127,855,104 and $1,847,169,934, and a contingent secured claim in the amount of $78,761,395.

[10] In connection with the USS Claims Determination Process, the Monitor filed a Seventh Report dated March 9, 2015 (the "Seventh Report") and a Supplemental Seventh Report dated April 29, 2015 (the "Supplementary Report"), describing its review of the USS Claims. The Monitor recommended that USS bring a motion for Court approval of its claims, and that, subject to the Court's determination of any objections to the USS Claims, USS be found to have Proven Claims in the full amounts claimed for the non-contingent claims. The Monitor also recommended leaving the contingent claims to be determined at a later date, as and when appropriate in the proceedings.

[11] On March 13, 2015, in accordance with the Monitor's recommendation, USS served a Notice of Motion for Court approval of the USS Claims.

[12] On March 18, 2015, a hearing to schedule the motion was held. The Court issued an endorsement setting a deadline of April 14, 2015 for the delivery of objections, and requiring the parties to return on April 24, 2015 to address a scheduling and litigation protocol.

[13] On April 14, 2015, four objections to the USS motion (the "Objections") were delivered by the following parties (collectively, the "Objecting Parties"): (i) the Province, (ii) the USW, (iii) representative counsel on behalf of the non-USW active salaried employees and retirees of USSC ("Representative Counsel"), and (iv) the Milbournes, each in their individual capacities as beneficiaries of a retirement benefits contract originally entered into by Stelco Inc. ("Stelco").

[14] On April 24, 2015, counsel to USSC, the Monitor, three of the Objecting Parties (the Province, the USW, and Representative Counsel), and USS appeared in chambers but were unable to settle a process and timetable for the determination of the USS Claims. A further case conference was held on April 30, 2014 to address the process and timetable, at which time it was agreed that the Objection of the Representative Counsel would be deferred and that a hearing would be scheduled for May 5, 2015 to address the process and timetable for the hearing of the Objections of the Province, the USW and the Milbournes.

[15] At the hearing on May 5, 2015, the parties addressed the substantive issue of whether the claims of the Province, the USW and the Milbournes were to be determined pursuant of the Claims Process Order, together with more procedural and timing issues that would follow after such a determination. This Endorsement does not address any of the latter issues for the reason that no material determinations were made other than to set a schedule for a subsequent case management conference to review the status of documentary production and the scheduling of discoveries, and any unresolved issues in respect thereof, regarding the process for determination of the Province's Objection and the similar claims of the USW and the Milbournes.

[16] This Endorsement is divided into three parts. In the first part, the Court summarizes the claims asserted in the Objections of each of the Province, the USW and the Milbournes. In the second part, the Court sets out its reasons for its previously announced decision that the claims of the Province set out in its Objection, and the similar claims of the USW and the Milbournes, would be determined pursuant to the Claims Process Order in the CCAA proceedings but that the remaining claims of the USW and of the Milbournes, set out in their respective Objections, would not. In the third part, the Court sets out its conclusions regarding the proper forum for the determination of these remaining claims of the USW and the Milbournes.

The Objections of the Province, the USW and the Milbournes

[17] The following summarizes briefly the claims set out in the Objections of the Province, the USW and the Milbournes, and adds certain observations concerning these claims that are relevant for the issues addressed in this Endorsement.

The Objection of the Province

[18] The Province says its Objection relates to financial issues, which it describes as relating to the proper characterization of the debt and the validity of the security. While it has provided the list of factual issues for which it seeks production and/or discovery, the Province has not provided any greater clarification regarding the specific legal issues that it intends to raise in respect of the USS Claim.

[19] It is my understanding, however, that, essentially, the Province intends to make two allegations: (1) that given the terms of the USS loans to USSC, and the circumstances in which the loans were made, such loans should substantively be characterized, in whole or in part, as equity; and (2) that given the circumstances in which the loans were made, the security for the loans should be invalidated pursuant to federal and/or provincial legislation pertaining to fraudulent preferences or fraudulent assignments.

[20] Although USS disputes the allegations of the Province in its Objection, USS is prepared to have these issues determined by the Court under the process contemplated by the Claims Process Order. The claim that the USS loans are, in substance, debt and should be so treated for the purposes of these CCAA proceedings is referred to herein as a "debt re-characterization claim".

The Objection of the USW

[21] The Union broadly categorizes its objections as follows:

(a) an objection to the granting of security interests on the assets of USSC;

(b) an objection to the characterization of much of the USS Claim as debt when it is properly characterized as equity; and

(c) an objection grounded in USS's conduct in relation to its Canadian plants, unionized pensioners, pension plan members and beneficiaries, which gives rise to claims of oppression and breaches of fiduciary duty.

By way of overview, the USW submits that USS, as the shareholder of USSC, directed the operations of USSC in a manner that has caused it to significantly underperform, thereby incurring substantial losses rather than achieving profitability and requiring it to incur significant debt. In addition, the USW says that such actions undermined the ability of USSC to meet its on-going funding obligations to the USW pension plans of USSC. The USW argues that, as a result, USS has diluted the potential recoveries of the USW members and the USW pension plan beneficiaries in this CCAA proceeding. In Schedule "A" to this Endorsement, I have set out an

excerpt from the USW Objection which summarizes the claims asserted by the USW in somewhat greater detail.

[22] The USW acknowledges that the first two claims overlap significantly, if not completely, with the claims raised by the Province in its Objection. Accordingly, in this section, I will deal only with the claims of oppression and breaches of fiduciary duty. The following four aspects of these claims are relevant.

[23] First, the USW's claims for oppression and breach of fiduciary duty do not involve a determination that, in substance, the USS loans to USSC are properly chacterized as equity, that is, they are not debt re-characterization claims. Instead, for the purposes of these claims, the USW implicitly accepts that such loans are valid debt claims but argues, instead, that, as a result of USS' actions, the USW should be entitled to equitable relief that would have the substantive result of treating some or all of the loans as if they were equity.

[24] Second, as a related matter, the USW claims are not related to the actions of USS in extending the challenged loans to USSC, and in particular do not involve claims based on the terms of the loans or the circumstances in which they were made. Instead, the oppression claim is based on actions of USS that occurred subsequent to the extension of most of the USS loans to USSC and that pertain principally to the effective integration of the manufacturing operations of USSC within the USS group of companies. Similarly, the breach of fiduciary duty claim pertains to the administration of the USW pension plans after USS acquired USSC. This claim has no connection whatsoever to the USS loans to USSC.

[25] The USW claims proceed on the basis that actions of USS resulted in a loss to the USW Beneficiaries (as defined in the USW Objection) that is represented by the diminished recoveries that they will realize in these CCAA proceedings. In essence, the USW argues that USSC would not have needed to commence these CCAA proceedings but for the decisions taken by USS regarding the operations of USSC. As such, the USW claims are fundamentally claims against USS in its capacity as a shareholder of USSC and as an alleged administrator of the USW pension plans, rather than in its capacity as a creditor of USSC.

[26] Third, while the actions upon which the USW bases its action are clear, the nature of the USW claim and the remedy which it seeks can be approached in two different ways.

[27] In its broadest form, the USW relies upon the actions as a basis for application of the doctrine of equitable subordination for which the relief sought would be a subordination of some or all of the USS Claims to the claims of all other creditors of USSC for all purposes of these CCAA proceedings. In this form, the USW claim asserts that the actions of USS caused loss to all of the other creditors of USSC or resulted in an unfair benefit to USS at the expense of all such other creditors. To anticipate a conclusion reached below, this claim cannot proceed within the process contemplated by the Claims Process Order for the reason that the Court lacks the authority under the CCAA to apply the doctrine of equitable subordination.

[28] In its alternative form, the USW Objection asserts claims on behalf of the USW members and its retirees against USS of oppressive behavior for the purposes of section 241 of the *Canada Business Corporations Act*, R.S.O. 1985, c. C-44 and of breach of trust. The USW asserts that

the actions of USS giving rise to such claims caused loss that is specific to such USW members and retirees. Two aspects of the USW claims, as expressed in this manner, are significant for present purposes.

[29] First, these claims are asserted against USS and are grounded in actions of USS, as the controlling stakeholder of USSC, pertaining to the manner in which USSC was operated as a subsidiary of USS from and after 2007. They are not asserted against USSC and, to the extent USSC were to be joined as a party to any proceeding in which the claims were determined, such joinder would be only for procedural purposes.

[30] Second if the USW is successful in its oppression claim or its breach of fiduciary duty claim, any remedy ordered subordinating some or all of the USS Claims would be specific to the USW members and retirees. Because the USW claim is based on an allegation of oppressive behaviour that is specific to the USW members, the relief granted by a court would be directed to, and limited to, rectification of the oppressive conduct suffered by such members. It would not extend to other stakeholders of USSC. Any other stakeholder who also considered that the actions of USS constituted oppressive conduct in respect of such stakeholder would have to institute a separate action based on its specific circumstances. In this regard, the Province, which is the other major stakeholder of USSC, while it supports the USW Objection, has not commenced a similar action and, does not suggest that it would be entitled to benefit from any equitable relief granted to the USW in respect of the USW's oppression claim.

[31] Similarly, the USW claim that is based on allegations that USS breached fiduciary duties owed to USW members and pensioners in respect of the USW pension plans is necessarily limited to claims in respect of alleged breaches of duties alleged to be owing to such individuals personally. Any remedy granted would therefore be specific to these individuals, and the loss that they suffered, rather than in favour of all stakeholders.

The Objection of the Milbournes

[32] The Milbournes also submit that the USS Claims should be dismissed in their entirety or subordinated to the claims of the other unsecured creditors of USSC.

[33] Their Objection is also based on the actions of USS as the controlling shareholder of USSC, which are summarized as follows:

> All of the USS Claims arise either as a result of USS's accounting and legal treatment of its investment in the acquisition of Stelco or as a result of its accounting treatment of the normal costs of, and operating results from, USS' fully integrated operation and management of the acquired assets [being the assets of USSC] as part of its North American Flat Rolled Group and are either the result of transactions between itself and non-arm's length entities over which it had dominance and exercised total control at all material times, or are expenses incurred in the normal course of operating its flat rolled steel mills.

[34] Insofar as the Milbournes challenge the treatment of USS' investment in the acquisition of Stelco Inc., the Milbournes appear to raise claims similar to those asserted by the Province, that is a debt re-characterization claim. However, the principal assertion in the Milbournes'

Objection is that, in its management of the former assets of Stelco as part of its North American Flat Rolled Group of steel plants, USS took actions to idle the blast furnaces and steelmaking units of USSC which resulted in significant operating losses to USSC while USS continued to supply the former customer base of Stelco from its steel plants in the United States. This claim is based on factual assertions similar to, although not identical to, the facts asserted by the USW in respect of the oppression claim and claim for breach of trust asserted on behalf of its members. It is not related in any manner to the actions of USS in extending the challenged loans to USSC or the terms therof. As with the USW oppression claim, the relief sought is an order for subordination of some or all of the USS Claims. Given the relationship of the Milbournes to the situation as pension recipients, the Milbournes' Objection is essentially a claim for breach of a fiduciary duty owed by USS to them personally, although in the discussion below I have also considered the possible expression of the Milbournes' Objection as a claim for application of the doctrine of equitable subordination.

Analysis and Conclusions Regarding the Process for Determination of the Claims of the USW and the Milbournes other than their Debt Re-Characterization Claims

[35] To address the issue in this section of the Endorsement, I will first set out the applicable statutory provisions and the authority of the Court to adjudicate claims in CCAA proceedings. I will then address the issue of whether the claims of the USW and the Milbournes, other than their debt re-characterization claims, are properly determined within the summary process provided for in the Claims Process Order.

The Applicable Statutory Provisions

[36] The following provisions of the CCAA are relevant for the issues on this motion:

2. In this Act,

"Claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*;

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

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

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

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

"Equity Interest" means

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

6. (8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

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.

20. (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

(*a*) the amount of an unsecured claim is the amount

> (i) in the case of a company in the course of being wound up under the *Winding-up and Restructuring Act*, proof of which has been made in accordance with that Act,
>
> (ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, proof of which has been made in accordance with that Act, or
>
> (iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, *the amount is to be determined by the court on summary application by the company or by the creditor*; and

(*b*) the amount of a secured claim is the amount, proof of which might be made under the *Bankruptcy and Insolvency Act* if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, to be established by proof in the same manner

> as an unsecured claim under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, as the case may be, and, in the case of any other company, *the amount is to be determined by the court on summary application by the company or the creditor*. [emphasis added]
>
> 22.1 Despite subsection 22(1) creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.
>
> 36.1 (1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.
>
> (2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*
>
> > (*a*) to *"date of the bankruptcy"* is to be read as a reference to *"day on which proceedings commence under this Act"*;
> >
> > (*b*) to *"trustee"* is to be read as a reference to *"monitor"*; and
> >
> > (*c*) to *"bankrupt"*, *"insolvent person"* or *"debtor"* is to be read as a reference to *"debtor company"*.

[37] Section 2 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 (the "BIA"), which is referenced in section 2 of the CCAA, provides that a "claim provable in bankruptcy" includes any claim or liability provable in proceedings under the BIA by a creditor. "Creditor" is defined in s. 2 of the BIA as a person having a claim provable as a claim under the Act. Section 121(1) of the BIA describes claims provable as follows:

> 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.

The Authority of the Court to Adjudicate Claims for Debt Re-Characterization and for Equitable Subordination

[38] An important issue on this motion is the authority of the Court to order that part or all of the USS Claims be re-characterized as equity for purposes of these CCAA proceedings or subordinated to the claims of all other unsecured creditors. The two determinations are not synonymous.

[39] The re-characterization of a debt claim as equity proceeds on the basis that a creditor's claim is, in substance, an "Equity Claim" for purposes of the CCAA, based on the terms of the

debt claim and the circumstances in which the debt claim arose, notwithstanding the creditor's characterization of its claim as debt.

[40] Equitable subordination proceeds on the basis that it is equitable to subordinate in whole or in part an otherwise valid debt claim based on some form of inequitable conduct on the part of a creditor that has resulted in loss to the other creditors of a debtor corporation generally or that has conferred an unfair advantage on the creditor. In this regard, I note that, in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S. C. R. 558 at p. 609, Iacobucci J. referred to the following three-part test for the application of the principle of equitable subordination in the United States: (1) the claimant must have engaged in some type of inequitable conduct; (2) the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and (3) equitable subordination of the claim must not be inconsistent with the provisions of the bankruptcy statute.

[41] For the following reasons, I conclude that the Court has the authority to re-characterize a debt claim as equity in accordance with the test for equity implied by the definition of an "Equity Claim" or to invalidate security in favour of a creditor if the granting of such security constituted a fraudulent preference or a transaction at an undervalue. However, I am not persuaded that the Court has the authority under the CCAA to subordinate a valid debt claim to the claims of other creditors of the debtor corporation based on the actions of the creditor pursuant to the principle of equitable subordination.

[42] The CCAA establishes a structure for the adjudication of claims of creditors. It contemplates two categories of claims – "Claims" and "Equity Claims". Under the CCAA, a creditor's valid "Claim" is recognized for all purposes as such unless the Court determines that it shall be treated as an "Equity Claim" for purposes of proceedings under the statute. The definition of "Equity Claim" provides that an "Equity Claim" is "a claim that is in respect of an equity interest". "Equity Interest" is, in turn, defined in very specific terms to mean, in the case of a corporation, a share of the corporation.

[43] The CCAA also provides that, in certain circumstances, creditors can challenge prior transactions of the debtor corporation with a view to invalidating such transactions. Section 36.1 provides, among other things, that the provisions of the BIA pertaining to fraudulent preference transactions and transactions at an undervalue apply to proceedings under the CCAA on the basis provided for therein. Such provision has not been the subject of any litigation of which the Court is aware. However, on its face, such provision appears to be available to creditors to invalidate security granted by a debtor corporation in favour of a creditor if a fraudulent preference under section 95, as amended by section 36.1, can be demonstrated or possibly if a transfer at undervalue under section 96, as so amended, can be established.

[44] Given this framework, the Court has authority to determine whether a valid debt claim is, in substance, an equity claim, that is, to find that a debt claim should be re-characterized as equity. This is inherent in the definition of "Equity Claim" which, by the language of that definition, contains the test to be applied by a court - whether the claim represents, in substance, a share of the debtor corporation. As mentioned, the Court also has the authority to, in effect, subordinate a secured claim of a creditor if the Court determines that the security granted by the debtor constituted a fraudulent preference or a transaction at an undervalue pursuant to the

provisions of section 36.1 of the CCAA. Such a determination proceeds, however, on the basis of a determination that the actions and intentions of the debtor corporation constituted a fraudulent preference, or that the nature of the transaction itself together with the intentions of the debtor corporation, constituted a transaction at an undervalue. Neither a re-characterization of a debt claim nor an invalidation of security pursuant to section 36.1 of the CCAA would engage the principle of equitable subordination inasmuch as neither determination would address the question of whether the actions of the creditor call for a remedy in favour of the other creditors of the debtor corporation in the form of an equitable subordination of the creditor's claim.

[45] In this CCAA proceeding, however, the principal actions upon which the USW and the Milbournes base their claim of subordination do not fall within the circumstances that would trigger a remedy in the form of a re-characterization of debt as equity or in the form of an invalidation of security under section 36.1. The Court must therefore address the issue of whether a court also has the authority to determine that a valid "Claim" that is not an "Equity Claim", and that was not the subject of a transaction that falls within the circumstances addressed by section 36.1 of the CCAA, should be subordinated to the claims of the other unsecured creditors of a debtor corporation in reliance on equitable principles based on actions of the creditor.

[46] I am not aware of any Canadian case law in which the doctrine of equitable subordination has expressly applied. In *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, Iacobucci J., speaking for the Supreme Court, declined to express a view on whether the doctrine exists in Canada. In this proceeding, neither the USW nor the Milbournes submits that the doctrine exists in Canada. However, they argue that the Supreme Court has not excluded the possibility of application of the doctrine. They argue that, in addition to the authority to grant an order re-characterizing debt as equity, the Court also has the authority to grant an order of equitable subordination in the exercise of its statutory jurisdiction under section 11 of the CCAA.

[47] If it exists, the authority for the Court's jurisdiction to impose equitable subordination must be found in the authority granted to a court under section 11 of the CCAA. As set out above, section 11 provides that "the court ... 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" (italics added).

[48] Given the definition of "Equity Claim" and the scope of section 36.1 of the CCAA, I am not persuaded that a court has authority under section 11 of the CCAA to subordinate a valid debt claim to the claims of other creditors, based on the actions of the creditor pursuant to the principle of equitable subordination as that doctrine is understood in the United States.

[49] There is no case law supporting such an authority. Moreover, given the silence of the Supreme Court on this issue when presented with the opportunity to affirm its existence in Canadian law, one might infer that the Supreme Court has, in effect, rejected the principle of equitable subordiantion. As mentioned, the Supreme Court refused to endorse the principle outside of the CCAA in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank.* More recently, the Supreme Court also refused to endorse the principle within the operation of the CCAA: see, in particular, Deschamps J. in *Sun Indalex Finance, LLC v. United Steel Workers*,

[2013] 1 S.C.R. 271 at para. 77. Insofar as the issue remains open, however, I am of the opinion that the CCAA indicates as intention on the part of Parliament to exclude equitable subordination claims based on the conduct of a creditor for the following reason.

[50] Parliament could have provided the authority to order that a "Claim" should be treated as a subordinated claim, or as an "Equity Claim", based on conduct of the creditor. It chose not to do so. There is no language in the definition of "Equity Claim" that gives a court the authority to consider conduct of the creditor, including without limitation conduct in its capacity as a shareholder or as an alleged administrator of a pension plan, as a basis for subordinating a valid debt claim to the claims of other creditors, secured or otherwise. Similarly, Parliament could have drafted section 36.1 of the CCAA more broadly to extend beyond the specidic circumstances in sections 95 and 96 of the BIA. It has chosen instead not to make any such provision in respect of the authority of a court under the CCAA.

[51] In these circumstances, the absence of any provision that would permit the application off the doctrine of equitable subordination must be taken as indicative of an intention to exclude the operation of the doctrine under the CCAA. As a matter of statutory interpretation, therefore, I consider that the language of the definition of an "Equity Claim" and of the provisions of section 36.1 operates as a "restriction set out in the Act" for the purposes of section 11 of the CCAA which has the effect of limiting the authority of the Court in any determination regarding an "Equity Claim" or in any proceeding brought under section 36.1.

[52] I note that the conclusion expressed herein is consistent with the views expressed by Pepall J. (as she then was) in *Nelson Financial Group Ltd., Re.*, 2010 ONSC 6229 (S. Ct.) at para. 34 in respect of actions of a debtor corporation in relation to the issuance of an equity interest:

> In substance, the Styles' claim is for an equity obligation. At a minimum, it is a claim in respect of an equity interest as described in section 2 of the CCAA. Parliament's intention is clear and the types of claims advanced in this case by the preferred shareholders are captured by the language of the amended statute. While some, and most notably Professor Janis Sarra, advocated a statutory amendment that provided for some judicial flexibility in cases involving damages arising from egregious conduct on the part of a debtor corporation and its officers, Parliament opted not to include such a provision. Sections 6(8) and 22.1 allow for little if any flexibility. That said, they do provide for greater certainty in the appropriate treatment to be accorded equity claims.

I acknowledge that that the issue raised in *Nelson* was whether the actions of the debtor corporation could create a debt obligation. However, I do not see any difference in principle, for present purposes, between the circumstances in *Nelson* and the circumstances of the present case, in which it is suggested that the actions of the creditor could give rise to an "Equity Claim", that is, could support the conclusion that a broader test would apply beyond that contemplated by the definition of an "Equity Claim".

[53] In addition, I note that the Court must also have regard to the caution articulated by Deschamps J. in *Sun Indalex* at para. 82 that "courts should not use equity to do what they wish

Parliament had done through legislation." As addressed above, Parliament could have expressly introduced the law of equitable subordination into the CCAA at the time of the most recent amendments but chose not to do so. The Court must respect that policy decision.

Analysis and Conclusions Regarding the Process for Adjudication of the Equitable Subordination Claims of the USW and the Milbournes

[54] In furtherance of the determination of the secured and unsecured claims of USSC, including the USS Claims, the Court issued the Claims Process Order. It is agreed that the claims contemplated by the Objections of the Province and the USW, to the extent they constitute debt re-characterization claims and claims for the invalidation of security based on allegations of a fraudulent preference, a transaction at an undervalue, or similar concepts under provincial legislation, will be addressed pursuant to such process. The principal issue on this motion is whether the remaining claims described in the Objections of the USW and the Milbournes (herein, the "Subordination Claims") are properly addressed pursuant to the process set out in the Claims Process Order.

[55] As mentioned, the Court advised the parties at the conclusion of the hearing on the motion that it had concluded that the Subordination Claims were not appropriately dealt with pursuant to the Claims Process Order. I reach this conclusion for the following reasons.

[56] For the reasons set out above, I have concluded that the CCAA grants a court the following authority regarding the determination of the Objections of the Province, the USW and the Milbournes in these CCAA proceedings. First, the Court has the authority to address the debt re-characterization claims of the Province, the USW and the Milbournes that some or all of the USS Claims are "Equity Claims" according to the test implied by the definition of an "Equity Claim". Second, the Court has the authority to determine whether any security for the USS Claims should be invalidated pursuant to the provisions of section 36.1 of the CCAA. I would note that I am not addressing in this Endorsement whether such authority also extends to similar proceedings in respect of provincial insolvency legislation. Third, however, the Court does not otherwise have the authority to order that some or all of the USS Claims, if otherwise valid, shall be subordinated to the claims of the other creditors of USSC for the purposes of the CCAA proceedings based on application of the doctrine of equitable subordination to the actions of USS.

[57] As discussed above, the Subordination Claims of the USW and the Milbournes can be approached in two ways. Insofar as the Subordination Claims are based on application of the doctrine of equitable subordination, it necessarily follows from the conclusions set out above that the Court does not have the authority to determine the Subordination Claims pursuant to the Claims Process Order or otherwise.

[58] There remains a question, however, of the proper means of addressing the Subordination Claims of the USW and the Milbournes insofar as they are approached as claims of oppression and breach of fiduciary duty. Approached in this manner, the Subordination Claims are clearly third-party claims between USS and each of the USW and the Milbournes. The issue in the remainder of this section is therefore whether such third-party claims fall to be determined within the process contemplated by the Claims Process Order. I find that such claims

are not properly determined within such process by virtue of both the express language of the Claims Process Order as well as the provisions of the CCAA.

[59] The CCAA is a facilitative statute aimed at allowing financially distressed businesses to devise a plan of compromise or arrangement with their creditors with a view to becoming a viable business again. Section 19(1) of the CCAA provides, in effect, that a plan of compromise or arrangement may only deal with claims that relate to debts or liabilities to which a debtor company is subject at the time of commencement of proceedings under the CCAA or may become subject, prior to sanctioning of a plan of arrangement, by reason of an obligation incurred before the date of commencement of such proceedings.

[60] Section 20(1) provides the manner in which the amount of claims of secured and unsecured creditors are to be determined for the purposes of the CCAA. In particular, in the present circumstances, paragraphs 20(1)(a)(iii) and 20(1)(b) provide that "the amount is to be determined by the court on summary application by the company or the creditor", in respect of unsecured and secured claims, respectively.

[61] Neither the Claims Process Order nor the CCAA contemplate that inter-creditor claims will be addressed, or will be relevant, to a plan of arrangement or compromise under the CCAA.

[62] The Claims Process Order addresses the determination of "Claims" as defined therein. The relevant provisions of the definition of a "Claim" are as follows:

> (i) *any right or claim of any Person that may be asserted or made in whole or in part against the Applicant*, whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, including by reason of the commission of a tort (intentional or unintentional), by reason of any breach of contract or other agreement (oral or written), by reason of any breach of duty (including any legal, statutory, equitable or fiduciary duty) or by reason of any right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise), and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present or future, known or unknown, by guarantee, surety or otherwise, and whether or not any right or claim is executory or anticipatory in nature, including any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, *which indebtedness, liability or obligation, and any interest accrued thereon or costs payable in respect thereof (A) is based in whole or in part on facts existing prior to the Filing Date, (B) relates to a time period prior to the Filing Date, or (C) is a right or claim of any kind that would be a claim provable in bankruptcy within the meaning of the BIA*

had the Applicant become bankrupt on the Filing Date and includes an Equity Claim and a Secured Claim; ... [emphasis added]

[63] As indicated in the italicized language, the definition of a "Claim" is restricted to a claim that may be asserted against USSC. Accordingly, on the plain reading of the Claims Process Order, the claims asserted by the USW and the Milbournes do not give rise to a "Claim" for purposes of the Claims Process Order. This restriction of the Claims Process Order to determination of claims asserted against USSC is also consistent with the language, and the policy, of the CCAA.

[64] In this regard, the Claims Process Order is consistent with, and reflects, the approach contemplated by section 20(1) of the CCAA insofar as it provides for a summary application to resolve the determination of any "Claim" under the CCAA. As set out above, a "Claim" for such purposes under the CCAA is a claim against the debtor company, in this case USSC. It does not extend to inter-creditor claims of the nature asserted by the USW and the Milbournes.

[65] The CCAA is directed towards the creation, approval and implementation of a plan of arrangement or compromise proposed between a debtor company and its secured and unsecured creditors, or any claim thereof. Section 19 sets out the only claims that may be dealt with by a compromise or arrangement. Section 19 uses the defined term "claim" throughout, evidencing an intention that only claims against a debtor company are to be the subject of a plan of arrangement or compromise under the CCAA. Similarly, as mentioned, section 20 addresses the determination of claims for the purposes of the CCAA. Again, the operative concept is a "claim" as defined under the CCAA. In addition, pursuant to section 22, the debtor company may establish classes of creditors for purposes of voting upon a plan of arrangement. Pursuant to section 22(2), the factors that determine a commonality of interest for inclusion of creditors in the same class are related to the "claims" of such creditors, as defined in section 2 of the CCAA. In short, the CCAA does not contemplate incorporation of inter-creditor claims into any plan of arrangement or compromise or into the voting process in respect of any proposed plan.

[66] There is, in fact, a strict separation between claims between a creditor and a debtor corporation, on the one hand, and between or among creditors, on the other hand. The former are determined pursuant to the summary application procedure, or otherwise, pursuant to section 20 of the CCAA. The Court's determination of such claims governs for all purposes of the CCAA proceeding proper. The latter are determined outside the process contemplated by section 20 of the CCAA unless specifically incorporated into the restructuring plan as approved by the parties or otherwise ordered. The Court's determination of such claims would govern only the respective rights and obligations of the particular creditors with respect to actual distributions by the debtor corporation.

The Forum for the Remaining Objections

[67] Given the foregoing determination, the Court must also address the forum for determination of the Subordination Claims of the USW and the Milbournes. For clarity, for the reason set out above, in considering this issue, I approach the Subordination Claims of the USW and the Milbournes as claims of oppressive behavior and of breach of fiduciary duty asserted by these parties against USS for which the remedy sought is an order subordinating some or all of the USS Claims to the claims of these parties.

[68] USS makes a number of arguments against determination of the Subordination Claims against it within the CCAA process. First, it argues that use of the CCAA proceedings to adjudicate inter-creditor claims not involving the debtor company is an impermissible use of the CCAA proceedings with the result that a court would lack jurisdiction to determine such an action. Second, USS argues that the Subordination Claims can only justify a monetary award if successful, which can just as easily be paid by USS directly out of its own assets as it could be paid by USSC pursuant to a plan of arrangement, even if subordination of the position of USS were ordered. Third, USS argues that it would be prejudiced in four respects from a procedural and/or substantive perspective if the Subordination Claims were determined under the CCAA process. Lastly, USS argues that the adjudication of the Subordination Claims within the CCAA process would complicate the adjudication of those claims by, for example, potentially involving unnecessary parties such as USSC and the Monitor. Conversely, it says that any efficiencies associated with determination under the CCAA process could equally be achieved outside that process by having a judge familiar with the CCAA proceedings hear the actions.

[69] The USW and the Milbournes make a number of different arguments which will be addressed in the anlaysis below. The Province supports the USW, principally on the basis that, if the USW were successful in either of its Subordination Claims, it would be entitled to relief that would include relief in respect of distributions under any plan of arrangement. On this basis, the Province argues that the Subordination Claims are sufficiently related to the CCAA proceedings that a timely and orderly resolution of these claims is necessary for a successful plan of arrangement.

[70] I propose to address the USW claims and the Milbourne claims in turn. Before doing so, however, I will address the threshold issue of whether the Court has the authority to order that these claims be determined within this CCAA process. In addition, I will also set out certain observations that inform the conclusions below.

The Jurisdictional Issue

[71] As mentioned, USS argues that the Court lacks jurisdiction to hear the USW 's oppression and breach of fiduciary duty claims under the CCAA proceedings. It says that the use of the CCAA proceedings to determine inter-creditor claims not involving the debtor company is not permissible under the CCAA as such use does not further the purpose of the CCAA. In support of its position, USS relies on dicta of Blair J.A. in *Stelco Inc., Re*, (2005), 78 O.R. (3d) 241 (C.A.) [*Stelco*] at para. 32, which also cited with approval the statement of Paperny J. in *Pacific Coastal Airlines Ltd. v. Air-Canada*, [2001] B.C.J. No. 2580 (B.C.S.C.) at para. 24.

[72] I acknowledge that the purpose of the CCAA is to facilitiate a compromise or arrangement between an insolvent debtor corporation and its creditors to allow the business to continue as a going concern. Accordingly, in most situations, it would be expected that the resolution of inter-creditor disputes would not further such process and may, in fact, delay and possibly hinder such process. In such circumstances, there is no reasonable basis for a determination of such claims within the CCAA process.

[73] The issue for the Court, however, is whether the broad jurisdiction of a court granted under section 11 of the CCAA permits a court to exercise its discretion to determine inter-

creditor claims within a CCAA process if it determines that, in its judgment, such action would further the purposes of the CCAA. USS argues, in effect, for an inflexible rule that excludes such a possibility. I am not persuaded, however, that this is correct as a matter of the statutory interpretation of section 11 of the CCAA. I am also not persuaded that the case law relied upon by USS precludes such an approach.

[74] On its face, section 11 of the CCAA confers broad authority on a court. As mentioned above, it provides that, subject to the restrictions set out in the CCAA, a court may make "any order that it considers appropriate in the circumstances". It is not suggested that there is any express restriction in the CCAA that prevents a court from ordering that inter-creditor claims, such as the Subordination Claims, shall be heard under the CCAA proceeding outside the process contemplated by the Claims Process Order.

[75] Case law establishes that the authority of a court under section 11 is to be interpreted broadly subject, in any particular case, to satisfaction of the baseline requirements of "appropriateness, good faith and due diligence": see *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70. In the present case, USS raises the consideration of appropriateness.

[76] In *Century Services*, the Supreme Court defined the test for appropriateness as "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". The application of this test argues against a hard and fast rule of the nature implied by USS and in favour of a more flexible rule that addresses, in any particular case, whether determination of inter-creditor issues will, in such case, further the remedial purpose of the CCAA.

[77] Two further observations in *Century Services* support this conclusion.

[78] First, at para. 60, the Supreme Court stressed that, in exercising a court's authority under the CCAA, the broader public interest may support determination of particular actions in a CCAA proceeding that would not otherwise be addressed within the CCAA process:

> Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed … 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 … 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 … [citations omitted]

[79] In addition, the Supreme Court noted with approval in para. 61 that, in exercising authority under the CCAA, and in particular under section 11 of the CCAA, courts must necessarily be flexible and innovative in order to further efforts to achieve the remedial purposes of the CCAA.

[80] All of these considerations argue in favour of a broad authority under section 11 that does not preclude the determination of inter-creditor claims within CCAA proceedings in appropriate circumstances. I do not suggest that such circumstances are presented in most circumstances before the courts. I do, however, think that the discretion or authority of a court under section 11 of the CCAA extends to the determination of inter-creditor matters within a CCAA proceeding if, on balance, such action would appear to further the remedial purpose of the CCAA.

[81] I turn then to the two authorities upon which USS relies. I do not read either of these cases as addressing the issue before the Court on this motion.

[82] In *Re Stelco Inc.*, the Court of Appeal addressed adjudication of an inter-creditor dispute in the context of the issue of classification of creditors for purposes of a vote on a plan of arrangement. At para. 30, Blair J.A. refers to the principle of that case in stating that "the classification of creditors is determined by their legal rights in relation to the debtor company, as opposed to their rights as creditors in relation to each other." This case therefore does not address whether the inter-creditor issue was appropriately dealt with inside or outside of the CCAA process. In fact, in the end, the plan of arrangement made provision for a determination of that issue within the CCAA proceedings after implementation of the plan.

[83] The circumstances in *Pacific Coastal Airlines* were also very different from the present circumstances. In that case, the tort claim against Air Canada was not connected in any way to the restructuring of Canadian Airlines. The issue was whether the plaintiff retained a claim after implementation of the plan of arrangement of Canadian Airlines. The plan of arrangement released the plaintiffs' claim against Canadian Airlines but not against its parent, Air Canada. Accordingly, the statement of Paperny J. at para. 24 of *Pacific Coastal Airlines* that "it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company" addresses a totally different situation from the present circumstances.

[84] Based on the foregoing, I conclude that the Court has authority under section 11 of the CCAA to order that the Subordination Claims be determined by a process within the CCAA proceedings, other than the process contemplated by the Claims Process Order, if the Court is of the opinion that, on balance, such action is likely to further the remedial prupose of the CCAA.

Preliminary Observations

[85] The following four general observations establish the framework within which the Court has reached the conclusions in this section of this Endorsement.

[86] First, USS argues that it would be prejudiced in its ability to assert certain defences to the claims of the USW if the Subordination Claims were adjudicated under the CCAA proceedings. I do not believe this to be correct.

[87] To the extent that the determination of the Subordination Claims were to proceed under the CCAA, it would proceed outside of the procedure provided for under the Claims Process Order. Accordingly, the Subordination Claims would have to be asserted in a separate process determined by the Court. I see no reason why such a process could not substantially reflect the normal litigation process contemplated by the *Rules of Civil Procedure*, including an exchange of pleadings, the right to pre-trial motions under, among other provisions Rules 20 and 21 of the *Rules of Civil Procedure*, and appropriate documentary production and discovery.

[88] Second, in their submissions, each of USS and the USW mischaracterizes important aspects of the Subordination Claims that are significant for present purposes.

[89] USS argues that the USW would only be entitled to a monetary award if it were successful on either or both of its claims. However, as pleaded, the USW seeks an order of subordination if it were successful based on the broad remedial statutory authority of a court in respect of the oppression claim and the equitable authority of a court in respect of its breach of fiduciary claim. It is not appropriate for the Court to take a position on this motion on the relative likelihood of such relief in the event the USW were successful on either or both of these claims. The Court must instead proceed on the basis that there is a possibility that such relief might be ordered.

[90] In such event, however, as mentioned, given that such relief would be ordered in the context of an inter-creditor claim, the relief would be limited to an order affecting the priority entitlement to any proceeds of distribution pursuant to the plan of arrangement as between the USW and USS. To be clear, given that any such claim would not be a "Claim" to be determined pursuant to the Claims Process Order, there is no basis on which any relief could extend more generally for the benefit of creditors or other stakeholders who are not a proper party to the action between the USW and USS. Accordingly, the USW's claim for "equitable subordination" of some or all of the USS Claims in the context of its claims for oppression and breach of fiduciary duty is effectively limited to a claim for subordination of the proceeds receivable by USS from USSC pursuant to any plan of arrangement to the extent of any claim of the USW against USSC. The Milbournes' claim for "equitable subordination" in the context of their claims for breach of fiduciary duty is also effectively limited in the same manner.

[91] More generally, the USW suggests that, if successful, the equitable remedies in its favour could directly affect, among other things, the sale of the assets of USSC and any approval of a plan of arrangement in which USSC proposes to make any payment or give any credit to USS. As mentioned, it also suggests that the equitable remedies could disallow or subordinate some or all of the USS Claims, or set off some or all of the USS Claims against not only the USW claim but also the claims of the other creditors of USSC. I understand this submission to contemplate the operation of such remedies within the plan of arrangement rather than outside it.

[92] This concept of the remedies available to the USW is also inconsistent with the earlier determination in this Endorsement that the USW claims are not "Claims" against USSC to be dealt with in the Claims Process Order. Determination of the USW Claims under the CCAA process cannot obscure the difference in nature, and consequence, of inter-creditor claims and claims against USSC. In particular, determination of the inter-creditor claims under the CCAA proceedings does not have the result that any such claims, as so determined, will be applicable in

respect of any plan of arrangement and compromise in the proceedings without express inclusion of such claims in the plan of arrangement by the debtor company and approval of all the stakeholders. Nor would any such determination affect or alter the amount of a creditor's claim that the creditor could bid in any sales process conducted in the CCAA proceedings.

[93] Third, similarly, inclusion of the determination of the USW's claims within the CCAA process does not imply, as the USW appears to assume, that such determination must be completed before the SARP process is completed or any plan of reorganization is approved. Clearly, resolution of such claims as quickly as possible is highly desirable as addressed further below. However, as inter-creditor claims, the timing of the determination of such claims is not tied to the timing of the various actions of USSC in formulating and proposing a plan of arrangement.

[94] Fourth, given the inherent jurisdiction of a court to control its own processes and the fact that the inter-creditor issues raised by the USW and the Milbournes are not to be determined within the process contemplated by the Claims Process Order, the Court also retains the authority to require, at a later date, that the claims of either or both of the USW and the Milbournes be continued in proceedings outside of the CCAA. Such a determination would be appropriate if, at such time, the Court is of the opinion that continuation of a process for determination of such claims within the CCAA proceeding no longer furthers the remedial purpose of the CCAA.

The Forum for Determination of the USW Subordination Claims

[95] I turn then to the issue of whether the USW oppression and breach of fiduciary claims against USS, as set out in the USW Objection, should be determined within these CCAA proceedings or in a separate action in the Superior Court outside of these proceedings. The comparable question regarding the Milbournes' Subordination Claims will be addressed in the next section.

[96] As set out above, there is little case law on the considerations which should inform the Court's decision. As a practical matter, the easiest answer would be to exclude the USW claims from the CCAA proceedings on the basis proposed by USS – that is, as inter-creditor claims they are not contemplated by the provisions of section 20 of the CCAA. Moreover, there is always the concern that, for strategic purposes, either or both of the USW or USS will seek to tie resolution of these claims to the completion of the SARP or the approval and implementation of a plan of arrangement notwithstanding the Court's determination, for the reasons above, that these are separate and unconnected issues.

[97] Nevertheless, I think there are good reasons in the particular circumstances of this case to order that determination of the USW Subordination Claims should proceed within the CCAA process. In reaching this conclusion, the guiding principle is whether, on balance, such an approach to the determination of the USW Subordination Claims would render a successful plan of arrangement more or less likely. In this regard, the following considerations are relevant.

[98] First, the circumstances giving rise to the USW Subordination Claims are unique in the context of a CCAA restructuring. USS is the predominant creditor of USSC. It has also controlled USSC since 2007. It is important to recognize that the USW position that USS must

bear the financial consequences for the circumstances in which USSC finds itself is honestly and forcefully asserted. Whether there is any legal merit in the specific claims that the USW asserts is not being determined at this time. Under certain scenarios, however, as a practical matter, a resolution of the legal viability of these claims as soon as possible could be an important factor in realising a successful plan of arrangement, insofar as USW support for any such plan is necessary.

[99] Second, as a related matter, it is possible that inclusion of the process for determination of the USW claims within the CCAA process will allow for a more expeditious process based on the dynamic of the related CCAA process. In any event, without in any way intending to cast aspersions on the motives of any of the parties that would be involved in the determination of the USW Subordination Claims, I think it is probable that the process of determining such claims outside the CCAA process would, as the Province suggests, involve protracted and more expensive litigation if any connection to the dynamic of the CCAA process is removed.

[100] Third, as a related matter, inclusion of the determination of the USW Subordination Claims within the CCAA process will permit consideration by a court on an expeditious basis of a certain number of threshold issues pertaining to the USW claims that have been raised by USS and USSC. In addition, the USW says it continues to be prepared to work co-operatively with USS and USSC to ensure that the USW Objection is resolved quickly and efficiently. To the extent it is possible within the CCAA proceedings to significantly advance identification of the factual basis upon which the USW Subordination Claims are asserted, and consideration of the legal merit of such claims, it is possible that the prospects for a negotiated arrangement among the parties would be furthered.

[101] Lastly, as mentioned, I am not persuaded that USS would be prejudiced, or that the USW would gain a tactical advantage, by inclusion of the USW Subordination Claims within the CCAA process, given the procedural approach to determination of those claims described above. In particular, I do not consider that USS would be prejudiced in respect of any of the four specific matters raised by it for the following reasons.

[102] First, inclusion of the claims within the CCAA process does not remove the need for the USW to assert claims based on recognized principles of law – in this case, oppressive behaviour under the *Canada Business Corporations Act* and breach of fiduciary duty under traditional principles of the law of equity as supplemented by applicable statutory provisions. The CCAA does not create or establish any new rights, or remove or affect, any existing defences of either of the parties. Accordingly, determination of the USW claims within the CCAA proceedings would still require the USW to establish that it had standing as a "complainant" under section 238 of the CBCA. Second, there is nothing in the procedures governing the conduct of CCAA proceedings that precludes a costs award in respect of inter-creditor claims in appropriate circumstances in the discretion of the court. Third, I am not persuaded that appeal rights from a determination of inter-creditor claims in a proceeding conducted within the CCAA proceedings should be subject to any different standard from that which would apply in respect of an appeal from a determination in a separate action. In particular, there is nothing in the CCAA that otherwise alters or narrows rights of appeal in the circumstances contemplated in this Endorsement. It is also important to note that the factors referred to by Blair J.A. in *Stelco* at para. 15 that result in leave being granted only sparingly in CCAA matters – the "real-time" dynamic and the

discretionary character underlying many orders under the CCAA – would not be present in any meaningful way in respect of any determination under the CCAA proceedings of the USW Subordination Claims. Lastly, USS submits that the USW is positioning itself to seek a holdback or escrow arrangement within the CCAA proceedings without having to satisfy the requirements for pre-judgement relief. This concern is entirely speculative and premature. In any event, any such request would require an order of the Court in the exercise of its discretion. I do not think that the considerations that would govern the exercise of that discretion in CCAA proceedings would differ from the applicable considerations in respect of a request for such relief in a separate proceeding commenced in the Superior Court.

The Forum for Determination of the Milbournes' Subordination Claim

[103] The Milbournes also seek to have the Subordination Claim raised in the Milbourne Objection determined within the CCAA proceeding.

[104] The argument for doing so is not a strong one. It is far less clear that determination of the claim will further the remedial purpose of the CCAA proceeding of USSC. In particular, the Milbournes have no continuing relationship with USSC. Other things being equal, the Court would be inclined to require the Milbournes to commence a separate action in the Superior Court.

[105] However, the Subordination Claim of the Milbournes overlaps substantially with the Subordination Claims of the USW. In these circumstances, considerations of efficiency and the avoidance of a multiplicity of actions, with the possibility of conflicting judgments by different courts, argue for determination of all of these claims within the CCAA proceedings so long as the corresponding USW claim is also being determined within the CCAA proceeding. In my view, these latter considerations should be determinative in the present circumstances.

Conclusion

[106] The issues addressed in this Endorsement have been superceded by subsequent events. In particular, since the hearing of this motion, the parties have concentrated on the process for a determination of the debt re-characterization claims of the Province and the USW. Based on the foregoing, however, to the extent that at some stage in these CCAA proceedings, the USW and the Milbournes wish to have their Subordination Claims determined, I conclude that such claims can be determined within the CCAA proceedings pursuant to a process, other than the process contemplated by the Claims Process Order, to be established by the Court and reflecting the procedural considerations discussed herein.

Wilton-Siegel J.

Date: August 13, 2015

Schedule "A"

3. The Union's Objection is based on a number of grounds:

   (a) USS's secured claim is based on security interests effectively granted by USS to itself, at a time when there was no independent board of directors or advisors, for insufficient consideration, and in a manner which amounted to an improper preference and/or fraudulent conveyance;

   (b) a significant portion of USS's "debt" is really in the nature of equity an should be re-characterized as such. For instance:

      (i) much of the debt was incurred to acquire Stelco Inc.;

      (ii) USS completely controlled USSC;

      (iii) USS was the sole source of USSC's financing;

      (iv) USS provided commercially unreasonable interest and repayment terms;

      (v) USS had no reasonable expectation of repayment on the purported loans; and

      (vi) USSC was significantly undercapitalized throughout the years following its acquisition by USS;

   (c) USS has acted in a manner that is oppressive, unfairly prejudicial to, and unfairly disregards the interests of the Union's members in respect of all of USSC's obligations. USS has failed to:

      (i) comply with its obligations to the federal and provincial government to maintain and/or increase production levels;

      (ii) make good faith efforts to run USSC as a viable business, managed in Canada;

      (iii) maintain the viability of the USW pension plans; and

      (iv) avoid incurring debts which would give USS repayment priority over USSC's other creditors or which would seriously dilute any recovery by them on their claims;

   (d) USS has engaged in business practices which breached legally binding undertakings it provided to the Canadian government, and which undermined USSC's ability to meet its obligations to the employees, retirees and beneficiaries of the USW pension plans (collectively, the "Beneficiaries"). USS's conduct in this regard is in breach of fiduciary

duties that it owed to the Beneficiaries by virtue of its role as administrator of the Pension Plans, including:

(i) failing to meet its undertakings to the Canadian government with respect to production and employment levels;

(ii) directing USSC's operations in a way which caused it to incur significant debts;

(iii) diverting production from Canadian facilities to its American facilities; and

(iv) locking out the Union's members in order to slow down Canadian production rather than for genuine labour relations purposes.

4. USS controlled USSC to further its own interests, to the detriment of USSC's business, its employees, pensioners, and other stakeholders. This conduct directly affects the validity of many or all of USS's claims. It would be inequitable to allow USS's claims in these circumstances, at the expense of USSC's other creditors, and in particular the Union and Beneficiaries. Its claims should be disallowed in their entirety, reduced, or subordinated to the claims of the Union and the Beneficiaries.

TAB 2

[1] Presumption of knowledge

The Construction of Statutes, 7th Ed.

Ruth Sullivan

The Construction of Statutes, 7th Ed. (Sullivan) > CHAPTER 8 Textual Analysis > PART 1 PRESUMPTIONS ABOUT HOW LEGISLATION IS DRAFTED > § 8.02 Presumed Knowledge and Competence

CHAPTER 8 Textual Analysis

PART 1 PRESUMPTIONS ABOUT HOW LEGISLATION IS DRAFTED

§ 8.02 Presumed Knowledge and Competence

[1] Presumption of knowledge

The legislature is presumed to know all that is necessary to produce rational and effective legislation. This presumption is very far-reaching. It credits the legislature with the vast body of knowledge referred to as legislative facts[1] and with mastery of existing law, common law and the *Civil Code of Québec* as well as ordinary statute law, and the case law interpreting statutes.[2] The legislature is also presumed to have knowledge of practical affairs.[3] It understands commercial practices and the functioning of public institutions, for example, and is familiar with the problems its legislation is meant to address. In short, the legislature is presumed to know whatever facts are relevant to the conception and operation of its legislation.[4]

Even if the presumption of knowledge is not often discussed by the courts it is implicit in the interpretive rules and techniques on which they rely. For example, a mastery of language is presupposed by the ordinary meaning rule while knowledge of practical affairs is presupposed by purposive analysis and in some cases by consequential analysis. A knowledge of law is presupposed by the presumption that the legislature does not intend to change existing law or to violate international law.

Logically, the substance of what the legislature is presumed to know must be knowledge that was available to it at the time the legislation was enacted. The legislature is not presumed to know the future. To determine the mischief at which a statute was aimed, for example, the courts look to material conditions existing at the time of enactment. In practice, however, courts often assume, in the absence of evidence to the contrary, that the knowledge available to the interpreting court is the knowledge relied on by the enacting legislature.

Footnote(s)

1 In *Willick v. Willick*, [1994] S.C.J. No. 94, [1994] 3 S.C.R. 670 (S.C.C.), L'Heureux-Dubé J. wrote, at 699: "An integral aspect of discovering Parliamentary intention is the precept that Parliament must be taken to be aware of the social and historical context in which it makes its intention known." See also *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] S.C.J. No. 53, 2011 SCC 53 at para. 45 (S.C.C.); *McDiarmid Lumber Ltd. v. God's Lake First Nation*, [2006] S.C.J. No. 58, [2006] 2 S.C.R. 846 at paras. 82-83 (S.C.C.); *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] S.C.J. No. 27, [2003] 1 S.C.R. 476 at paras. 25-26 (S.C.C.).

[1] Presumption of knowledge

2 In *2747–3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] S.C.J. No. 112, [1996] 3 S.C.R. 919 at para. 238 (S.C.C.), L'Heureux-Dubé J. wrote: "It must be presumed that the Quebec legislature had knowledge of all the relevant law." See also *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd*., [2016] S.C.J. No. 47, 2016 SCC 47 at para. 78 (S.C.C.); *Canada (Canadian Human Rights Commission) v. Canada (Attorney General*), [2011] S.C.J. No. 53, 2011 SCC 53 at para. 45 (S.C.C.); *ATCO Gas and Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] S.C.J. No. 4, [2006] 1 S.C.R. 140 at para. 59 (S.C.C.); *R. v. Clarke*, [2013] O.J. No. 94, 2013 ONCA 7 at para. 20 (Ont. C.A.), affd [2014] S.C.J. No. 100 (S.C.C.); *Triad Gestco Ltd. v. Canada*, [2012] F.C.J. No. 1274, 2012 FCA 258 at para. 56 (F.C.A.).

3 See, for example, *R. v. St. Pierre*, [1995] S.C.J. No. 23, [1995] 1 S.C.R. 791 at para. 61 (S.C.C.), where Iacobucci J. noted, that "... Parliament can be assumed to have known that blood alcohol levels constantly change". See also *R. v. Ahmad*, [2011] S.C.J. No. 6, 2011 SCC 6 at para. 31 (S.C.C.): "We must presume that Parliament was aware of the possibility that proceedings would be needlessly stayed if the trial judge was denied access to material that could not be disclosed for valid reasons of state secrecy."

4 *Donovan v. Mccain Foods Limited*, [2004] N.J. No. 70, 2004 NLCA 12 at paras. 37-38 (N.L.C.A.).

End of Document

TAB 3

LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON
SHARED LIABILITY

LRC 88

August, 1986

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

The Commissioners are:

Arthur L. Close, *Chairman*
Mary V. Newbury
Lyman R. Robinson, Q.C.
Peter T. Burns, Q.C.

Thomas G. Anderson is Counsel to the Commission.

Sharon St. Michael is Secretary to the Commission.

The Commission offices are located at Suite 601, Chancery Place, 865 Hornby Street, Vancouver, B.C. V6Z 2H4

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Report on shared liability

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"LRC 88"

The common law governing shared liability arising in tort has been altered by legislation. In British Columbia, the *Negligence Act* provides that liability to make good damage is proportional to the degree in which each person contributed to the damage or loss, and that persons who share liability have a statutory right to contribution.

(b) Reform of the Negligence Act

Various problems arising from the procedural and substantive aspects of the law that governs shared liability arising in contract or tort remain. For example, shared liability need not necessarily derive from a common legal basis. One of the persons might be liable in tort and another in contract or by reason of a breach of a statutory duty. There is some doubt whether, in these circumstances, liability can be apportioned and whether those causing the damage enjoy rights of contribution. This and other aspects of shared liability are examined in this Report.

(c) The Uniform Contributory Fault Act

The Uniform Law Conference of Canada has recently adopted a *Uniform Contributory Fault Act*, which is the culmination of a number of years of work. Many of the problems experienced in British Columbia are resolved by the *Uniform Act*. In the following discussion of joint and several liability, contributory negligence and contribution, the provisions of the *Uniform Act* will be considered. An issue which will be addressed later in this Report is whether the *Uniform Act* should be adopted in British Columbia.

B. A Note on Terminology

Articles in legal journals tend to distinguish between kinds of shared liability based upon the context in which they arise. Shared liability in contract is treated separately from shared liability in tort. That approach implies that the manner in which shared liability arises is of more significance than its consequences. And yet, the consequences of shared liability tend to be uniform, independent of the manner in which it arises. For that reason, the discussion in this Report is of shared liability generally, and distinctions peculiar to shared liability in con tract or in tort are treated as exceptions to the general principles which apply.

C. The Working Paper

A Working Paper on Shared Liability (W.P. 50) was published in May 1985. This was given wide circulation, but failed to elicit significant response. Points raised in submissions we received are referred to later in this Report.

CHAPTER II JOINT LIABILITY AND JOINT AND SEVERAL LIABILITY

A. Introduction

1. Separate and Shared Liability

Liability to another may arise by agreement or by operation of law. It may be separate or shared.

Separate liability is referred to as "several" in the sense that the fault of a person for loss or damage is distinct or severable from the fault of anyone else. A person who is severally liable is independ-

ently responsible for another's loss or damage. Two or more persons may make independent promises to another or may be separately responsible for causing different injuries to another. In either case, liability to the injured person or to the person to whom the promises were made is separate. For example, if A and B each separately promise to pay C ten dollars, each is liable to pay C ten dollars. If the promises are kept, C will receive $20. Several liability is cumulative.

Where two or more persons promise to do the same thing or are responsible for a common injury to another, they share liability to perform the promise or compensate for the injury. The obligation is indivisible. Performance by one will discharge the other or others, since they cannot be called upon to repeat the performance of the obligation. Shared obligations are not cumulative.

The common law recognizes two kinds of shared liability: joint liability and joint and several liability. Different rules apply, depending on the characterization of shared liability. The chief distinction between the two kinds of shared liability is procedural. If liability is joint, the plaintiff must usually proceed against all who share liability in the same proceeding. If liability is joint and several, the plaintiff may elect to proceed against defendants separately. In this chapter, we examine the distinctions between joint liability and joint and several liability, together with the differing rules that apply to discharge of shared liability depending on its characterization.

2. Characterizing the Nature of Liability

It is not always clear whether shared liability is joint or joint and several.

The characterization of liability which arises consensually is one of construction. A promise made by two or more persons is usually presumed to be joint unless it is qualified. What constitutes qualification is, however, a question of interpretation. Liability for overdrafts on a joint bank account, for example, is not necessarily joint. It depends upon the terms of the contract and the nature of the dealings with the bank.

In some cases the characterization of shared contractual liability is dealt with by statute. The *Partnership Act* provides that partners are jointly liable for partnership debts and obligations. The *Bills of Exchange Act* provides that where two or more persons sign a promissory note which bears the words "I promise to pay" the obligation is deemed to be joint and several.

The *Negligence Act* provides that shared liability in tort is joint and several. Recently, however, it was held that where the injured person is contributorily negligent, liability is only several.

B. Principles of Shared Liability

1. Principles Common to Both Joint Liability and Joint and Several Liability

(a) Defence of One Person Liable

If one person has a personal defence, (for example, a defence based on his minority) the others who share liability with him may not take advantage of it. If one person has a defence which goes to the root of the plaintiff's claim, the others who share liability with him, although they have not pleaded it, may take the benefit of it.

Special rules apply to contracts of guarantee under which the guarantor usually undertakes joint and several liability with the principal debtor. The Commission examined these special rules in its *Report on Guarantees of Consumer Debts*.

(b) Release of One Person Liable

Actions or aspects of actions may be settled before trial. The plaintiff may accept payment or performance from a defendant in satisfaction of his claim, or he may abandon his claim. Frequently the defendant will require an assurance from the plaintiff that the plaintiff will not later proceed against him on the settled matter. An assurance of that kind may take one of two forms. It may constitute a "release" under which the plaintiff acknowledges that the defendant is not, or is no longer, liable to him with respect to the settled matter. Or it may take the form of a "covenant not to sue" which provides that the plaintiff agrees not to sue or continue an action against the defendant with respect to the settled matter, but does not address the issue of liability. Lord Denning M.R. has described the distinction between the two as arid and technical, without any merit. The distinction, however, has significant consequences.

A release of one person discharges others who share liability with him. On the other hand, a covenant not to sue a person does not discharge the others with whom he shares liability. A release which reserved the plaintiff's rights against persons who shared liability with the person released has been construed as a covenant not to sue.

2. Principles Which Differ

(a) Joinder of Parties

(i) Joint Liability

A joint obligation is only one obligation. At common law, as a general rule all persons jointly liable had to be joined as defendants and process served on them. A person who was jointly liable could apply for a stay of proceedings until the others jointly liable were joined in the proceedings and served with process. There are exceptions to the general rule. For example, a person jointly liable with others need not be joined if he is outside the jurisdiction, his promise is void or voidable by reason of his minority, he is a member of a firm of common carriers, or he is an undisclosed partner of one who represented himself as being the sole contracting party.

The court now has a discretion in the matter. A stay might be refused, for example, when the plaintiff has done all in his power to effect service on an absent defendant. Moreover, the *Law and Equity Act* now provides that:

> 48. (1) Where a party has a demand recoverable against 2 or more persons jointly liable it is sufficient if any of the persons is served with process, and an order may be obtained and execution issued against the person served notwithstanding that others jointly liable may not have been served or sued or may not be within the jurisdiction of the court.

(ii) Joint and Several Liability

Separate actions may be brought against persons jointly and severally liable. The court may, however, order joinder of other persons who share liability if their participation is necessary in the proceedings.

(b) Death of a Person Who Shares Liability With Others

(i) Joint Liability

Liability of a person jointly liable with others passes on his death to the survivors who shared the liability with him. His estate is freed of that liability. Liability of the last person jointly liable passes to his estate. When there is no one else to share liability, it necessarily becomes several. At that time, the rules governing joint liability no longer have any relevance.

The common law has been altered insofar as partners are involved. The *Partnership Act* provides that, although partners are jointly liable for partnership debts, the estate of a deceased partner is severally liable, subject to the prior payment of his separate debts.

(ii) Joint and Several Liability

Liability of a person jointly and severally liable with others passes to his estate on his death.

(c) Judgment Against One Person Who Shares Liability With Others

(i) Joint Liability

At common law, judgment against one or more persons jointly liable with others bars any subsequent action against the others. That is so even if the plaintiff was unaware of the existence of other persons who shared liability with the defendants and the judgment is not satisfied.

The common law position has been altered by the *Law and Equity Act*, which provides as follows:

> 48. (2) The obtaining of an order against any one person jointly liable does not release any others jointly liable who have been sued in the proceeding, whether the others have been served with process or not.

This section does not accomplish very much. Even before enactment of section 48 of the *Law and Equity Act*, the Supreme Court Rules offered some relief from the consequences of the common law rule. The Supreme Court Rules provide, for example, that judgment for a liquidated sum in default of appearance or defence does not prejudice the plaintiff's right to proceed against others jointly liable who have entered an appearance or delivered a defence. Similarly, summary judgment against one person does not prejudice the plaintiff's right to proceed against others jointly liable who obtained leave to defend. Section 48(2) of the *Law and Equity Act* is not restricted to liquidated demands and, therefore, does go slightly further than the Supreme Court Rules.

(ii) Joint and Several Liability

Where shared liability is joint and several, judgment against one does not bar action against others. Only satisfaction of the judgment will discharge others who share liability.

C. Reform

1. Introduction

In the previous discussion, various difficulties and uncertainties have been observed in the law governing shared liability. These include the different results which arise depending upon whether shared liability is joint or joint and several and the effect of a release of, or judgment against, one person on others who share liability with him.

In many respects, there is consistency in the rules governing shared liability arising in contract or tort. Historical distinctions between joint liability and joint and several liability have become blurred. A question which deserves attention is whether any advantage is obtained from continuing to distinguish between different kinds of shared liability.

2. Joint Liability and Joint and Several Liability

The characterization of shared liability determines who the plaintiff must proceed against. If liability is joint, generally the plaintiff must include in the same proceeding all persons jointly liable to

TAB 4

Anything You Can Do, I Can Do Better: Does the *CCAA* Provide Broader Discretionary Relief than the *BIA*?

*Eamonn Watson, Gray Monczka and Jordan Schultz**

Canada's insolvency legislation provides a number of potential avenues for the reorganization of an insolvent debtor's financial affairs. Some of these avenues allow an insolvent debtor to restructure its debt and continue as a going concern. Going-concern restructurings are primarily pursued under two statutory regimes: the more codified proposal provisions of the *Bankruptcy and Insolvency Act*[1] and the more flexible *Companies' Creditors Arrangement Act*.[2]

Certain eligibility requirements may restrict a debtor from pursuing a reorganization under the *CCAA*. However, for some restructurings, a debtor may be able to choose between selecting either a *BIA* proposal or a *CCAA* restructuring. In these circumstances, an insolvency professional may consider a number of factors to determine which regime presents the most effective path to restructure an insolvent corporation's affairs. These factors may include the length of the proceeding, cost, secured versus unsecured debt, the availability of interim financing and creditor support, among other considerations. One factor that may also cross the mind of an insolvency professional is the flexibility afforded to the supervising court under each regime—ie, the availability of discretionary relief in *BIA* proposal proceedings compared with *CCAA* proceedings.

The *CCAA* continues to be described as "famously skeletal in nature",[3] whereas the proposal regime under the *BIA* "is achieved through a rules-based mechanism that

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

[2] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*].

[3] *Canada v Canada North Group Inc*, 2021 SCC 30 at para 138 [*Canada North*].

offers less flexibility".[4] Although various amendments to Canada's bankruptcy and insolvency legislation have made the dichotomy between the codification of the *BIA* and the flexibility of the *CCAA* less pronounced, certain areas of comparison between the regimes remain uncertain. One such area is the court's discretion to approve relief not explicitly stated in each statute.

The *CCAA* is heralded for its broad discretion, which allows a supervising judge to "make a variety of orders that respond to the circumstances" unique to each insolvent corporation.[5] This discretion has been described as "the engine" driving the *CCAA*,[6] and it is accepted that *CCAA* courts may "sanction measures for which there is no explicit authority in the *CCAA*".[7] As a result, the *CCAA* provides a clear path should unique relief be required to implement a particular restructuring. In contrast, the *BIA*'s rules-based proposal regime is suggested to have a narrower scope for discretionary relief.[8] At the very least, there are fewer examples of courts employing discretionary relief in the *BIA* proposal context.

This article primarily focuses on comparing judicial flexibility between the *BIA* and the *CCAA* and in turn considers whether judicial discretion should influence an insolvent corporation's choice between progressing a *BIA* proposal proceeding or a *CCAA* proceeding to restructure its debt. Section I provides an overview of proposals under the *BIA* and formal plans of arrangement under the *CCAA* and highlights the advantages and disadvantages associated with each scheme that may inform a debtor's selection. Section II discusses the authority for discretion under the *CCAA* and provides examples of relief granted in *CCAA* proceedings relying on this discretion. Section III similarly examines the authority for discretion under the *BIA* in proposal proceedings and reviews case law in which courts have utilized ancillary jurisdiction under the *BIA* to achieve the

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[4] *Ibid* at para 140, citing *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 15 [*Century Services*].
[5] *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 at para 48 [*Callidus*]; *Canada North*, *supra* note 3 at para 138.
[6] *Callidus*, *supra* note 5 at para 48, citing *Re Stelco Inc* (2005), 253 DLR (4th) 109 at para 36, 2005 CarswellOnt 1188 (CA) [*Stelco*]; *Canada North*, *supra* note 3 at para 138.
[7] *Century Services*, *supra* note 4 at para 61.
[8] *Canada (Attorney General) v Chronométriq Inc et al* (8 April 2022), Montréal 500-11-060355-217 (QCCA), Appellants' Brief at para 6, online: *Richter* <https://www.richter.ca/wp-content/uploads/2021/10/10-tax-authorities-appeal-brief.pdf> [Appellants' Brief].

objects of the *BIA*. Finally, Section IV proposes that recent trends in Canadian insolvency law encouraging the harmonization of the two insolvency regimes support the proposition that there is equally broad discretion available in *BIA* proposal proceedings.

In the authors' view, the comparison set out in this article demonstrates that courts are willing to implement much of the same relief in *BIA* proposal proceedings that has been granted under the *CCAA*. As a result, other than scenarios that deal with truly unique and unprecedented relief, the scope of discretionary relief is likely not a determinative factor when considering whether to restructure under a *BIA* proposal or the *CCAA*.

I. OVERVIEW OF THE *BIA* AND *CCAA*

1. Proposals under the *BIA*

A *BIA* proposal provides a debtor the opportunity for a "fresh start" by giving the insolvent business the chance to restructure its affairs to become financially viable.[9] Restructurings are accomplished through creditors agreeing to accept less-than-full repayment, an extension of time and/or a scheme of arrangement in terms of the alteration of the debt and equity structure.[10] The codified *BIA* offers certainty, timeliness and predictability for the proposal process by providing detailed provisions that expressly set out the rights and expectations of the reorganization.[11] There are two different types of proposals under the *BIA*: Division I and Division II.

The use of Division I proposals is essentially unrestricted; any "insolvent person" (ie, not yet bankrupt) or "bankrupt" may make a Division I proposal.[12] In contrast, access to Division II proposals is more limited. Division II proposals are only available to

[9] Janis Sarra, "Economic Rehabilitation: Understanding the Growth in Consumer Proposals under Canadian Insolvency Legislation" (2009) 24 BFLR 383 at 1 [Sarra, "Economic Rehabilitation"].
[10] *Ibid* at 6.
[11] Janis Sarra, "Failure to Capture the Brass Ring: An Empirical Study of Business Bankruptcies and Proposals under the Canadian Bankruptcy and Insolvency Act" in Janis P Sarra, ed, *Annual Review of Insolvency Law 2009* (Toronto: Carswell, 2010) at 14, 57 [Sarra, "Brass Ring"].
[12] *BIA*, *supra* note 1, ss 2, 50(1). Section 50 of the *BIA* is subject to subsection (1.1), which states that a "proposal may not be made under this Division with respect to a debtor in respect of whom a consumer proposal has been filed under Division II until the administrator under the consumer proposal has been discharged".

individuals, either bankrupt or insolvent, with debts below $250,000.[13] As this article is concerned with comparing relief under the *CCAA* and *BIA*, and the *CCAA* only applies to corporate debtors, Division II proposals are not addressed any further.

The Division I proposal process commences with the filing of a proposal or a notice of intention ("NOI") to file a proposal.[14] Corporate debtors may prefer or need to file an NOI, as debtors often require time to devise a viable proposal.[15]

Upon filing a Division I proposal or an NOI, an automatic stay of proceedings is imposed on almost all secured and unsecured creditors.[16] The stay of proceedings freezes the ability of creditors to enforce their claims against the debtor and gives the insolvent debtor time to negotiate a possible going-forward plan.[17]

Under the NOI provisions, a Division I proposal must be filed within 30 days of filing the NOI, unless the debtor applies for an extension.[18] A debtor may apply for a 45-day extension before the initial 30-day period expires and may continue to do so for up to five months after the initial 30-day period.[19] A Division I proposal must therefore be filed within six months after the initial filing of the NOI, which helps reduce overall costs and keeps the debtor focused on developing a viable strategy.[20] In granting an extension, the court must be satisfied that the debtor is acting in good faith and with due diligence, that the debtor is likely to make a viable proposal should the extension be granted and that no creditor would be materially prejudiced as a result of the extension.[21]

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[13] *BIA*, *supra* note 1, ss 66.11 "consumer debtor", 66.12; Sarra, "Brass Ring", *supra* note 11 at 12. The $250,000 limit excludes any debts secured by the debtor's principal residence. Section 66.12 is subject to subsection (2), which states that a "consumer debtor who has filed a notice of intention or a proposal under Division I may not make a consumer proposal until the trustee appointed in respect of the notice of intention or proposal under Division I has been discharged". As a result, it is not possible to pursue Division I and Division II proposals concurrently.
[14] *BIA*, *supra* note 1, ss 50(1), 50.4, 62(1); Sarra, "Brass Ring", *supra* note 11 at 12.
[15] Sarra, "Brass Ring", *supra* note 11 at 12.
[16] *BIA*, *supra* note 1, ss 69(1), 69.1(1).
[17] Sarra, "Brass Ring", *supra* note 11 at 7.
[18] *BIA*, *supra* note 1, s 50.4(8).
[19] *Ibid*, s 50.4(9).
[20] Kelly J Bourassa, "Is it Time to Restructure Canada's Restructuring Statutes—Or Not?" in Janis P Sarra, ed, *Annual Review of Insolvency Law 2013* (Toronto: Carswell, 2014) at 5 [Bourassa].
[21] *BIA*, *supra* note 1, s 50.4(9).

The debtor must appoint a trustee under a Division I proposal or a proposal trustee, in the case of an NOI.[22] The trustee or proposal trustee acts in a monitoring and advisory capacity, is given full access to the debtor's financial books and is obliged to notify creditors and the court of any adverse change in the debtor's financial position.[23] In the case of an NOI, the proposal trustee must "advise on and participate in the preparation of the proposal", which expressly includes negotiations.[24]

The *BIA* sets out requirements for what a Division I proposal must include, such as providing for the payment of certain priority claims and for all proper fees and expenses of the trustee.[25]

Under the Division I provisions, a meeting of creditors is then called to vote on the proposal. For the proposal to be accepted, the *BIA* requires greater than a majority of all classes of unsecured creditors in number and two thirds in value of the claims for each class of unsecured creditor to vote in favour of it.[26] Should the proposal obtain the requisite support, it is then brought to the court for approval. The court has the authority to refuse the proposal if 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".[27] However, the court will almost always defer to the creditors' vote to sanction the proposal.[28]

If the debtor that filed an NOI fails to file a proposal or the Division I proposal is rejected by creditors or is annulled by the court, the debtor is deemed to have made an assignment in bankruptcy.[29]

2. Plans of Arrangement and Compromise under the *CCAA*

[22] *Ibid*, ss 50(10), 50.4(7).
[23] *Ibid*.
[24] *Ibid*, s 50.5.
[25] *Ibid*, s 60.
[26] *Ibid*, ss 54(1), 54(2), 62(2).
[27] *Ibid*, s 59(2).
[28] Jacob S Ziegel & Rajvinder S Sahni, "An Empirical Investigation of Corporation Division I Proposals in the Toronto Bankruptcy Region" (2003) 41 Osgoode Hall LJ 665 at 8 [Ziegel & Sahni].
[29] *BIA*, *supra* note 1, ss 50.4(8), 57, 61(2).

The *CCAA* is remedial legislation designed to facilitate restructuring arrangements between insolvent companies and their creditors.[30] A plan of arrangement or plan of compromise represents a proposed contract between a debtor and its creditors to settle outstanding debt and restructure the affairs of the insolvent company.[31] These plans are most analogous to *BIA* Division I proposals but are not the only means available under the *CCAA* to restructure an insolvent debtor. However, for the sake of comparison, plans of arrangement or compromise are the focus of this article.

The *CCAA* has been described as an "exceptionally short statute" compared with its codified *BIA* counterpart.[32] Courts have relied on judicial discretion to fill in the legislative gaps of the *CCAA* by interpreting it broadly.[33] The supervising court's willingness to tailor the *CCAA*'s provisions to meet the unique demands of individual cases allows for a significant amount of flexibility to advance the debtor's reorganization.[34]

Plans of arrangement under the *CCAA* are limited to larger corporations, as the Act requires the debtor (or a group of affiliated debtors, all of whom are filing) to have amounts owing to creditors in excess of $5 million.[35] On the initial application, the debtor must satisfy the court that the orders sought are appropriate in the circumstances.[36] As stated by the Supreme Court of Canada ("SCC"):

> 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.[37]

[30] Alfonso Nocilla, "Is 'Corporate Rescue' Working in Canada?" (2013) 53 Can Bus LJ 382 at 384 [Nocilla].
[31] *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp*, 2008 ONCA 587 at para 62 [*ATB Financial*].
[32] George G Triantis, "Book Review: Keeping the Gates to Corporate Reorganization: Judicial Activism Under the BIA and CCAA" (1997) 28 Can Bus LJ 279 at 279 [Triantis]; *Canada North*, *supra* note 3 at paras 138–140.
[33] *Stelco*, *supra* note 6 at para 32; *Canada North*, *supra* note 3 at para 138.
[34] Bourassa, *supra* note 20 at 2; see also *Century Services*, *supra* note 4 at para 21.
[35] *CCAA*, *supra* note 2, s 3(1).
[36] *Ibid*, ss 11, 11.02(3)(a).
[37] *Century Services*, *supra* note 4 at para 70.

The *CCAA* does not provide for an automatic stay of proceedings upon granting an initial order; however, a stay is typically sought and obtained.[38] As with *BIA* proposal proceedings, a stay in *CCAA* proceedings protects the insolvent corporation from its creditors' claims to allow the corporation time to advance its restructuring and develop a potential plan of arrangement. There is no maximum stay period under the *CCAA*, with the exception of the initial stay period, which is limited to 10 days.[39] Unlike proposal proceedings under the *BIA*, the *CCAA* does not put an outside limit on extending the stay of proceedings. Theoretically, an insolvent corporation may continue to extend the stay of proceedings indefinitely, provided the debtor satisfies the supervising judge that those extensions are appropriate in the circumstances and that the debtor is acting in good faith and with due diligence.[40]

There is also no strict test for lifting a stay of proceedings under the *CCAA*. The party seeking to lift the stay bears a very heavy onus, and the supervision judge, among other things:

> [s]hould consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action.[41]

Upon granting the initial order, the court must appoint a monitor to supervise the financial affairs of the insolvent corporation.[42] The monitor is tasked with overseeing and reporting on the debtor's business and financial affairs, and must "advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors", among other requirements.[43]

Unlike a Division I proposal, in preparing a plan of arrangement or compromise, a debtor is subject to relatively few procedural requirements and does not have the time constraints of an NOI proceeding. However, as with a Division I proposal, a *CCAA* plan

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[38] Bourassa, *supra* note 20 at 4.
[39] *CCAA*, *supra* note 2, s 11.02(1).
[40] *Ibid*, s 11.02(3).
[41] *Re Canwest Global Communications Corp* (2009), 61 CBR (5th) 200 at para 32, 2009 CarswellOnt 7882 (Sup Ct).
[42] *CCAA*, *supra* note 2, s 11.7(1).
[43] *Ibid*, s 23(1)(i).

of arrangement or compromise must include full payment of certain priority claims.[44] Subject to these restrictions, a corporation may include any term in the plan which may lawfully be contained in a contract at law.[45]

A completed plan of arrangement is then presented and voted on at a meeting or meetings of affected creditor classes.[46] If approved by a majority of creditors (ie, representing two thirds of the value of debt held by voting creditors in each required class), the plan moves on to the court to determine whether it is fair and reasonable and complies with statutory requirements.[47] Unlike *BIA* proceedings, if the plan is rejected either by the affected creditors or by the court, there is no automatic bankruptcy.[48] As *CCAA* proceedings often involve large and complex enterprises, an automatic bankruptcy could have significant repercussions for employees, customers, suppliers and the general public.[49] Instead, the corporation has the opportunity to extend the stay to consult further with stakeholders and devise a new or amended plan, or to consider alternative forms of restructuring under the *CCAA*.[50]

3. Choosing between the Two Restructuring Statutes

As discussed, certain eligibility requirements may limit the avenues of reorganization available to an insolvent debtor. However, an insolvent corporation whose debts exceed $5 million can seek relief under either a *BIA* Division I proposal or the *CCAA*. Depending on the circumstances of the insolvency and the complexity or size of the debtor, one statutory scheme may be preferable to the other. When both options are available, a debtor has a choice between the more predictable *BIA* framework and taking a “gamble” on a *CCAA* judicial determination.[51] Because a debtor can potentially decide to avoid any unfavourable rule under the *BIA* to effect a better outcome under the *CCAA*, it has been argued that this self-selection could lead to strategic behaviour

[44] *Ibid*, ss 5.1(2), 6(3)–(8).
[45] *ATB Financial*, *supra* note 31 at para 62.
[46] *CCAA*, *supra* note 2, ss 4, 5.
[47] *Ibid*, s 6(1).
[48] Nocilla, *supra* note 30 at 385.
[49] Bourassa, *supra* note 20 at 5.
[50] Nocilla, *supra* note 30 at 385.
[51] Triantis, *supra* note 32 at 284.

that would frustrate the policy objectives of the Canadian insolvency regime.[52] Other fundamental distinctions between the *BIA* and *CCAA* that may influence an insolvent debtor's selection between the regimes include transaction costs, timing, stigma, control and flexibility.[53]

Reorganization proceedings under the *CCAA* generally involve considerable judicial involvement and discretion, which usually leads to a more expensive process than under the *BIA*. Counsel for a monitor and debtor in a *CCAA* proceeding will typically appear in court frequently throughout the reorganization, and what is commonly referred to as "'real-time' litigation" tends to be very expensive.[54] Proposals under the *BIA*, on the other hand, are generally more accessible to debtors or companies with limited resources.[55] *BIA* reorganization costs are usually lower due to the codified nature of the statute, specified procedural rules and reduced judicial intervention.[56] As one author notes, even larger corporations that qualify for *CCAA* protection may still not be able to afford a potentially drawn-out restructuring under the *CCAA* and so may instead choose to pursue a less expensive Division I proposal.[57]

Timeliness is another factor an insolvent debtor may wish to consider when deciding between statutory regimes. A *CCAA* restructuring that culminates in a plan of arrangement or compromise typically involves completing a claims process, seeking a plan filing and meeting order, convening a meeting of creditors to vote and returning to court to sanction the plan of arrangement. Proceedings under the *CCAA* can extend for years, as there are no explicit timing restrictions in the *CCAA*.[58] By contrast, in NOI proceedings, the *BIA* mandates a proposal within six months.[59]

[52] *Ibid.*
[53] Sarra, "Brass Ring", *supra* note 11 at 57.
[54] Nocilla, *supra* note 30 at 397.
[55] Richard McLaren, *Canadian Commercial Reorganization: Preventing Bankruptcy* (Aurora: Canada Law Book, 1994) at 2.5 30, 3.3 10.
[56] *Re Bearcat Explorations Ltd* (2004), 3 CBR (5th) 167 at para 7, 2004 CarswellAlta 1183 (QB).
[57] Nocilla, *supra* note 30 at 399.
[58] Bourassa, *supra* note 20 at 4.
[59] *BIA*, *supra* note 1, s 50.4(8).

Some commentators suggest that there may be stigma associated with a corporation proceeding under the *BIA* because the statute has "bankruptcy" in its name.[60] A corporation may therefore be more inclined to develop a plan of arrangement under the *CCAA* to avoid any potentially negative social impacts following a reorganization under the *BIA*.

The *BIA* presents a codified procedure for initiating a proposal; this procedure has been used by larger corporations with multi-million dollar liabilities that are attracted by the explicit provisions of the statute, such as the ease of initiating proceedings or the initial absence of publicity.[61] However, the *BIA*'s detailed procedural codification can also present procedural challenges for corporations with multiple operating subsidiaries in different jurisdictions. Unlike the *CCAA*, which allows a single proceeding that involves "affiliated companies" (ie, subsidiaries),[62] an NOI must be filed with the official receiver in the "insolvent person's locality".[63] Because NOI proceedings cannot be consolidated until after filing, each debtor entity is required to filed an NOI in its respective jurisdiction. This procedural hurdle can cause delay and expense for complex corporations operating through numerous subsidiaries across Canada, both of which are avoided by proceeding under the *CCAA*.

Depending on the complexity of the restructuring or financial peril of the debtor, either the *BIA* or *CCAA* may be more desirable. The *CCAA* may be the preferred avenue for a larger complex corporation whose viable restructuring plan will likely take more time to develop and may not involve an arrangement or compromise. Alternatively, if there is a clear path to a proposal, proceeding under a Division I proposal may be preferable for a debtor wishing to settle debts quickly and efficiently.

The rest of this article focuses on a potential distinction between the two insolvency statutes that can be particularly important: judicial discretion. Specifically, it examines

[60] Sarra, "Brass Ring", *supra* note 11 at 57; Bourassa, *supra* note 20 at 2.
[61] Ziegel & Sahni, *supra* note 28 at 4.
[62] *CCAA*, *supra* note 2, ss 3(2)–(3).
[63] *BIA*, *supra* note 1, s 50.4(1).

whether the scope of discretion under the *BIA* is actually narrower than it is under the *CCAA*.

II. AUTHORITY FOR DISCRETION UNDER THE *CCAA*

1. Discretion in Insolvency Proceedings

Some authors have recognized a trend in the modern Canadian legal system: moving away from rules-based legislation to more discretionary decision-making.[64] Discretionary decision-making has the potential to individualize the application of the law, making it more flexible and adaptable to individual cases.[65] Individualizing applications of the law may be particularly effective in the insolvency context because, due to insolvency's highly dynamic and complex nature, statutory rules may not be fashioned to address every contingency.[66]

The *CCAA* has been praised as a highly flexible statutory scheme. The skeletal structure and "broad-brush" provisions of the *CCAA* leave wide avenues of discretion for the supervising judge, allowing the statute to adapt and evolve to meet contemporary business and social needs.[67] This judicial discretion has been described by the SCC as the most important feature of the *CCAA* and one that has led to the Canadian insolvency restructuring regime being "one of the most sophisticated systems in the developed world".[68]

On the other hand, the *BIA* is a "highly codified" statutory scheme, the provisions of which are specific and detailed.[69] As a result, it is generally suggested that courts may find less room for judicial discretion because Parliament has likely explicitly limited or

[64] DJ Galligan, "Discretionary Powers: A Legal Study of Official Discretion" (1987) 46:3 CLJ at 40.
[65] David M Walker, *The Oxford Companion to Law* (New York: Oxford University Press, 1980) *sv* discretion.
[66] Georgina R Jackson & Janis Sarra, "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Janis P Sarra, ed, *Annual Review of Insolvency Law 2007* (Toronto: Carswell, 2008) at 9 [Jackson & Sarra].
[67] *Clear Creek Contracting Ltd v Skeena Cellulose Inc*, 2003 BCCA 344 at para 3 [*Skeena Cellulose*]; *Century Services*, *supra* note 4 at para 58.
[68] *Century Services*, *supra* note 4 at para 21, citing R B Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in Janis P Sarra, ed, *Annual Review of Insolvency Law 2005* (Toronto: Carswell, 2006) at 481. See also *Canada North*, *supra* note 3 at para 21.
[69] Jackson & Sarra, *supra* note 66 at 19.

prescribed the court's jurisdiction.[70] Thus, it has been argued that while the *BIA* serves a similar remedial purpose to the *CCAA*, this objective is achieved through a rules-based mechanism that offers less flexibility.[71] However, a review of authorities under the *BIA* seems to indicate that there is a willingness to adopt much of the discretionary relief granted under the *CCAA* in *BIA* proceedings, which suggests a comparable amount of judicial flexibility under both statutes.

2. General Discretionary Authority

Canadian courts have acknowledged a preference for determining the limits of discretionary authority through a hierarchical order of judicial tools.[72] First, courts should rely on statutory interpretation to determine whether such discretionary power exists and what limits are to be placed on it.[73] Next, a court may rely on the exercise of inherent jurisdiction should a broad and liberal interpretation of the statute reveal a legislative gap.[74] However, it has been cautioned that inherent jurisdiction is a tool that should be considered only where broad statutory authority is unavailable and one that is not necessary to utilize in most circumstances.[75]

Statutory jurisdiction is grounded in the text of the statute, and the provision granting discretion generally defines the limits of the jurisdiction.[76] Inherent jurisdiction, on the other hand, is derived from the nature of a court as a superior court of law; thus, the limits of such jurisdiction are not always easy to define.[77] Some academics have even argued that inherent jurisdiction "postulates the existence of an amplitude of amorphous powers, which may be arbitrary in operation and which are without limit in extent".[78]

Nevertheless, there are innumerable examples of relief being granted under section 11 of the *CCAA* that are beyond the strict text of the statute. Although the number of

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[70] *Ibid* at 9.
[71] *Century Services*, *supra* note 4 at para 15.
[72] *Ibid* at para 65.
[73] *Ibid.*
[74] Jackson & Sarra, *supra* note 66 at 1.
[75] *Ibid.*
[76] *Skeena Cellulose*, *supra* note 67 at para 45.
[77] *Ibid.*
[78] IH Jacob, "The Inherent Jurisdiction of the Court" (1970) 23:1 Current Legal Problems 23 at 52 [Jacob].

examples may not be as vast in the context of section 183(1) of the *BIA*, there is sufficient authority for much of the same relief in proposal proceedings.

3. Discretion under Section 11 of the *CCAA*

Judicial discretion is essential to give effect to the public policy objectives of a statute, particularly under a statute such as the *CCAA*, where the express provisions may be "inadequate and incomplete".[79] Supervising judges are granted broad discretion to fulfil their difficult roles of balancing conflicting and changing interests.[80] The flexibility provided under the *CCAA* to restructure businesses has played and will continue to play a critical role in avoiding the grave social and economic losses that result from liquidation.[81]

Prior to the 2009 *CCAA* amendments, Canadian courts often relied on inherent jurisdiction to fill in the gaps of the *CCAA* and give effect to the objectives of the statute.[82] However, the enactment of the *CCAA*'s current section 11 has been said to have firmly cemented the shift from inherent to statutory jurisdiction.[83] The SCC has affirmed that section 11 "for the most part supplants the need to resort to inherent jurisdiction", as the text of the *CCAA* will be sufficient to ground measures necessary to achieve its objectives.[84] As a result, in most instances, orders in *CCAA* proceedings should be considered exercises of statutory, and not inherent, power.[85]

However broad the scope of judicial discretion may be, discretion under the *CCAA* is "not open-ended and unfettered."[86] Section 11 is subject to the restrictions set out in the

[79] *Re Westar Mining Ltd* (1992), 14 CBR (3d) 88 at para 23, 1992 CarswellBC 508 (SC).
[80] *Canada North*, *supra* note 3 at para 22.
[81] Jocelyn T Perreault, Gabriel Faure & Francois Alexandre Toupin, "Reverse Vesting Transactions: An Innovative Solution to Restructure Insolvent Cannabis Companies" 10:10 IIC-ART at 1 [Perreault, Faure & Toupin]; see also *Canada North*, *supra* note 3 at paras 137–138.
[82] *Skeena Cellulose*, *supra* note 67 at para 45.
[83] Roderick J Wood, "Come a Little Bit Closer": Convergence and its Limits in Canadian Restructuring Law" 10:1 IIC-ART at 5 [Wood]. It is widely acknowledged that the majority of the 2009 amendments codified pre-existing judge-made law that had gone "far beyond the statutes"; see David Bish, "In Search of the Limits of Judicial Discretion in Insolvency Law" 7:9 IIC-ART at 3 [Bish]; see also *Callidus*, *supra* note 5 at para 91.
[84] *Callidus*, *supra* note 5 at para 68, citing *Stelco*, *supra* note 6 at para 36.
[85] *Canada North*, *supra* note 3 at para 69.
[86] *Stelco, supra* note 6 at para 44.

statute, and any order granted must be "appropriate in the circumstances".[87] Specifically, section 11 is worded as follows:

> 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.[88]

Section 11 cannot be used to negate an unambiguous legislative expression. However, section 11 should not be read as being restricted by the availability of more specific orders.[89]

Appropriateness has been interpreted as an assessment of whether the order sought advances the *CCAA*'s remedial policy objectives, while also requiring that the applicant be acting in good faith and with due diligence.[90] Good faith requirements are "well-established" and are made explicit in the current section 18.6 of the *CCAA*.[91] Due diligence requires that those involved in the proceeding be on equal footing and have a clear understanding of their respective rights, and discourages parties from sitting on their rights to strategically manoeuvre or position themselves to gain an advantage.[92]

Judicial discretion may also be further limited by the articulation of principled grounds in precedent and case law. Due to its skeletal structure, the *CCAA* operates substantially through judge-made law.[93] Thus, the decisions of courts that interpret and apply provisions of the *CCAA*, in particular the skeletal section 11, may begin to follow certain patterns over time and thus may be less a product of discretion and more a product of precedent.[94] Ironically, an overreliance on precedent may actually restrict the flexibility essential to the *CCAA*, as formulaic adherence to precedent, in particular established criteria for granting specific discretionary relief, may disrupt the necessary tailoring of

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[87] *CCAA*, *supra* note 2, s 11.
[88] *Ibid*.
[89] *Century Services*, *supra* note 4 at para 70.
[90] *Ibid*; *Callidus*, *supra* note 5 at para 49.
[91] *Callidus*, *supra* note 5 at para 50.
[92] *Re ENTREC Corporation*, 2020 ABQB 751 at para 4; *Callidus*, *supra* note 5 at para 51.
[93] *Skeena Cellulose*, *supra* note 67 at para 33.
[94] Jackson & Sarra, *supra* note 66 at 12.

statutory provisions in a similar way as codification. It has been noted that *stare decisis* is "difficult to embed into the insolvency law paradigm because it cannot easily be reconciled with the judicial discretion on which our system is premised".[95] In contrast, one of the strongest critiques of discretionary authority is that it promotes "ad hocery",[96] compromising predictability and the rule of law.[97]

As corporate insolvencies have become increasingly complex, courts have had to utilize section 11 of the *CCAA* to craft innovative solutions, for which there may be no express authority, to meet the policy objectives underlying the insolvency statute.[98] The following section reviews some prominent examples of relief granted by courts under section 11 of the *CCAA*.

4. Examples of Relief Granted Relying on Discretionary Authority Under Section 11 of the *CCAA*

i. Barring voting on a plan of arrangement where a creditor is acting with an improper purpose

In *9354-9186 Québec inc v Callidus Capital Corp*, the SCC upheld the supervising judge's ruling and unanimously agreed that section 11 of the *CCAA* grants a supervising judge discretion to bar a creditor from voting at a meeting of creditors where they are acting for an improper purpose.[99]

In *Callidus*, Callidus Capital Corp ("Callidus") wished to settle its debts with 9354-9186 Québec inc ("Blueberi") through a plan of arrangement, but the plan of arrangement did not receive sufficient support from Blueberi's unsecured creditors and was rejected. Callidus, as a secured creditor, could have voted at the first meeting but chose not to. Callidus subsequently put forward a new plan of arrangement at a meeting of creditors that was "essentially identical" to the first one but instead valued the security it held in

[95] *Ibid*.
[96] Virginia Torrie, "Implications of the Blueberi Decision: An Affirmation of Broad Judicial Discretion in *CCAA* and a 'Green Light' for Litigation Funding in Canada" (2021) 36 BFLR 277 at 6.
[97] *Ibid*; see Jasmine Girgis, "A Generalized Duty of Good Faith in Insolvency Proceedings: Effective or Meaningless?" (2020) 64 Can Bus LJ 98 at 9; see also Bish, *supra* note 83 at 3.
[98] *Century Services*, *supra* note 4 at para 61.
[99] *Callidus*, *supra* note 5.

support of its $3 million claim at $0, making it an unsecured creditor.[100] Callidus then asked the supervising judge if it could vote on the new plan in the same class as Blueberi's unsecured creditors. Given the size of its claim, if Callidus voted to approve the new plan of arrangement, the plan would "certainly have met the [double majority] threshold".[101] The supervising judge found that Callidus was attempting to strategically devalue its security to acquire control over the outcome of the vote, an action "plainly contrary to the expectation that parties act with due diligence".[102] The supervising judge barred Callidus from voting, concluding that Callidus was acting with the improper purpose of overriding the result of the initial vote.

The SCC acknowledged that there is no *CCAA* provision specifically dealing with barring a creditor that is otherwise entitled to vote from voting. Nevertheless, the SCC held that supervising judges in *CCAA* proceedings must often sanction measures even where there is no explicit authority.[103] The SCC went on to say that fairness in *CCAA* proceedings demands that judges be able to meaningfully address parties who are working against the goals of the statute.[104] Thus, policy objectives may require judicial discretion to bar a creditor from voting when that creditor is seeking to exercise its voting rights in a manner that frustrates or undermines the remedial objectives of the *CCAA.*[105]

The SCC also commented that a supervising judge is best positioned to decide whether discretion ought to be exercised in the circumstances, as they are often "steeped in the intricacies of the *CCAA* proceedings they oversee".[106] The SCC held that it was appropriate for the *CCAA* to capitalize on this positional advantage by granting supervising judges broad discretion to order a variety of remedies to respond to the unique facts of each case.[107]

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[100] *Ibid* at para 21.
[101] *Ibid* at para 78.
[102] *Ibid* at para 80.
[103] *Ibid* at para 65.
[104] *Ibid* at para 75.
[105] *Ibid.*
[106] *Ibid* at para 54.
[107] *Ibid* at para 48.

ii. Granting priority over the Crown's deemed trust claims

In the recent SCC decision in *Canada v Canada North Group Inc*, the majority of the Court held that section 11 of the *CCAA* permits a court to grant super-priority charges that rank ahead of the Crown's deemed trust, despite the deemed trust falling "outside the scope of the express priming charge provisions" of the *CCAA*.[108]

In *Canada North*, an initial order granted by the Court of King's Bench of Alberta in favour of Canada North Group Inc gave priority to certain charges over the claims of any existing secured creditor.[109] The Crown applied to vary the initial order, arguing that the super-priority granted in the initial order did not apply because the deemed trust was a proprietary interest, not a security interest, and that the priming provisions of the *CCAA* did not apply. The Crown contended that unremitted source deductions had priority over the charges, based on the deemed trust provisions of federal tax legislation. The Chambers Judge dismissed the Crown's application, finding that the deemed trust was not a proprietary interest and that the *CCAA* gave the court the authority to rank charges ahead of the Crown's interest.[110] The majority of the Alberta Court of Appeal agreed.[111]

The two majority decisions and Justice Moldaver's dissent in *Canada North* held that courts could utilize section 11 of the *CCAA* to grant a charge against the property of another or to rank charges ahead of claimants that are not secured creditors.[112] This flows from a supervising judge's ability to make orders pursuant to section 11 of the *CCAA* despite the relief not being contained in any express provision and even when the general issue is addressed in specific grants of authority under the *CCAA*.[113]

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[108] *Canada North*, *supra* note 3 at para 70, Côté J, paras 163, 168, 172–176, Karakatsanis J. See also *CCAA*, *supra* note 2, ss 11.2, 11.4, 11.51, 11.52.
[109] *Canada North*, *supra* note 3 at paras 5–11.
[110] *Re Canada North Group Inc,* 2017 ABQB 550; *Canada North*, *supra* note 3 at paras 9–11.
[111] *Canada v Canada North Group Inc*, 2019 ABCA 314; *Canada North*, *supra* note 3 at paras 13–14.
[112] *Canada North*, *supra* note 3 at paras 70–74, Côté J, at para 181, Karakatsanis J, at paras 258–259, Moldaver J, dissented because the priming charges were in a direct conflict with the absolute priority of the Crown's interest under s 227(4.1) of the *Income Tax Act*, RSC 1985, c 1, and the power under s 11 of the *CCAA* is stopped "by the express language of s 227(4.1)".
[113] *Ibid* at para 70.

The majority reasons of Justice Côté, Chief Justice Wagner and Justice Kasirer set out that the discretion afforded under section 11 of the *CCAA* permits courts to create priming charges that are not explicitly provided for in the *CCAA* and are beyond the specific provisions that address such charges.[114] The majority, however, emphasized that a supervising judge must still always consider the underlying objectives of the *CCAA* in granting such a discretionary order.[115] They stated that supervising judges should have the discretion to order priority charges because financing is critical to a successful restructuring and it is unreasonable to expect professionals to act and put themselves at risk if they may be placed in compromised positions.[116]

The concurring reasons of Justices Karakatsanis and Martin agreed that section 11 of the *CCAA* permits a court to rank priming charges ahead of the Crown's deemed trust claim, as ordering a priority charge in favour of parties who facilitate the proposal of a plan of arrangement may in fact further the remedial objectives of the *CCAA.*[117] They based their reasoning on the fact that there is no provision in the *CCAA* explicitly stating that a priming charge cannot rank ahead of the beneficiary of a deemed trust, and since section 11 is only restricted by provisions set out in the *CCAA*, such an order falls under the jurisdiction conferred by section 11.[118] Under section 11, it is up to the supervising judge to weigh and balance the moving pieces to determine whether an order is appropriate.[119] Additionally, the concurring reasons noted that discretionary power in *CCAA* proceedings has been used to make a wide array of orders and is critical in allowing courts to tailor the *CCAA* to meet contemporary business and social needs.[120]

The dissenting reasons of Justices Abella, Brown and Rowe disagreed with both majorities, arguing that the Crown's deemed trust claims had ultimate priority and could not be subordinated under the *CCAA*.[121] They warned that the broad discretionary power under section 11 is not unfettered, and that circumstances could not circumvent

[114] *Ibid*.
[115] *Ibid* at para 72.
[116] *Ibid* at paras 29, 30.
[117] *Ibid* at paras 173–74.
[118] *Ibid* at para 176.
[119] *Ibid* at para 177.
[120] *Ibid* at paras 138, 171.
[121] *Ibid* at para 185.

the “unambiguous restrictions” through which Parliament had clearly expressed its intention to restrict charges taking priority over the Crown’s deemed trust.[122]

Justice Moldaver held that in order to give proper effect to section 11 as empowering supervising judges to further the remedial objectives of the *CCAA*, any restrictions on discretionary power should be explicit and unambiguous.[123] Justice Moldaver found that Parliament had expressly indicated the supremacy of section 227(4.1) of the *Income Tax Act* over any provisions of the *CCAA* and so, accordingly, ruled that section 11 was restricted by the express language of section 227(4.1), which prevents a court from subordinating the Crown’s deemed trust.[124]

Unfortunately, *Canada North* does not provide the clearest picture of the SCC’s position on the specific issue that was before the Court. The majority held that section 11 of the *CCAA* permits a court to grant super-priority charges that rank ahead of the Crown’s deemed trust. More generally, it seems fair to characterize *Canada North* as affirming a supervising court’s broad discretion to grant relief under section 11 of the *CCAA*. However, that discretion is not unbounded.

iii. Granting reverse vesting orders

In recent years, Canadian courts have increasingly sanctioned reverse vesting orders (“RVOs”), a variant of the traditional vesting order, to effect a sale of the debtors’ assets and maximize creditor recovery.[125] An RVO transfers a debtor’s unwanted assets and liabilities to a newly incorporated company, leaving the insolvent company with only desirable assets and liabilities to be purchased.[126] Generally, an RVO may be preferable where parties would otherwise be unable to preserve the value of certain assets, such as permits, licences or tax losses.[127]

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[122] *Ibid* at para 228.
[123] *Ibid* at para 257.
[124] *Ibid* at paras 259–60.
[125] Perreault, Faure & Toupin, *supra* note 81 at 7.
[126] *Ibid.*
[127] *Re JMB Crushing Systems Inc* (16 October 2020), Calgary 2001-05482 (Alta QB) at 25.

The SCC has yet to rule on whether an RVO is permitted under the *CCAA*. However, two Court of Appeal decisions dismissing applications for leave to appeal have expressed the view that, under sections 11 and 36(1) of the *CCAA*, a supervision judge may grant an RVO.[128]

In *Re Quest University Canada*, Justice Fitzpatrick of the Supreme Court of British Columbia held that broad discretion is granted under sections 11 and 36(1) of the *CCAA* to craft innovative solutions to any challenge that may arise in a *CCAA* proceeding. This discretion provides authority to grant an RVO, despite there being no provision in the *CCAA* expressly permitting such relief.[129] The Court in *Quest* acknowledged that a judge must always be attuned to the remedial objectives of the *CCAA* to avoid social and economic losses and noted that any restructuring is best achieved where all stakeholders are treated as fairly as the circumstances permit.[130] The British Columbia Court of Appeal dismissed an application for leave to appeal, upholding the orders of Justice Fitzpatrick as being appropriate and "well within her broad discretion […] as a supervisory judge of ten months in the matter".[131]

Similarly, in *Arrangement relatif à Nemaska Lithium inc*, the Québec Court of Appeal also dismissed an application for leave to appeal an RVO.[132] The Court of Appeal noted the lower court's position that sections 11 and 36(1) of the *CCAA* provide wide discretion to allow the granting of innovative solutions, such as an RVO, on a case-by-case basis.[133] Although the authority to grant an RVO was "a novelty", the Court of Appeal did not agree that leave to appeal was warranted.[134]

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[128] *Re Quest University Canada*, 2020 BCCA 364 [*Quest* CA]; *Arrangement relatif à Nemaska Lithium inc*, 2020 QCCA 1488 [*Nemaska Lithium*]. An RVO was also before the Québec Court of Appeal in *Arrangement relatif à Blackrock Metals Inc*, 2022 QCCA 1073. Although the Court of Appeal dismissed the application for leave to appeal, Justice Healy did not make any substantive comments on the court's authority to grant an RVO under sections 11 and 36(1) of the *CCAA*.
[129] *Re Quest University Canada*, 2020 BCSC 1883 at paras 153–57.
[130] *Ibid* at para 66.
[131] *Quest* CA, *supra* note 128 at paras 29–30.
[132] *Nemaska Lithium*, *supra* note 128.
[133] *Ibid* at para 19.
[134] *Ibid* at paras 33, 36, 44.

Interestingly, two 2022 decisions have both expressed doubt with respect to whether section 36(1) of the *CCAA* is an appropriate foundation for granting an RVO: *Re Harte Gold Corp* and *Arrangement relatif à Blackrock Metals Inc*. However, both decisions stated that section 11 does provide such discretion.[135] In *Harte Gold*, Justice Penny cautioned that the approval of an RVO should involve close scrutiny and that an RVO should continue to be regarded as an unusual or extraordinary measure.[136] However, some authors have recently noted that RVO transactions are being progressively adapted to a variety of industries and are not necessarily reserved for the most extraordinary circumstances.[137]

iv. Approval of key employee retention plans

The exodus of essential employees during a restructuring has the potential to significantly weaken the ability of a company to successfully reorganize.[138] Key employee retention plans ("KERP") seek to provide payments to employees with critical knowledge and expertise to motivate them to continue with the debtor and contribute to a successful restructuring. A KERP is generally secured by a charge over the debtor company's assets to ensure payment to key employees.[139]

The *CCAA* does not contain any provisions explicitly dealing with a KERP, but courts have nevertheless approved these plans on numerous occasions under the broad discretionary power under section 11.[140] Certain authors argue that not codifying a KERP is a good thing, as a flexible and business-oriented approach is more effective and efficient than a heavily codified regime.[141] Since the use of a KERP is inherently fact driven, statutory rules could be "too blunt an instrument for the delicate surgery"

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[135] *Re Harte Gold Corp,* 2022 ONSC 653 at paras 36–37 [*Harte Gold*]; *Arrangement relatif à Blackrock Metals Inc*, 2022 QCCS 2828 at paras 92–94 [*Blackrock Metals*], leave to appeal refused 2022 QCCA 1073.
[136] *Harte Gold*, *supra* note 135 at para 38.
[137] Luc Morin & Guillaume Michaud, "Guiding Principles for Distressed M&A Transactions: Choosing the Right Path and the Future of POAs an RVOs" 10:5 IIC-ART at 15 [Morin & Michaud].
[138] Derek Harland, "The 'Key' To Success? KERPs in Canadian Restructuring Law" 9:7 IIC-ART at 1.
[139] *Ibid.*
[140] *Re US Steel Canada Inc*, 2014 ONSC 6145 at para 27; *Re Walter Energy Canada Holdings Inc,* 2016 BCSC 107 at para 61 [*Walter Energy*].
[141] Magnus Verbrugge & Ryan Laity, "Let's Not Codify the Use of Kerps, Stalking Horse Bids and Third-Party Releases" 3:3 IIC-ART at 1 [Verbrugge & Laity].

required on a case-by-case basis.[142] As well, a list of codified factors may become out of date relatively quickly as unique situations arise over time.[143]

In *Re Walter Energy Canada Holdings, Inc*, the Supreme Court of British Columbia approved a KERP based on the appropriateness requirement of section 11 of the *CCAA*.[144] Justice Fitzpatrick acknowledged that the loss of employees' expertise during the *CCAA* proceeding would be extremely detrimental to the chances of a successful restructuring and posed a legitimate risk that the companies would become "rudderless in the midst of [the] proceedings".[145] This result would have been directly contrary to the remedial objectives of the *CCAA.*[146] The Court ruled it would be "appropriate" in the circumstances to grant a KERP, as the expertise of certain employees would assist the debtor in achieving a successful restructuring and thus advance the underlying objectives of the *CCAA.*[147] Justice Fitzpatrick listed relevant factors for judges to consider when determining whether the approval of a KERP is appropriate under section 11 of the *CCAA*, including how important the employee is to the restructuring process, whether they have specialized knowledge that cannot easily be replaced, whether they will consider other employment options if the KERP is not approved and whether the monitor supports the KERP.[148]

v. Releasing third-party claims

The release of claims against non-debtor parties has been described as "[o]ne of the most exceptional forms of relief available under the *CCAA*".[149] Third-party releases generally involve a release of claims against the third party in exchange for the third party providing some financial investment or other contribution to support the restructuring.[150] No provisions under the *CCAA* explicitly deal with allowing for the release of liabilities owed by third parties other than for directors under section 5.1(1).

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[142] *Ibid.*
[143] *Ibid* at 16.
[144] *Walter Energy*, *supra* note 140 at paras 56, 61.
[145] *Ibid* at para 30.
[146] *Ibid* at para 61.
[147] *Ibid* at para 35.
[148] *Ibid* at para 59.
[149] Chris Armstrong, "Where's the Plan? The Declining Role of *CCAA* Plans in the Canadian Restructuring Landscape, and When They Still May be Needed" 10:16 IIC-ART at 7 [Armstrong].
[150] Verbrugge & Laity, *supra* note 141 at 2.

However, courts have sanctioned releases extending beyond directors under the authority of section 11 of the *CCAA*, holding that the skeletal nature and broad discretion of the *CCAA* provide ample room for legal ingenuity to accommodate unique factual scenarios.[151]

The Ontario Court of Appeal in *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp* provided judicial guidance based on a set of enumerated factors for when third-party releases may be permitted within a *CCAA* plan of arrangement.[152] The Court in *ATB Financial* rejected the notion that Parliament intended to limit third-party releases exclusively to directors and instead found the authority to extend this relief based on remedial objectives of the *CCAA* and principles of statutory interpretation.[153] The Court acknowledged that the *CCAA*'s skeletal framework encourages a flexible approach to facilitating insolvencies over a rigid approach that does not allow for compromise.[154] Releases now typically cover the debtor's employees, plan sponsor, monitor and other professionals in the proceeding, as long as third parties meet the criteria listed in *ATB Financial*.[155]

Since *ATB Financial*, courts have developed and applied the criteria for approving third-party releases in circumstances that are not limited to plans of arrangement or compromise. In *Re Green Relief Inc*, Justice Koehnen of the Ontario Superior Court of Justice disagreed that the absence of a plan of arrangement deprived the court of the authority to approve a third-party release.[156] Justice Koehnen went on to conclude that the explicit mention of directors in section 5.1(1) did not preclude a *CCAA* court from granting other third-party releases pursuant to section 11.[157]

[151] Michael De Lellis et al, "The Use of Third-Party Releases in Canadian Restructuring Proceedings" 10:14 IIC-ART at 14 [De Lellis].
[152] *ATB Financial*, *supra* note 31.
[153] *Ibid* at paras 44–49.
[154] Verbrugge & Laity, *supra* note 141 at 6.
[155] Armstrong, *supra* note 149.
[156] *Re Green Relief Inc*, 2020 ONSC 6837 at para 23.
[157] *Ibid* at para 25.

However, courts have cautioned against too readily authorizing third-party releases, holding that granting such relief should be reserved for "extraordinary and exceptional" circumstances.[158]

vi. Permitting payment of pre-filing obligations to critical suppliers

In *Re Cinram International Inc*, in permitting the payment of pre-filing obligations, the Ontario Superior Court of Justice held that a broad and liberal interpretation of the *CCAA* should be encouraged to facilitate successful restructurings wherever possible.[159]

Cinram International Inc ("Cinram") was a replicator and distributor of CDs and DVDs and required protection under the *CCAA* to allow it to restructure after experiencing financial difficulty. During the proceedings, Cinram intended to continue to make payments to resume business operations for the benefit of all stakeholders, including obligations to critical suppliers. The Court held that while the current section 11.4 of the *CCAA* deals explicitly with critical suppliers, a court still has broad jurisdiction pursuant to section 11 to supplement statutory provisions and that this jurisdiction is not ousted by a more specific provision in the *CCAA*.[160] Justice Morawetz (as he then was) held that there was "ample authority" to support a court's discretion to permit the payment of pre-filing obligations to service providers critical to the continued business operations of the debtor.[161] In that case, the applicants relied on the efficient supply of products to ensure that their operations could continue, and the Court recognized that to accomplish this, the applicants needed to pay certain pre-filing amounts to essential suppliers.[162]

The courts in *Re Northstar Aerospace Inc* and *Re Performance Sports Group Ltd* applied similar reasoning, holding that section 11.4 of the *CCAA* did not detract from the

[158] *Re Canwest Global Communications Corp*, 2010 ONSC 4209 at paras 28–29.
[159] *Re Cinram International Inc*, 2012 ONSC 3767 at para 58.
[160] *Ibid* at paras 59, 67.
[161] *Ibid* at para 67.
[162] *Ibid* at para 69.

inherently flexible nature of the *CCAA* or the court's broad jurisdiction under section 11 to make orders it considers appropriate in the circumstances.[163]

vii. Summary of relief granted through relying on discretionary authority under section 11 of the CCAA

The preceding examples highlight how judicial discretion under the *CCAA* may be relied on to craft new and fact-specific remedies to address increasingly complex *CCAA* restructurings. Where there is no provision explicitly prohibiting a court from granting relief under the *CCAA* and where the relief promotes the underlying policy objectives of the insolvency regime, a judge may rely on the discretion afforded by section 11 to devise innovative solutions to facilitate a successful restructuring.

III. AUTHORITY FOR DISCRETION UNDER THE *BIA*

1. Discretion under the *BIA*

While there is no mirror equivalent to section 11 of the *CCAA* in the *BIA*, section 183(1) has been interpreted as empowering the court to exercise its "inherent jurisdiction to control its own processes in order to promote the objectives of the *BIA*".[164] As in *CCAA* proceedings, courts supervising a *BIA* proposal require flexibility to balance the interests of stakeholders and to craft solutions to unanticipated problems.[165] Courts have exercised jurisdiction under section 183(1) to rectify contracts, grant injunctions, order specific performance and grant relief from forfeiture.[166] Under the operative language of section 183(1), the 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.[167]

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[163] *Re Northstar Aerospace Inc*, 2012 ONSC 4546 at paras 11, 14; *Re Performance Sports Group Ltd*, 2016 ONSC 6800 at paras 24–25.
[164] *Re Pope & Talbot Ltd*, 2009 BCSC 1552 at para 126 [*Pope & Talbot*]; see also *Petrowest Corp v Peace River Hydro Partners*, 2019 BCSC 2221 at para 38 [*Petrowest*], aff'd 2020 BCCA 339, leave to appeal granted 2021 CarswellBC 1850.
[165] *Petrowest*, *supra* note 164 at paras 47–50.
[166] Thomas GW Telfer, "Equitable Subordination Redux? Section 183 of the Bankruptcy and Insolvency Act and Respecting the 'Legislative Will' of Parliament" (2021) 64 Can Bus LJ 316 at 8.
[167] *BIA*, *supra* note 1, ss 183(1), (1.1). Subsections (1) and (1.1) are essentially identical, but they address the courts of different jurisdictions.

The SCC has stated in general terms that the *BIA* offers less judicial discretion and less flexibility than the *CCAA.*[168] When supervising judges make an order pursuant to the express language in a statute, it may be argued that the judge is exercising their statutory power and authority, not their inherent jurisdiction.[169] Therefore, a codified statute such as the *BIA* may present less room to rely on inherent jurisdiction.[170]

In contrast, it has been argued that as restructurings under the *CCAA* and *BIA* become more dynamic and complex, no statutory regime, no matter how codified, can be fashioned to meet every contingency, and thus some discretion is required.[171] Some courts have relied on inherent jurisdiction to fill in the gaps of the *BIA* where statutory interpretation has revealed no discretionary power similar to section 11 of the *CCAA*. It has been noted that inherent jurisdiction under the *BIA* can be used to fashion remedies where no other alternative is available, provided it is necessary to promote the objectives of the *BIA.*[172] During insolvency proceedings, supervising judges are not dealing with "matters which are neatly organized and operating under predictable discipline"; instead, proceedings carry their own "internal seeds of chaos, unpredictability and instability."[173] As a result, Parliament must have intended for courts to exercise ancillary powers to facilitate unique and complex restructurings; otherwise, the objectives of the statute would be frustrated.[174]

In response to suggestions that inherent jurisdiction can be exercised arbitrarily,[175] the Alberta Court of Appeal in *Re Residential Warranty Co of Canada Inc* held that inherent jurisdiction is not without limits.[176] The exercise of inherent jurisdiction cannot be used to negate the unambiguous expression of legislative will and, as stated by the lower court, requires that the benefit of granting the relief outweigh the prejudice to those

[168] *Century Services*, *supra* note 4 at paras 14–15; *Canada North*, *supra* note 3 at para 140.
[169] Jackson & Sarra, *supra* note 66 at 33.
[170] *Ibid* at 9.
[171] *Ibid.*
[172] *Re Residential Warranty Co of Canada Inc*, 2006 ABCA 293 at para 21 [*Residential Warranty* CA].
[173] *Canada (Minister of Indian Affairs & Northern Development) v Curragh Inc* (1994), 114 DLR (4th) 176 at para 16, 1994 CarswellOnt 294 (Ct J [Gen Div]).
[174] Wood, *supra* note 83 at 5.
[175] Jackson & Sarra, *supra* note 66 at 21; Jacob, *supra* note 78 at 52.
[176] *Residential Warranty* CA, *supra* note 172 at para 20.

affected by it.[177] The Court of Appeal also listed non-exhaustive factors for courts to consider before invoking inherent jurisdiction, including whether there are realistic alternatives in the circumstances, what the impacts of an order are on the claimants and creditors, the anticipated time and costs involved and the need to maintain integrity in the *BIA* process.[178] As inherent jurisdiction has been instructed by the SCC to be used "sparingly and with caution", it is possible to argue that inherent jurisdiction is as limited as, if not more limited than, judicial discretion under section 11 of the *CCAA*.[179] To this point, Roderick J Wood notes that, following the 2009 *CCAA* amendments, the "shift from inherent jurisdiction to statutory discretion put an end to any notion that the judicial powers were extraordinary or limited in availability."[180] Wood seems to imply that while inherent jurisdiction is limited in availability, statutory discretion is not.

Ultimately, it may boil down to whether a court's expansive interpretation of the *BIA* can support the granting of judicial discretion similar to section 11 of the *CCAA* under the *BIA*.[181] However, relying on statutory interpretation may introduce challenges for parties in legal proceedings wishing to argue that the *BIA* does, in fact, grant discretionary powers similar to those of the *CCAA*. If Parliament wanted to confer courts with similar discretion in *BIA* proceedings, it could have included a provision identical to section 11 of the *CCAA*.[182] Without such a provision, it can just as easily be argued that Parliament envisioned less judicial discretionary power in *BIA* proposal proceedings.

Regardless of the arguments on either side of the issue, in practice, it does not appear that there are any express impediments to any particular relief being imported into *BIA* proposal proceedings that has previously been granted under section 11 of the *CCAA*. Courts in *BIA* proceedings have increasingly found jurisdiction to grant relief under the *BIA* that is not explicitly provided for in the statute to achieve the underlying remedial objectives of the *BIA*. The following section provides examples of such relief.

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[177] *Ibid*; *Re Residential Warranty Co of Canada Inc*, 2006 ABQB 236 at para 26.
[178] *Residential Warranty* CA, *supra* note 172 at para 37.
[179] *R v Caron*, 2011 SCC 5 at para 30.
[180] Wood, *supra* note 83 at 5.
[181] *Ibid* at 6.
[182] *Ibid*.

2. Examples of Relief Granted under the *BIA*

i. Barring voting on a proposal where a creditor is acting with an improper purpose

Although discretionary jurisdiction is not granted under section 183(1) of the *BIA*, the Nova Scotia Court of Appeal in *Re Laserworks Computer Services Inc* held that there is discretionary jurisdiction under the *BIA* to bar a creditor from voting on a *BIA* proposal when the creditor is using the statute in a manner that is abusive of the purpose of the legislation.[183]

In *Laserworks*, Datarite, a competitor of LaserWorks Computer Services Inc ("LaserWorks"), acquired the claims of 18 creditors and voted those claims to defeat LaserWorks' proposal.[184] The Nova Scotia Court of Appeal found that Datarite approached the creditors and encouraged them to reject the proposal to limit competition in its own marketplace and forced LaserWorks into bankruptcy.[185] The Court of Appeal found that this was an improper purpose not contemplated by the *BIA* and thus affirmed the decision to disallow the votes of the 18 creditors.[186]

The issue became whether the court's inherent supervisory jurisdiction could be invoked to interfere with *BIA* proposal voting where the process was being used for purposes not contemplated by Parliament.[187] The lower court concluded that the registrar's order prevented an abuse on a minority class of unsecured creditors and thus upheld fundamental principles underlying the *BIA.*[188] The Nova Scotia Court of Appeal concurred, affirming that the appropriate remedy in this case was the rejection of the tainted votes.[189] The Court of Appeal stated succinctly that an improper purpose is "any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament".[190] In this case specifically, using bankruptcy to eliminate a debtor as a competitor in the marketplace met that threshold and was an improper

[183] *Re Laserworks Computer Services Inc*, 1998 NSCA 42 at para 65.
[184] *Ibid* at para 2.
[185] *Ibid* at paras 63–64.
[186] *Ibid* at para 65.
[187] *Ibid* at para 5.
[188] *Ibid* at para 23.
[189] *Ibid* at para 56.
[190] *Ibid* at para 54.

purpose.[191] Thus, the Court of Appeal took no issue with the lower court's reliance on the supervisory jurisdiction under section 187(9) of the *BIA* to remedy this "substantial injustice".[192]

ii. Granting RVOs

As discussed above, *Nemaska Lithium*, among other authorities, has grounded the statutory authority to issue an RVO under sections 11 and 36(1) of the *CCAA*.[193]

Section 65.13 of the *BIA* is nearly identical to section 36(1) of the *CCAA,* and thus it has been argued that similar latitude may be given to courts in *BIA* proceedings to approve the disposition of assets by way of an RVO.[194] This is bolstered by the fact that the SCC has recognized the benefits of harmonizing the two insolvency regimes to the extent possible.[195] Where the *BIA* and *CCAA* are capable of being interpreted harmoniously, that interpretation is to be preferred.[196] Thus, academics have suggested that there would be "no impediment to harmonizing the interpretation of section 65.13 of the *BIA* with the interpretation that has been given to its analogous section of the *CCAA*".[197]

As noted above, recent decisions under the *CCAA* have raised doubt that section 36(1) provides jurisdiction for granting an RVO. These courts have preferred to rely solely on section 11 and to leave the issue with respect to section 36(1) "for another day".[198] This makes the comparison between section 65.13 of the *BIA* and section 36(1) of the *CCAA* a less persuasive argument for granting an RVO in a *BIA* proceeding. However, this does not invalidate the point that relief under the *BIA* and *CCAA* should generally be consistent, which may necessitate grounding authority for an RVO in *BIA* proceedings on section 183(1).

[191] *Ibid* at para 65.
[192] *Ibid* at para 81.
[193] *Nemaska Lithium*, *supra* note 128 at para 19.
[194] Perreault, Faure & Toupin, *supra* note 81 at 9.
[195] *Century Services*, *supra* note 4 at para 24; *Callidus*, *supra* note 5 at para 74.
[196] *Callidus*, *supra* note 5 at para 74.
[197] Perreault, Faure & Toupin, *supra* note 81 at 9.
[198] *Harte Gold*, *supra* note 135 at para 37; see also *Blackrock Metals*, *supra* note 135 at paras 92–94.

The use of RVO transactions appears to be growing in NOI proceedings.[199] However, to date, no court has had occasion to embark on a detailed analysis of the jurisdiction to grant an RVO in proposal proceedings under the *BIA*.

In *Re Ayanda Cannabis Corporation*, Justice Conway of the Ontario Superior Court of Justice considered the factors set out in *Harte Gold*, but did not address the issue of whether jurisdiction exists under the *BIA*.[200] The motion was unopposed, and Justice Conway concluded that "the RVO structure will preserve the company's licenses that are critical to its business."[201] Not only would the transaction result in full payment to creditors, there was even "money left over for the shareholders".[202]

In *Re Junction Craft Brewing Inc*, Justice Penny of the Ontario Superior Court of Justice did address jurisdiction, but did not rely on a specific section of the *BIA*. In this case, where Justice Penny considered an RVO when approving a stalking horse bid,[203] the actual RVO was granted after the sale process in respect of the stalking horse bid.[204] The proposal trustee was of "the view that the RVO transaction structure is superior to any alternatives and represents the transaction structure that best preserves the Company's value".[205] As in *Ayanda*, the RVO in *Junction* was unopposed.[206] Justice Penny specifically noted in the context of the RVO that the company did not have the

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[199] *Re Tidal Health Solutions Ltd* (20 November 2020), Montréal 500-11-058600-202 (Qc Sup Ct [Comm Div]), Court Order, online: *pwc* <https://www.pwc.com/ca/en/car/tidalhealth/assets/tidalhealth-017_112520.pdf>; *Re Ayanda Cannabis Corporation* (1 March 2022), London BK-22-02802344-0035 (Ont Sup Ct [Comm List]), Court Order, online: *Richter* <https://www.richter.ca/wp-content/uploads/2022/03/06-approval-and-vesting-order.pdf>; *Re Junction Craft Brewing Inc* (17 December 2021), Toronto 31-2774500 (Ont Sup Ct [Comm List]), Court Order, online: *Richter* <https://www.richter.ca/wp-content/uploads/2021/10/12-junction-order-dated-december-17-2021.pdf>.

[200] *Re Ayanda Cannabis Corporation* (1 March 2022), London BK-22-02802344-0035 (Ont Sup Ct [Comm List]), Endorsement of Conway J at para 1, online: *Richter* <https://www.richter.ca/wp-content/uploads/2022/03/07-commercial-endorsement-ayanda-cannabis-corp-bk-22-02802344-0035-.pdf>.

[201] *Ibid*.

[202] *Ibid*.

[203] *Re Junction Craft Brewing Inc* (8 November 2021), Toronto 31-2774500 (Ont Sup Ct [Comm List]), Endorsement of Penny J at para 2, online: *Richter* <https://www.richter.ca/wp-content/uploads/2021/10/09-junction_noi_-_endorsement.pdf> [*Junction*].

[204] *Re Junction Craft Brewing Inc* (17 December 2021), Toronto 31-2774500 (Ont Sup Ct [Comm List]), Approval and Vesting Order, online: *Richter* <https://www.richter.ca/wp-content/uploads/2021/10/13-junction_approval-and-vesting-order_december-17-2021.pdf>.

[205] *Junction*, *supra* note 203 at 3.

[206] *Ibid* at 5.

ability to apply under the *CCAA* because its total liabilities did not exceed the requisite $5,000,000 threshold,[207] a comment that aligns with the principle of harmonization. Justice Penny found that an RVO was the "only way to ensure the preservation of Junction's licenses etc. which are necessary for it to continue in business."[208] Although Justice Penny acknowledged that "an RVO has not been issued in the context of NOI proceeding before", the Court was satisfied it had jurisdiction under the *BIA* to grant an RVO, and that there was no prejudice in granting an RVO in this case.[209]

iii. Approval of KERP

In *Re Danier Leather Inc*, Danier Leather Inc sought approval of a KERP that would apply to 11 employees deemed critical to the success of the transaction in a *BIA* proposal proceeding. Although the Ontario Superior Court of Justice did not discuss the source of authority for approving a KERP in a *BIA* proposal context, Justice Penny stated that "key employee retention plans have frequently been approved in proposal proceedings under the *BIA*".[210] Justice Penny generally referred to this relief being warranted in "insolvency proceedings where the continued employment of key employees is deemed critical to restructuring efforts", without distinguishing between the *CCAA* and the *BIA*.[211]

Justice Penny went on to apply the list of factors enumerated in *Re Grant Forest Products Inc* while acknowledging that this was a KERP decision under the *CCAA*.[212]

Presumably, Justice Penny also relied on earlier analysis importing *CCAA* jurisprudence into *BIA* proceedings generally. The Court stated that courts have "recognized that the *CCAA* is an analogous restructuring statute to the proposal provisions of the *BIA*," citing the SCC in *Century Services*, among other authorities.[213] The Court's analysis seems to

[207] *Ibid* at 2, 5; see *CCAA*, *supra* note 2, s 3(1).
[208] *Ibid* at 5.
[209] *Ibid*.
[210] *Re Danier Leather Inc*, 2016 ONSC 1044 at para 77, citing *In the Matter of the Notice of Intention of Starfield Resources Inc* (15 March 2013), Toronto CV-13-10034-00CL (Ont Sup Ct), Court Order at 10.
[211] *Ibid* at para 75.
[212] *Ibid* at paras 76–77.
[213] *Ibid* at para 24.

suggest that, at least in the context of a KERP, there is no meaningful difference between the authority under the *CCAA* and the *BIA*.

iv. Releasing third-party claims

In *Re Kitchener Frame Ltd*, Justice Morawetz (as he then was) approved a *BIA* proposal containing a broad release in favour of the applicants and certain third parties.[214] The Court's decision was based primarily on the fact that there is no principled basis to treat third-party releases in *BIA* proceedings differently than in *CCAA* proceedings.[215] Justice Morawetz agreed that the *BIA* and *CCAA* should be interpreted harmoniously to the greatest extent possible to achieve consistency and coherence.[216]

In promoting such harmonization, Justice Morawetz drew several parallels to the *CCAA* in the decision, noting that, as in the *CCAA*, there is no provision in the *BIA* explicitly precluding the inclusion of a release in a *BIA* proposal.[217] Justice Morawetz also noted that the objective of *BIA* proposals, as with *CCAA* plans of arrangement or compromise, is to allow the debtor to restructure and avoid the social and economic costs of liquidation, where possible.[218] Justice Morawetz held that the differences between the two insolvency statutes are not of such significance that the presence of a specific provision of the *BIA*, section 62(3), "should be viewed as dictating a different approach to third-party releases generally from the approach that applies under the *CCAA*".[219] The Court went on to state that an interpretation of the *BIA* that would lead to a different result than under the *CCAA* should only be accepted through clear statutory authority, which was not present in the *BIA*.[220] In addressing the presence or absence of express authority to grant relief under the *BIA*, Justice Morawetz stated that:

> In this respect, it seems to me, that the governing statutes should not be technically or stringently interpreted in the insolvency context but, rather, should be interpreted in a manner that is flexible rather than technical and literal, in order to deal with the numerous situations and variations which arise

[214] *Re Kitchener Frame Ltd*, 2012 ONSC 234 [*Kitchener Frame*].
[215] *Ibid* at para 78.
[216] *Ibid* at para 47.
[217] *Ibid* at para 54.
[218] *Ibid* at para 70.
[219] *Ibid* at para 72.
[220] *Ibid* at para 73.

> from time to time. Further, taking a technical approach to the interpretation of the BIA would defeat the purpose of the legislation.[221]

Justice Morawetz went on to state that *BIA* proposal proceedings:

> [O]ffer debtors an opportunity to carry out a going concern or value maximizing restructuring in order to avoid a bankruptcy and related liquidation and that these purposes justify taking a broad, flexible and purposive approach to the interpretation of the relevant provisions.[222]

As such, Justice Morawetz applied the *ATB Financial* criteria to the *BIA* proposal proceeding at bar and concluded that the release should be approved.[223]

Justice Morawetz also addressed past cases where courts had not approved third-party releases in *BIA* proposal proceedings. The Court accepted that those cases were all distinguishable[224] and did not reflect the modern approach to Canadian insolvency law.[225] Justice Morawetz disagreed with the case law, ruling that section 62(3) of the *BIA* precluded third-party releases, accepting instead that the correct interpretation of section 62(3) is protective, not prohibitive.[226] The Court stated that if Parliament had, in fact, intended that only the debtor may be released in a *BIA* proposal, section 62(3) would have been drafted to state exactly that.[227] Any *BIA* provision purporting to limit the debtor's ability to contract with creditors must be explicit, as limiting this ability decreases the likelihood of a viable proposal and successful restructuring, subsequently defeating the underlying objects of the *BIA* proposal process.[228]

The Ontario Superior Court of Justice recently approved a *BIA* proposal with third-party releases in *Re FT ENE Canada Inc*, applying Justice Morawetz's reasoning from *Kitchener Frame* and the criteria set out in *ATB Financial.*[229] The Court stated that there

[221] *Ibid* at para 46.
[222] *Ibid* at para 53.
[223] *Ibid* at paras 83–92.
[224] *Ibid* at paras 64–68.
[225] *Ibid* at paras 69–74.
[226] *Ibid* at paras 50–51.
[227] *Ibid* at para 51.
[228] *Ibid* at para 62.
[229] *Re FT ENE Canada Inc*, 2019 ONSC 5793.

was “no reason why [the *ATB Financial* criteria were] not equally applicable to a proposal” in *BIA* proceedings.[230]

Critics of approving third-party releases under the *BIA* have expressed concern that, in granting such relief, judges too narrowly focus on whether the release is necessary to the purpose of the proposal, rather than determining whether it is necessary to the restructuring as a whole.[231] However, as illustrated in *Re Innovative Coating Systems Inc*, courts still rationalize their decisions against the underlying goals of the *BIA*, which have served as a “check and balance on the exercise of judicial discretion for decades”.[232] In *Innovative Coating*, Justice Garson applied both *ATB Financial* and *Kitchener Frame* to the facts of the case but declined to grant the third-party release based on insufficient evidence proving the release was necessary or essential to the liquidation of the debtor’s assets or proving the proposal was calculated to benefit the general body of creditors.[233]

v. Overriding contractual rights

Several decisions support the proposition that section 183(1) of the *BIA* vests courts with the jurisdiction to disrupt private contractual rights when necessary to further the objectives of the *BIA.*[234] In *Re Pope & Talbot Ltd*, Justice Walker of the Supreme Court of British Columbia stated that, where there is no express provision in the *BIA* providing for relief, a gap may be filled by statutory construction, or where the statute does not authorize statutory discretion, it is appropriate to resort to inherent jurisdiction.[235] Justice Walker specifically stated that the broad discretion of the *CCAA* is “not confined to *CCAA* proceedings”, and that it is equally applicable to *BIA* proceedings.[236] Justice Walker relied on *CCAA* precedent to stay the operation of an arbitration clause in the

[230] *Ibid* at para 48.
[231] De Lellis, *supra* note 151 at 10.
[232] *Ibid* at 11.
[233] *Re Innovative Coating Systems Inc*, 2017 ONSC 3070 at paras 4, 30.
[234] *Pope & Talbot, supra* note 164 at para 118.
[235] *Ibid* at para 120.
[236] *Ibid* at paras 129–31, referring in part to stays of proceeding.

BIA context, and it has been subsequently held that *Pope & Talbot* confirms that the approach to arbitration clauses is the same under both the *CCAA* and *BIA*.[237]

Justice Butler of the Supreme Court of British Columbia relied on the reasoning in *Pope & Talbot* to similarly rule in *Industrial Alliance Insurance and Financial Services Inc v Wedgemount Power Limited Partnership* that the *BIA* confers jurisdiction on superior courts to disrupt contractual rights.[238] Justice Butler arrived at a similar conclusion as Justice Walker, noting that when the interests at stake were balanced, the benefit of granting the relief outweighed any prejudice suffered by affected parties.[239] The Court also noted that failing to provide relief would likely have resulted in the dispute not being resolved on its merits.[240]

The Supreme Court of British Columbia in *Petrowest Corporation v Peace River Hydro Partners* also relied on Justice Walker's use of inherent jurisdiction in *Pope & Talbot* to avoid the operation of section 15 of the *Arbitration Act* in *BIA* proceedings.[241] Justice Iyer acknowledged that bankruptcy proceedings under the *BIA* require flexibility to balance stakeholder interests. Where the *BIA* is silent, the court has jurisdiction to "craft appropriate remedies to ensure the fair, orderly, and expeditious resolution of the proceedings before it."[242]

The British Columbia Court of Appeal affirmed the result in *Petrowest*, but for a different reason. The Court of Appeal held that section 15 of the *Arbitration Act* was not engaged.[243] In reaching this decision, the Court of Appeal acknowledged that the British Columbia Court of Appeal had previously found that section 183(1) of the *BIA* preserves an equitable jurisdiction that could give rise to discretion, but that "that, too, must give way to legislative will".[244] Interestingly, unlike some of the decisions referred to above,

[237] *Petrowest*, *supra* note 164 at para 43.
[238] *Industrial Alliance Insurance and Financial Services Inc v Wedgemount Power Limited Partnership*, 2018 BCSC 970 at para 48.
[239] *Ibid* at para 50.
[240] *Ibid.*
[241] *Petrowest*, *supra* note 164 at para 40.
[242] *Ibid* at para 49.
[243] *Petrowest Corp v Peace River Hydro Partners,* 2020 BCCA 339 at para 29.
[244] *Ibid* at para 18.

the Court of Appeal noted that the *BIA* analysis is "conceptually different" from *CCAA* proceedings, and that discretion under section 11 of the *CCAA* is quite specific.[245] This comment stands in contrast to many authorities, which tout the similarities of the two regimes. This is perhaps distinguishable because *Petrowest* was a receivership, where the receiver had assigned the debtor into bankruptcy and was acting as trustee. Leave to appeal the Court of Appeal decision to the SCC was granted,[246] and the SCC's pending decision stands to potentially alter the legal landscape of section 183(1) of the *BIA*.[247]

vi. Granting priority over the Crown's deemed trust claims

Another issue that is currently awaiting an appellate decision is the court's discretion to subordinate the Crown's deemed trust claims to charges granted in *BIA* proposal proceedings. In many respects, this is the same question that was answered in *Canada North*; however, the outstanding issue arises in the context of a Division I proposal under the *BIA*, rather than the *CCAA*.

In the NOI proceeding of *Re Chronométriq inc et al,* Justice Castonguay of the Superior Court of Québec granted an order authorizing an interim financing facility and related charge, an administrative charge and a directors and officers charge.[248] The charges each constituted a charge on the property of the debtors in priority to any and all other encumbrances "or trusts (statutory or otherwise)" affecting the property of the debtors in favour of any person.[249] Justice Castonguay relied on sections 50.6, 64.1, 64.2 and 183 of the *BIA*.[250] The Court further ordered that, notwithstanding "the provisions of any federal or provincial statute", the charges shall be binding on any trustee in bankruptcy.[251]

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[245] *Ibid* at paras 40–41.
[246] *Peace River Hydro Partners v Petrowest Corp,* [2021] SCCA No 30, 2021 CarswellBC 1850.
[247] The appeal was heard on 19 January 2022, and judgment is reserved.
[248] *Re Chronométriq inc et al* (27 October 2021), Montréal 500-11-060355-217 (Qc Sup Ct [Comm Div]), Court Order, online: *Richter* <https://www.richter.ca/wp-content/uploads/2021/10/05-chrono-health-order-oct-27-21.pdf>.
[249] *Ibid* at para 34.
[250] *Ibid* at paras 17–23, 26–30, 33. Sections 50.6, 64.1 and 64.2 of the *BIA* are analogous to the interim financing provision (section 11.2), the directors and officers charge provision (section 11.51) and the administration charge provision (section 11.52) of the *CCAA*, respectively.
[251] *Ibid* at para 37(d).

The debtors failed to file a proposal within the required time period and were deemed to have made an assignment in bankruptcy.[252]

The Attorney General of Canada (the "AG") has appealed the order granted by Justice Castonguay.[253] In its factum, the AG argues that section 183(1.1) of the *BIA* does not grant a court the authority to order priming charges over the Crown's deemed trusts.[254] Although the AG acknowledges that section 183(1.1) allows a court to exercise its inherent jurisdiction in *BIA* proceedings, this authority is not limitless.[255] Specifically, the Court "did not have authority to rely on its inherent jurisdiction in contradiction" to section 227(4.1) of the *Income Tax Act*.[256] The AG's position is that *Canada North* does not apply to the circumstances, as it was rendered in the context of section 11 of the *CCAA* and not section 183(1.1) of the *BIA*.

It remains to be seen whether the Québec Court of Appeal will continue to progress the general harmonization of relief under the *BIA* and *CCAA* or if a distinction between the two regimes will emerge.

vii. Summary of discretionary relief granted under the BIA

While no provision in the *BIA* is the same as section 11 of the *CCAA*, courts in *BIA* proceedings have nevertheless found authority elsewhere in the Act to grant innovative and case-specific relief in *BIA* reorganizations. Similar to the discretion under the *CCAA*, a *BIA* court may not grant relief contrary to an explicit provision of the statute. Although the proposal regime under the *BIA* theoretically "offers less flexibility",[257] it would appear that courts will focus on harmonizing Canada's insolvency regimes over identifying provisions in the *BIA* that inhibit relief that is permitted under the *CCAA*. Based on the foregoing section, it would seem that supervising judges in *BIA* proposal proceedings will construe provisions of the *BIA* narrowly to avoid unnecessary limits on

[252] *Re Chronométriq inc et al* (4 January 2022), Montréal 500-11-060355-217 (Qc Sup Ct [Comm Div]), Trustee's Report to the First Meeting of Creditors, online: *Richter* <https://www.richter.ca/wp-content/uploads/2021/10/05-chronometriq_trustee_report_to_first-meeting-of-creditors_20220104.pdf>.
[253] Appellants' Brief, *supra* note 8 at para 19.
[254] *Ibid* at para 19.
[255] *Ibid* at paras 73–87.
[256] *Ibid* at para 86.
[257] *Canada North*, *supra* note 3 at para 140, citing *Century* Services, supra note 4 at para 15.

the court's discretion (be that inherent jurisdiction or statutory discretion). The preceding examples show that, just as with restructurings under the *CCAA*, *BIA* courts have barred creditors from voting on a proposal, granted an RVO, approved a KERP, granted third-party releases and disrupted private contractual rights.

Because limiting the relief that is available in *BIA* proposal proceedings could decrease the likelihood of a viable proposal and successful restructuring, which would subsequently defeat the underlying objects of the *BIA* proposal process, the authors are of the view that courts will likely continue the trend of relying on *CCAA* rationale to expand the relief that is available under the *BIA*.

IV. HARMONIZING THE INSOLVENCY REGIMES

The examples provided above demonstrate how *BIA* courts have increasingly relied on *CCAA* precedent and inherent jurisdiction to grant relief similar to that which has been authorized pursuant to section 11 of the *CCAA*. These cases are part of a trend "towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation".[258] This trend will likely increase judicial discretion under the *BIA* as supervising judges in proposal proceedings look to import relief granted under section 11 of the *CCAA* in an effort to progress the objectives of the *BIA*.

Provided there is no express contradiction in the provisions of the *CCAA* and the *BIA*, harmonization seems to be the dominant rationale underlying increasing discretion under the *BIA*. Since any relief fashioned in *CCAA* proceedings must advance the policy objectives underlying the *CCAA*, in particular the statutes' remedial purpose of avoiding the social and economic losses resulting from liquidation,[259] the logical foundation for the relief is almost invariably applicable to *BIA* proposal proceedings. Further support for harmonization can be found in the alignment of the underlying policy objectives of the *BIA* and *CCAA*.

[258] *Century Services*, *supra* note 4 at para 24.
[259] *Ibid* at para 70.

The purpose of the *CCAA* has evolved since it was originally enacted. The SCC has recently clarified that:

> [T]he *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally".[260]

In pursuing these objectives, the SCC noted that outcomes available under the *CCAA* have expanded beyond simply restructuring the debts of an insolvent company.[261] The outcomes under the *CCAA* today are diverse, including the liquidation of assets and the continuation of a debtor's business under a different corporate form or ownership.[262] Thus, the SCC has noted that the "relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances".[263]

The *BIA* has also been acknowledged by the SCC as remedial legislation and serving two purposes: "the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation".[264] Similar to the *CCAA*, only one policy objective may be relevant, depending on the circumstances of the case. For example, where a company's reorganization is not possible under the *BIA*, the focus of the legislation may be to facilitate the equitable distribution of the debtor's assets. With liquidations under the *CCAA* now becoming "commonplace",[265] it seems that the two insolvency regimes promote similar objectives: where possible, to prioritize reorganization; and where not, to preserve and maximize the value of the debtor's assets.[266]

Further, courts have noted a "strange asymmetry" that would arise if the two statutes treated issues in insolvency proceedings differently.[267] In *Century Services*, Justice

[260] *Callidus*, *supra* note 5 at para 42.
[261] *Ibid.*
[262] Morin & Michaud, *supra* note 137 at 7.
[263] *Callidus*, *supra* note 5 at para 46.
[264] *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 at para 67; see also *Callidus*, *supra* note 5 at para 46.
[265] *Callidus*, *supra* note 5 at para 42.
[266] Sarra, "Economic Rehabilitation" supra note 9 at 1; *Callidus, supra* note 5 at para 40.
[267] *Century Services*, *supra* note 4 at para 47.

Dechamps cautioned that if creditors' claims were better protected under the *BIA*, "incentives would lie overwhelmingly with avoiding proceedings under the *CCAA*", which would in turn promote statute shopping, "undermine [the] statute's remedial objectives and risk inviting the very social ills that it was enacted to avert".[268] Similarly, in *Re Indalex Ltd*, the SCC encouraged an interpretation of the *CCAA* that gave creditors analogous entitlements to those under the *BIA* to "avoid a race to liquidation under the *BIA*".[269] If a rule is more favourable under one statute, stakeholders may attempt to influence a debtor's choice of restructuring regime to ensure that the more favourable provision is invoked, which may result in the selection of a less appropriate regime merely to give one party an advantage over another.[270]

The continued convergence of the *BIA* and *CCAA* promotes similar treatment and parallel legal development between the two statutes, which has the potential to grant courts similar discretion under either regime.[271] Harmonization also allows *BIA* courts to expand available relief by applying the "deeper reservoir" of *CCAA* precedent.[272]

That said, it should be acknowledged that authors have cautioned that, at some point, the attempt to bring the two regimes closer will interfere with Parliament's decision to keep the two reorganization systems distinct.[273] The *BIA* proposal provisions are designed to produce a faster and cheaper process for entities whose reorganization does not require the full gamut of flexible relief under the *CCAA*.[274] Expansive judicial powers that lead to flexibility and innovation in *CCAA* proceedings are well suited to the restructuring of large entities.[275] However, under the *BIA*, such expansive discretion could threaten the efficiency of *BIA* proposal proceedings.[276]

V. CONCLUSION

[268] *Ibid.*
[269] *Sun Indalex Finance, LLC v United Steelwokers*, 2013 SCC 6 at para 51.
[270] Roderick J Wood, "Priorities and Judicial Authority Under the CCAA: Century Services Inc v Canada (Attorney General)" (2011) 51 Can Bus LJ 118 at 6.
[271] Wood, *supra* note 83 at 8.
[272] *Ibid.*
[273] *Ibid* at 1.
[274] *Ibid* at 7.
[275] *Ibid* at 8.
[276] *Ibid* at 8–9.

As the provisions and underlying policy objectives of the *BIA* and *CCAA* continue to converge, *BIA* courts have increasingly relied on *CCAA* precedent and inherent jurisdiction in Division I proposal proceedings to grant relief and craft solutions to problems not anticipated by the express language of the *BIA*.

However, one distinction between the two statutes remains and is frequently noted: the codified nature of the *BIA*. Although various amendments to the *CCAA* and the *BIA* have brought these statutes substantially more in line, the *BIA* continues to be fundamentally more codified, especially procedurally. Although this undoubtedly increases efficiency and reduces the flexibility of the statute, procedural codification is likely not an appropriate justification to limit judicial discretion that would otherwise advance the remedial objectives of the *BIA*.

In any given situation, there may be a clear reason to choose to proceed under either the *CCAA* or *BIA*. The recent trend of case law harmonizing Canada's insolvency regimes encourages similar treatment under both regimes. The *CCAA* presents a more definitive path to unique relief that may be required to implement a particular restructuring. However, the authors suggest that the availability of discretionary relief under either the *CCAA* or the *BIA* is potentially not as determinative as once thought when selecting the most appropriate regime to restructure an insolvent company.

ADDENDUM

The SCC's decision in *Peace River Hydro Partners v Petrowest Corp* was released on 10 November 2022.[277] As it relates to the topic of this article, the SCC's decision generally continues the trend of relying on *CCAA* rationale to expand the relief available under the *BIA*, and the decision does not substantially alter the legal landscape of section 183(1) of the *BIA*.

The SCC affirmed the result in *Petrowest*, but for different reasons than both the Court of Appeal and the chambers judge, although the SCC's reasons were more consistent with the reasoning of the chambers judge. The SCC held that an arbitration agreement

[277] *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41 [*Petrowest* SCC].

may be inoperative under section 15 of the *Arbitration Act* if, for example, enforcing it would compromise court- ordered receivership proceedings under section 243 of the *BIA*.[278] This may occur where the arbitration agreed to by the parties would preclude the orderly and efficient resolution of the receivership, contrary to the purposes of the *BIA*.[279]

The SCC commented that the "*BIA* is remedial legislation that is intended, in part, to provide for an orderly and efficient distribution of a bankrupt's funds to various creditors" and, as such, that "it is to be given a liberal interpretation in order to facilitate its objectives".[280]

With respect to section 183(1) of the *BIA* specifically, the SCC stated that it confers a "broad scope of authority" on superior courts to deal with most bankruptcy disputes, as "[a]nything less would unnecessarily complicate and undermine the economical and expeditious winding up of the bankrupt's affairs".[281] Further, section 183(1) of the *BIA* confirms that superior courts have jurisdiction in bankruptcy and insolvency matters that may be exercised concurrently with their jurisdiction in ordinary civil matters.[282]

The SCC referred to the jurisdiction under section 183(1) of the *BIA* as "statutory jurisdiction", and therefore it is "unnecessary in this case to resort to inherent jurisdiction, which is to be considered only after statutory jurisdiction is determined to be unavailable".[283] This is consistent with the existing preference in insolvency proceedings for courts to determine the limits of discretionary authority through a hierarchical order of judicial tools.[284]

The SCC's decision is consistent with the trend reviewed in this article of encouraging Canadian courts to harmonize the two insolvency regimes. Since courts supervising a *BIA* proposal may require similar flexibility as under the *CCAA* to balance the interests

[278] *Ibid* at para 7.
[279] *Ibid* at paras 7, 34, 129, 155.
[280] *Ibid* at para 147.
[281] *Ibid* at para 55, citing *Sam Lévy & Associés Inc v Azco Mining Inc*, 2001 SCC 92 at para 38.
[282] *Petrowest* SCC, *supra* note 277 at para 147.
[283] *Ibid* at para 152.
[284] *Ibid*; see also fn 72.

of stakeholders and to craft solutions to unanticipated problems, the SCC's decision in *Petrowest* continues to support the granting of judicial discretion similar to section 11 of the *CCAA* under the *BIA*.

TAB 5

ESSENTIALS OF
CANADIAN LAW

BANKRUPTCY AND INSOLVENCY LAW

THIRD EDITION

RODERICK J WOOD
Faculty of Law
University of Alberta

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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 beaten out by other creditors. The fundamental importance of "single control" in a collective insolvency proceeding has long been recognized in Canadian law.[2] The single control policy alleviates "the inefficiency and chaos that would result if each stakeholder in an insolvency initiated a separate claim to enforce its rights"[3] and furthers the "public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse."[4]

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.

The objective of the single proceeding model is not simply to inhibit a race to grab assets. It is also designed to promote the orderly and efficient assessment of the claims of creditors. Resort to the usual civil process can result in a multitude of legal proceedings, escalating legal costs, and inconsistent outcomes. This consideration took centre stage in the Supreme Court of Canada in *Peace River Hydro Partners v Petrowest Corp.*[5] Because multiple overlapping arbitral proceedings would interfere with the orderly and efficient resolution of the court-ordered receivership proceedings, the supervising court was held to have properly exercised

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2 *Century Services Inc v Canada (AG)*, 2010 SCC 60 at para 22; *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at para 33; *Re J McCarthy & Sons Co* (1916), 38 OLR 3 (SCAD); *Stewart v LePage* (1916), 53 SCR 337.

3 *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41 at para 55.

4 *Re Eagle River International Ltd*, [2001] 3 SCR 978 at para 27.

5 Above note 3.

TAB 6

Legislative Assembly of Alberta

Title: **Monday, March 3, 2003 1:30 p.m.**
Date: 03/03/03
[The Speaker in the chair]

head: **Prayers**

The Speaker: Good afternoon and welcome back. Hon. members, would you please remain standing after the conclusion of the prayer for the singing of our national anthem.

Let us pray. O Lord, guide us all in our deliberations and debate that we may determine courses of action which will be to the enduring benefit of our province of Alberta. Amen.

Now would you please participate in the singing of our national anthem in the language of your choice. We'll be led by Mr. Paul Lorieau.

Hon. Members:

O Canada, our home and native land!
True patriot love in all thy sons command.
With glowing hearts we see thee rise,
The True North strong and free!
From far and wide, O Canada,
We stand on guard for thee.
God keep our land glorious and free!
O Canada, we stand on guard for thee.
O Canada, we stand on guard for thee.

The Speaker: Please be seated.

head: **Introduction of Guests**

The Speaker: The hon. Minister of Community Development.

Mr. Zwozdesky: Thank you, Mr. Speaker. It's indeed a great pleasure for me to rise and introduce to you and through you to all members of this House several bright, young, alert, attentive, and very inquisitive students from one of the best schools in Mill Creek, and that would be Julia Kiniski. I would ask that they rise with their teacher, Mr. Don Douglas, and other helpers to receive the very warm welcome of all members of this Assembly. Thank you for coming.

The Speaker: The hon. Minister of Economic Development.

Mr. Norris: Thank you very much, Mr. Speaker. I, too, want to rise on this beautiful Alberta day and welcome some of the best and brightest in the province of Alberta from the riding of Edmonton-McClung, students from Good Shepherd school. They're accompanied here today by their teacher/group leaders Mrs. Doreen Neuls and Ms Val Newgard, as well as parent helpers Ms Lise Prosser and Mrs. Pat Davidson. I would like them to rise and please receive the warm welcome of the gallery. Welcome to the Legislature.

The Speaker: The hon. Member for West Yellowhead.

Mr. Strang: Thank you very much, Mr. Speaker. On behalf of our Member for Wetaskiwin-Camrose I would like to introduce 35 students from the Battle River home and school camp and their group leader, Mr. Richard Schultz. At this time I'd like to have them rise and receive the warm welcome of this Assembly.

Thank you.

The Speaker: The hon. Member for Redwater.

Mr. Broda: Thank you, Mr. Speaker. It's my pleasure to rise today to introduce to you and through you to the members of the Assembly 25 energetic students from Sturgeon composite high school. They are accompanied by their teachers Mr. Norman Zweifel and Mr. Ron Haskell. They're seated in both members' and public galleries. I'd please ask them to rise and receive the traditional warm welcome of this Assembly.

The Speaker: The hon. Minister of Revenue.

Mr. Melchin: Thank you, Mr. Speaker. It's my pleasure today to introduce to you and through you to members of the Assembly nine visitors from Alberta Revenue who are taking part in a public service orientation tour. This is to acquaint everybody a little more with the operations of the Legislative Assembly. I'll ask them to stand: John Mathias, Warren Regehr, Jennifer Smart, Brandy Stefanyk, Kim Le, Irena Luciw, Tanya Holmes, Doug Stratton, and Justin Chow.

The Speaker: The hon. Member for Edmonton-Meadowlark.

Mr. Maskell: Thank you, Mr. Speaker. It is my pleasure today to introduce to you and through you three guests who are seated in the members' gallery. Last Thursday a new Canadian play, *Einstein's Gift*, premiered on the Citadel's Maclab stage, and my guests are here as a result of the premiere. My first guest is Vern Thiessen, who is artistic associate of dramaturgy, and play development at the Citadel Theatre. He's president of the Playwrights Guild of Canada and a board member of the Edmonton Arts Council. His play *Einstein's Gift* received its world premiere at the Citadel Theatre. This talented Albertan, a grad of the U of A, has written for stage, radio, and television for over 15 years.

My second guest is Bob Baker, artistic director of the Citadel Theatre, a position he's held since 1999. He's been nominated for and been the recipient of numerous awards including the Sterling and Dora. As a result of his strong leadership, the Citadel Theatre is considered by many Canada's leading theatre.

Finally, my third guest is Sol Rolingher, QC, officer of the Order of St. John, recipient of the Queen's jubilee medal, and known by many in this Assembly. He's a senior partner in the 108-year-old law firm of Duncan & Craig, which counts in its namesake the first Minister of Justice of the province of Alberta in 1905, Charles Cross, and the first mayor of the city of Edmonton in 1904, William Short. Mr. Rolingher has many public faces, including that of a member of the board of governors at the Citadel Theatre.

Gentlemen, would you please rise and receive the warm traditional welcome of this Assembly.

The Speaker: The hon. Member for Calgary-West.

Ms Kryczka: Thank you, Mr. Speaker. This afternoon I am really very pleased to introduce to you and through you to this Assembly – a moment ago there were two people sitting up there that I was going to introduce, but I will refer to the second person anyway. I would like to say that in Calgary-West we produce only the best. The person who has left momentarily, Gord Olsen, is an outgoing executive director of the southern Alberta office of the Premier, and I suspect he's out maybe already doing work as a consultant. That would be his next career. The person that is left sitting there, very important to us, brings wonderful people and business skills to his new job as executive director of the southern Alberta office of the Premier. I'm sure that everyone he works with, whether politicians or citizens, will feel that they were well heard. Rich Jones, would you please – and you are; see how keen he is – rise and receive the warm welcome of this Assembly.

Energy Conservation

Mr. MacDonald: Thank you, Mr. Speaker. Today I rise to recognize the humble sweater, that comfortable yet underappreciated garment that helps Albertans with high utility bills now that the government's deregulation policies have failed. The government would not protect Albertans from high home heating bills. Even the Minister of Energy, upon realizing that his own act contains fatal flaws, has found solace in the dark blue sweater. The sweater, insists the minister, will comfort Albertans because they currently cannot afford their sky-high utility bills. The sweater has picked up right where the government's energy policies have left many Albertans, freezing in the dark.

I would like to say that we are a hardy breed here in Alberta, much like the rough fescue grass, and I think it appropriate to suggest that the humble sweater one day be recognized as Alberta's official garment. The sweater can then be honoured along with the other official emblems: the official arms, the official flag, the official flower, the official dress tartan, the official bird, the official stone, the official tree. I think that the sweater would be in proud company.

Thank you, Mr. Speaker.

The Speaker: The hon. Member for Edmonton-Glengarry.

Polish Veterans' Society

Mr. Bonner: Thank you, Mr. Speaker. On Saturday evening the Polish Veterans' Society gathered to celebrate its 65th anniversary. The society was originally formed by a group of 100 veterans from World War I. Later, World War II veterans, their families, and interested members of the general public were able to join the society. I know that the original members would be proud of the society's accomplishments over the past 65 years and that all of them would certainly agree that their optimism and vision has continued.

Approximately 30 years ago the society built a senior citizens' home and a few years later added an attached banquet hall. The building of this complex demonstrates their commitment to their community. Over the years it has provided a comfortable home for many seniors, and through their fund-raising efforts they've been able to assist the residents with subsidized rents.

In the span of 65 years the Polish Veterans' Society has been consistent in its dedication to the Polish community. They have enriched the lives of many by their efforts. Congratulations on your anniversary, and may the next 65 years be as successful as the first.

Thank you.

The Speaker: The hon. Member for Calgary-Fort.

Cultural Diversity

Mr. Cao: Well, thank you, Mr. Speaker. Today I rise to recognize a celebrity event in Calgary. Nowhere else in the world but in our Alberta do we celebrate cultural diversity with gusto. Nowhere else but in Alberta can we visually, acoustically, and linguistically immerse ourselves in many parts of the world within a short evening. Indeed, just a moment after enjoying the rich culture from the subcontinent of India, we crossed the Pacific to the lands of Columbia, El Salvador, and Chile, with their fiesta spirits and colours. Then we crossed the Atlantic to enjoy the colourful, festive traditions of Hungary, Poland, and Switzerland. Then we went to Spain, with its heartfelt rhythm of the flamenco. We are brought back to Calgary with the sound of the Calgary Police Service Pipe Band.

Cultural diversity has enriched our province, our nation. Crossing the ethnic boundaries, sharing the cultures, provides solidarity and understanding among our fellow Albertans. Culturally speaking, this is what we call the Alberta advantage.

I want to thank the hundreds of Albertans who delivered outstanding performances. Please keep growing the flower garden of Alberta's culture.

head: **Presenting Petitions**

The Speaker: The hon. Member for Edmonton-Riverview.

Dr. Taft: Thank you, Mr. Speaker. I have today a petition – it's in order – signed by over 1,500 Albertans which says:

> We, the undersigned residents of Alberta, petition the Legislative Assembly to consider increasing base funding to post-secondary education to ensure that every qualified Albertan is able to attend University.

Thank you.

head: **Introduction of Bills**

The Speaker: The hon. Member for Calgary-Bow.

Bill 18
Energy Statutes Amendment Act, 2003

Ms DeLong: Thank you, Mr. Speaker. I request leave to introduce Bill 18, the Energy Statutes Amendment Act, 2003.

The Mines and Minerals Act and the Freehold Mineral Rights Tax Act will be amended by this bill. The amendments will provide legislative clarity for investors as well as ensure the rules are clear and effective if someone drilling a well trespasses onto minerals for which they don't have the rights.

Finally, the bill will allow the government to enhance its tenure and collections practices, thereby ensuring that Alberta continues to have the best land tenure and royalty systems in the world.

Thank you.

[Motion carried; Bill 18 read a first time]

The Speaker: The hon. Government House Leader.

Mr. Hancock: Thank you, Mr. Speaker. I'd move that Bill 18 be moved onto the Order Paper under Government Bills and Orders.

[Motion carried]

The Speaker: The hon. Member for Bonnyville-Cold Lake.

Bill 21
Ombudsman Amendment Act, 2003

Mr. Ducharme: Thank you, Mr. Speaker. I request leave to introduce Bill 21, the Ombudsman Amendment Act, 2003.

This bill will allow the Ombudsman to more thoroughly investigate complaints and will allow for the expansion of his jurisdiction to include other government agencies not currently covered by legislation.

[Motion carried; Bill 21 read a first time]

The Speaker: The hon. Government House Leader.

Mr. Hancock: Thank you, Mr. Speaker. I'd move that Bill 21 be moved onto the Order Paper under Government Bills and Orders.

[Motion carried]

Legislative Assembly of Alberta

Title: **Thursday, March 27, 2003 1:30 p.m.**
Date: 2003/03/27
[The Speaker in the chair]

head: **Prayers**

The Speaker: Good afternoon. At the conclusion of the prayer would you please join me in a moment of silence.

Let us pray. O Lord, we humbly give our gratitude for the life of your faithful and trusty servant, Edward Glancefield "Ted" Hole, husband of our beloved Lieutenant Governor, Lois Elsa Hole.

We give thanks for his love of family and his gift of friendship, for his grace, dignity, and courage, for his humour, generosity, and sheer love of life.

We remember his family and all who mourn.

Would you please join me now in a moment of silence. Amen.

Please be seated.

head: **Introduction of Visitors**

The Speaker: The hon. Member for Spruce Grove-Sturgeon-St. Albert.

Mr. Horner: Thank you, Mr. Speaker. It is my pleasure to rise on behalf of my constituents, yourself, Mr. Speaker, and the Member for Redwater and introduce through you to all members of this House two of Alberta's elected municipal officials. I had the opportunity to have lunch with these individuals today, where we discussed regional issues of mutual interest. As far as I know, they are not paid lobbyists, but I bought them lunch anyway. I would like to ask that His Worship Mayor Lloyd Bertschi of Morinville and Councillor Don Rigney of Sturgeon county rise in your gallery and receive the traditional warm welcome of this Assembly.

head: **Introduction of Guests**

The Speaker: The hon. Minister of Transportation.

Mr. Stelmach: Thank you, Mr. Speaker. Today it is a great privilege to introduce to you and through you to members of this Assembly constituents from Vegreville-Viking seated in the members' gallery. All the people that I will introduce share a common thread of community-building, unbelievable hours of volunteering, all individually talented and skilled, and one thing that can be said about all of them is that they all put the needs of others ahead of their own.

I will ask the following people to rise and receive the welcome of this Assembly as I call their names, and these are all recipients of the Queen's golden jubilee medal. The first person I'd like to introduce is Mrs. Elsie Kawulych from Vegreville. Next are Mrs. Georgina Hauca from Willingdon, Mr. Jack Roddick from Viking, an unbelievably talented pianist Mr. Christopher Kupchenko from Brosseau, Mrs. Mae Adamyk from St. Michael, Mrs. Yvonne Brown from Tofield, my former bus driver, Mr. George Morie from Andrew, and Mr. Jerrold Lemko, volunteer fire captain of Vegreville volunteer fire brigade. I will ask all of the recipients and their accompanying family members and support members to rise and receive the traditional warm welcome of this Assembly.

The Speaker: The hon. Deputy Speaker.

Mr. Tannas: Thank you, Mr. Speaker. It's my pleasure today to introduce to you and through you to the members of the Assembly 40 members of the Girl Guides of Canada, Alberta Council, who are participating in the Alberta Girls' Parliament. They are accompanied today by head adviser Edie Jubenville and leaders Sherry Gurjar, Claudette Vague, and Bernadette O'Connor. They're seated in the public gallery this afternoon, and I'd ask them to please rise and receive the warm traditional welcome of the Assembly.

Mr. Ouellette: Mr. Speaker, it gives me great pleasure to stand up on behalf of the hon. Member for Wainwright and introduce to you and through you to all members of the Assembly 19 of the brightest children in Alberta, from Allan Johnstone school in Hardisty. I did get a chance to speak with them before we came into the House, and they're a great grade 6 class. They're accompanied by their teacher, Mr. Dawson; the school secretary, Mrs. MacKinnon; Mrs. Dewald, the teacher's aide; Mrs. Balaban, a parent; and John Bruketa, the bus driver. I would like them all to rise and receive the warm welcome of the House. They're seated in the visitors' gallery.

The Speaker: On this day 47 years ago the hon. Member for Vermilion-Lloydminster arrived in the world, and we will now recognize him for an introduction.

Mr. Snelgrove: It seemed longer, Mr. Speaker.

Thank you, Mr. Speaker. I'm pleased to introduce to you and through you to the members of this Assembly three visitors from the Vermilion-Lloydminster constituency. Mrs. Dawn Garnier and her husband, Stan, run a very successful ranching operation near Dewberry. As well as being great neighbours and terrific community supporters, they've been very actively involved in the rodeo industry. In fact, they've participated in Australia and New Zealand both as participants and timers. Dawn is accompanied by her daughters Danelle and Skye. Danelle works as a teacher's aide in Heinsburg, and Skye will graduate from high school in May. Both of these young women work on the family ranch, are involved in rodeo, 4-H, and community sports. They have risen. I wish you would all join me in congratulating them on their attendance and welcoming them to the Assembly.

The Speaker: The hon. Member for Redwater.

Mr. Broda: Thank you, Mr. Speaker. It's my pleasure to rise today and introduce to you and through you to the members of the Assembly one very special individual, my daughter Cindy Broda. After spending a year in Tokyo and three years in Italy, it's certainly great to have her back home. Accompanying her is her good friend Adi White from Belfast, Ireland. Adi will be leaving next week for Ireland and then to the Caspian Sea, where he's second officer navigating a ship in subsea surveying of oil and gas fields around the world. They're both seated in the members' gallery, and I'd ask them to please rise and receive the warm welcome of this Assembly.

The Speaker: The hon. Member for Lac La Biche-St. Paul.

Mr. Danyluk: Thank you very much, Mr. Speaker. I am pleased to introduce to you and through you to members of this Assembly a constituent from Lac La Biche-St. Paul and a good friend of mine. Mr. Johnny Lypowy has the distinction of being the longest serving employee of AFSC, a total of 36 years, and I can attest to the fact that he's still running at full choke. Johnny has been a major rancher in the constituency. Unfortunately, the drought has had quite an impact on his herd, and he has recently had to sell his cattle due to shortage of feed. His contributions to the community and the

Statements, and occasionally it's okay to say positive things during question period as well. So perhaps this might be viewed more as a point of clarification. I certainly do not personally think that there's any cause for a point of order, but I'll leave it up to your wisdom to decide that in your own good way, Mr. Speaker.

Thank you.

The Speaker: Well, it sounds like a love-in to me, but what the Blues actually say – this affords an opportunity for a lesson; how's that? The hon. Member for Edmonton-Centre says in her lines: "will the Premier agree that at a . . ." Just remember those words: "will the Premier agree that at". Then the Premier coming back at one point in his response:

> Mr. Speaker, I would point out: is the hon. Member for Edmonton-Ellerslie suggesting, for instance, that her husband lose his livelihood because he is a consultant along with a former member of this Legislature, this government caucus, Jon Havelock, and a former member of I believe the Liberal caucus, Peter Sekulic. With all due respect he does a marvelous job. We hire him, the private sector hires him, nonprofit organizations hire him, and he does a wonderful job in representing whatever he has to represent.

Well, sounds to me like quite an endorsement. But the interesting thing about this – there is no point of order, by the way, in the one raised, but there could have been two points of order raised out of this. So, hence, the lesson.

Now, the hon. Member for Edmonton-Centre said: "Will the Premier agree that at a . . ." Now, it's quite clear that the rules prohibit the seeking of opinions, and they are certainly not permissible under the rules. *House of Commons Procedure and Practice* at page 427 and *Beauchesne's* 409(3) would prohibit the seeking of an opinion in a question. The question might have been ruled out of order.

Now, the hon. Member for Edmonton-Ellerslie might also have risen on a point of order basically saying that it is totally unacceptable to name a person in this Assembly who is not present and not able to defend themselves, but then that would have ruled out virtually all the tablings today, too, because everybody who made a tabling today mentioned somebody's name.

Dr. Taft: With permission. For information.

The Speaker: No, no, no. There's no such thing as for information.

The preambles and the personal references are very clear in the *House of Commons Procedure and Practice* at page 524 and *Beauchesne's* paragraph 493(4).

So while there was no point of order on the point of order raised, there could very easily have been two points of order raised, and all I'd say is: just give some careful consideration to this swinging sword that's sharp on both sides. It cuts both ways.

head: **Orders of the Day**

head: **Government Motions**

Spring Recess

10. Mr. Zwozdesky moved on behalf of Mr. Hancock:
    Be it resolved that when the Assembly adjourns on Thursday, March 27, 2003, at the regular hour of 5:30 p.m., it shall stand adjourned until Monday, April 7, 2003, at 1:30 p.m.

The Speaker: Hon. members, as per Standing Order 18(2) and 18(3) such a motion is not debatable.

[Government Motion 10 carried]

head: **Government Bills and Orders**
head: Second Reading

Bill 22
Child and Family Services Authorities Amendment Act, 2003

[Adjourned debate March 10: Dr. Massey]

The Speaker: The hon. Minister of Children's Services to close the debate.

Ms Evans: Thank you, Mr. Speaker. Just taking leave to speak to second reading and to close debate on Bill 22. This amendment is a very straightforward amendment. It removes the stipulation of the maximum number of members that may sit on a child and family services authority board. With the number of regions going from 18 to 10, this will allow us to ensure adequate community representation on the boards. I feel very confident that when this bill passes, we will be able to ensure the governance and the consistency of representation through the differing needs of each region.

Therefore, I am pleased to move second reading of Bill 22.

[Motion carried; Bill 22 read a second time]

Bill 18
Energy Statutes Amendment Act, 2003

The Speaker: The hon. Member for Calgary-Bow.

Ms DeLong: Thank you very much, Mr. Speaker. Today I'm pleased to rise and move second reading of the Energy Statutes Amendment Act, 2003.

Alberta is known and respected worldwide for its land tenure and royalty collection systems. It is a fact that other jurisdictions from around the world regularly come to Alberta to learn about our tenure and royalty systems. These systems ensure industry competitiveness and provide Albertans with a fair return for the development of their resources. Revenue from the oil and gas industry is critical to this province's economic prosperity. For the 2001-2002 fiscal year the Department of Energy collected $6.227 billion in bonuses, royalties, and rent on behalf of the people of Alberta.

[The Deputy Speaker in the chair]

Mr. Speaker, these amendments will improve the management and administration of the Crown's mineral rights and will optimize benefits to Albertans. One key element in Alberta's success in this area is certainty. Investors want and need to know what the rules are before they make their investments. Those rules are generally laid out clearly in legislation and regulations; however, there are always areas where those rules have not kept up to date with changes in technology or markets. Some are also found in the common law, which investors may not always find or which may not be as clear as legislation. This bill clarifies some important points that are existing policy or are existing common law in the view of the government and are how this province currently practises. This will provide certainty and reduce any uncertainty as to who is entitled to what or under what regulations they pay their royalties on production.

The bill makes it clear which Crown mineral rights leaseholder has the rights to natural gas in areas with coal or with oil sands. Natural gas found separated from the bitumen in the oil sands at original conditions is part of the natural gas lease, while any additional gas that evolves from the bitumen as it is produced is part of the oil sands lease. In other words, natural gas produced out of sandstone, shale, coal, or other rock is part of the natural gas lease.

3:00

These are the policies of the government today and the practices of government and industry. They will now be there in black and white for any investor to see when they decide on an oil sands, natural gas, or coal project. You may note that the holder of a coal lease today can produce natural gas for safety reasons to remove it from a mining development. That safety precaution is continued.

One of the cornerstones of Alberta's land tenure system is that industry has access to a fair and level playing field. It becomes unfair if someone trespasses on unsold Crown minerals by drilling a well into them deliberately or in error. Doing that can result in that person having more information than other potential bidders or even producing minerals that they have no right to. Current provisions to deal with trespass have not always been an effective deterrent. A significant and effective deterrent is required because these situations are difficult to detect and can result in revenue loss to the Crown both as a direct result of the wrongful recovery of Crown minerals and also as a result of lower bonuses paid to the Crown for mineral agreements. You can imagine the effect of someone's bidding strategy if as a result of trespassing they already know that it's a dry hole. The proposed amendments to the Mines and Minerals Act will improve the Crown's ability to respond when someone explores for or produces Crown minerals without authority.

Mr. Speaker, one of the main objectives is to ensure that our good corporate citizens can continue to do business in Alberta for the economic benefit of all Albertans. In keeping with our desire to provide certainty to investors, these amendments will do just that. As such, another key amendment is an enhancement to the provisions around collection of royalties. This bill will codify joint liability of Crown leases and provide procedural flexibility to remove the administration of collections. It will also allow the minister to redirect funds owed to a person and apply that money to any outstanding debts that person might have to another branch of the government, expand and clarify the application of provisions related to royalty and tax recalculation by the Crown, and also ensure that a company cannot transfer their interests to a lease to absolve themselves of a debt. Any debt will flow through to the transferee.

Another significant change to these acts deals with the Limitations Act. The recent Limitations Act has created some doubt as to how time limits imposed by that act for initiating legal actions in court impact existing time limitations provided under the Mines and Minerals Act and the Freehold Mineral Rights Tax Act. This bill excludes or specifies time limitations for initiating legal actions under the acts from the limitation periods specified in the Limitations Act. The time periods under these acts to complete calculations and assessments of royalty, mineral tax, and related interest or penalties are well understood and accepted by the industry and the Crown and were designed with industry business practices in mind as well as this government's business needs of ensuring complete and accurate payment of royalties, taxes, and penalties. The existing periods, generally four years, are not exceptional, and they have generally worked well through the years. The bill will exempt these practices from the Limitations Act.

Issues of trespass can take years to detect. The bill specifies specific limitations once a trespass has been documented. Issues of mineral ownership, primarily between the federal government and Alberta, can also take years to resolve. The bill exempts these cases from the Limitations Act.

Mr. Speaker, gas storage helps smooth peaks and valleys in production activity and gas prices while enhancing security of supply. The bill will reduce administrative barriers and barriers of uncertainty to entering into storage arrangements. This legislation allows the use of depleted oil and gas reservoirs for storage but speaks generally in terms of recovery of minerals. This bill amends the act to make it clearer for people interested in developing storage that there is legislation for use of these reservoirs for storage purposes. The bill also clarifies that use of a reservoir for storage continues the leases granting the rights to the reservoir.

Mr. Speaker, in 1949 all coal mines were required to sell coal to Alberta residents for their domestic needs at market prices at their plant gate. At that time, coal was a common domestic fuel. This in theory requires all coal mines to have the equipment and processes to be able to do this today even if no one is asking for it. This bill continues the requirement but provides the ministerial discretion as to which coal mines need to be able to sell coal for domestic needs.

Finally, the Fees and Charges Review Committee has asked the government to comply with an Ontario court ruling to specify where money collected as a penalty is properly identified. In fact, Mr. Speaker, these amendments will do just that.

Thank you very much, Mr. Speaker.

The Deputy Speaker: The hon. Member for Edmonton-Gold Bar.

Mr. MacDonald: Thank you, Mr. Speaker. It's with interest that I rise this afternoon to participate in the debate on Bill 18, the Energy Statutes Amendment Act, 2003. Certainly, I appreciate the words from the hon. Member for Calgary-Bow in regard to this amendment act.

We're talking about the Mines and Minerals Act and the Freehold Mineral Rights Tax Act, and certainly there is merit in providing clarity in the rules for all investors in this province. When we consider the influence and the amount of money that is being invested by the energy industry from around the world in this province, it's certainly a strong vote of confidence not only now but well into the future for the energy industry in this province. We have to be very careful. I believe I was looking at Economic Development, their department and their annual report from last year, and close to half of the activity in this province was generated from the oil industry and the gas industry, and that's reason enough to provide clarity in the rules for investors.

Whenever you compare this province and this country to other jurisdictions around the world and whenever there are investors that say: oh, well, if we don't get our way, we're going to move on . . . We have a very stable, secure investment climate in this province. You look at the situation around the globe. You look at the current situation in the Middle East, particularly in Iraq and in Kuwait, Saudi Arabia, large oil-producing nations. Then you compare them to us. Certainly we have modest reserves when you count up their reserves, but people want to do business here, and it's our political stability that provides that.

If you look at Venezuela and those arguments made last year, late last fall: oh my gosh, we're going to take our money and invest it in Venezuela. Well, there have been a series of political upheavals in that country that certainly make Alberta even more attractive now than it was in October.

Mr. Speaker, you look at some of the enormous potential that's left in the former republics of the Soviet Union as far as oil and gas development go, but there's considerable economic risk in putting your money there for development because you don't know the politics of the region. It was not long ago that there was a gas field developed in Russia, and no sooner was the last weld X-rayed in the gathering system than a local group of bandits took it over. So we have to heed the words of the hon. member when the Member for Calgary-Bow discusses the fact that we have a regulatory regime that is admired and I believe copied from other parts of the world.

Legislative Assembly of Alberta

Title: **Monday, May 5, 2003** **8:00 p.m.**
Date: 2003/05/05
[Mr. Shariff in the chair]

The Acting Speaker: Please be seated. Hon. members, before I recognize the hon. Member for Drayton Valley-Calmar, may we briefly revert to Introduction of Guests?

[Unanimous consent granted]

head: **Introduction of Guests**

The Acting Speaker: The hon. Member for Calgary-Mountain View.

Mr. Hlady: Well, thank you, Mr. Speaker. It's indeed a pleasure for me this evening to introduce to you and through you to members of the Assembly five guests that we have in the members' gallery this evening. The first is Mr. Peter MacKay, who is running for the leadership of the federal PC Party and is the front-runner today with the most delegates going for him to the convention in Toronto at the end of the month. With any luck we'll be fortunate to be looking at the new leader of the federal PC Party and the future Prime Minister of this country.

Traveling with him is Russ Carrigan, who's been a constant help all along as he travels back and forth across the country. We also have three of our cochairs organizing in northern Alberta: Kerry Mahood, Kori Mahood, and Peter Grewar. I'd ask them all to please rise and receive the warm welcome of the Assembly.

head: **Motions Other than Government Motions**

Organized Crime and Terrorism

508. Mr. Cenaiko moved:
Be it resolved that the Legislative Assembly urge the government to work with Criminal Intelligence Service Alberta to enhance collaborative partnerships and co-ordinated programs with various levels of government, policing agencies, and the public to effectively combat organized crime and terrorism.

[Debate adjourned April 28: Rev. Abbott speaking]

The Acting Speaker: The hon. Member for Drayton Valley-Calmar.

Rev. Abbott: Thank you, Mr. Speaker. When we left off Monday last, I was talking about how we live in a time of increasing uncertainty, where organized crime and terrorism pose real threats to safety, security, and our collective well-being as a society. How or whether you respond to terrorist threats is a bit of a double-edged sword. On the one hand, whenever a threat is made, it would be wrong to ignore it completely. For instance, no matter how unlikely or far-fetched a bomb threat may seem, it would be unthinkable in our society in this day and age to take no action. Even the remotest of possibilities that injury, damage, or even death may be the outcome prompts us to take action. Thankfully, these threats turn out to be empty threats almost all the time, certainly in these parts anyway, and life returns to what we may call normal not long afterwards.

But is this an acceptable norm? I don't think so, Mr. Speaker. It is not acceptable to have everyday life punctuated with threats of murder and mayhem, not even if these threats are made but once a year, not even if they're made but once a decade. This is why Motion 508 is so important in that it recognizes the valuable work of CISA, the Criminal Intelligence Service of Alberta. The temper of the times has now become such that the work of CISA is vital to the safety and security of Albertans, Mr. Speaker.

We must, however, proceed with caution. One of the hallmarks of terrorists and those involved in organized crime is their ability to blend in with the rest of society. We've seen this recently in the news around Edmonton. It allows them to strike when we least expect it. Another concern is how we view organized crime. I would suggest that collectively as a society we have a rather glamourized view of organized crime, which I'm afraid has given it an undeserved mystique and allure. As I will discuss in greater detail, these factors make it necessary for us not to paint with too broad a brush in trying to eliminate this scourge from our society. If we fail to act with caution, the likelihood that innocent individuals will be targeted is great.

Although North America has been spared much of the terrorist activities, other parts of the world have had to accept them as staples of ordinary life. For instance, during the 1970s terrorist actions in Europe ushered in a general awareness among Europeans that, like it or not, there were terrorists in their midst. Mr. Speaker, terrorist activity in Europe was frequent in the 1970s and the early 1980s. To mention just a few, West Germany's Bader-Meinhof, the Basque separatist organization ETA, or Italy's Red Army faction rose to infamy in that time and had become household names by the end of the 1970s. Over time, while the vast majority of the demands for money or the release of convicted terrorists have been rejected, where terrorists have succeeded is in making the concept of terrorism an accepted, albeit unwanted, aspect of daily life in Europe and in many other places around the world.

For this reason alone, Mr. Speaker, we must support the work of CISA to ensure that this does not happen here in Alberta. Terrorist activity has been and continues to be widespread in parts of the Middle East. Prior to September 11 that's probably where its occurrence was most expected and ingrained in our collective consciousness. For better or worse, we'd hear the word "terrorist," and we might have had an immediate association with the Middle East. However, it is imperative that our debate here tonight and at all other times not degenerate to being a matter of stereotypes. This is part of why Motion 508 is so important at this time. Terrorist activity is not unique to any one group of people. We must never lose sight of that fact.

Similarly, when we speak of organized crime, we should not treat that term as being synonymous with any one particular ethnic group, and we should steer clear altogether of the term "Mafia." One of the reasons we still use the latter term, I think, is that over the years it has gained a mysterious, intriguing, and alluring quality or dimension that for all of its ugliness also has a romantic quality. This makes recognizing the work of CISA all the more important.

Mr. Speaker, I'm sorry to say that thanks to the way organized crime has been glamourized in films and on television, the public at large has gotten a rather one-sided view of what organized crime is all about. For instance, look at *The Godfather* trilogy, pathbreaking in so many ways. The first installment of the trilogy, *The Godfather*, is considered by some to be one of the best movies ever made. Meanwhile, the crass television series *The Sopranos* has been showered with awards ever since it premiered in 1999. Why is this so? Well, Mr. Speaker, I don't think there's an easy answer to this question, but what is clear is that we live in a culture where dramatizations of criminal activity are commonplace. It has become a staple of prime-time programming as dramatizations of organized crime tend to be particularly successful. People eat this kind of stuff up like there's no tomorrow. Having said that, it shows why Motion 508 is such a timely initiative.

supportive. In fact, one of my former colleagues, the former Member for Edmonton-Rutherford, was a leader and a crusader in that area, and certainly one of the reasons we enjoy such strong accessibility legislation and bylaws in Edmonton is because of him. He has shown us all leadership, and we've all learned a great deal from him. Am I willing to support something that makes it easier for people to gas up either using technology that would make the pump system easier to access somehow or in fact by making sure that there are people there to assist if someone required it? Absolutely.

Just a couple of questions for the member. Is he anticipating that there would eventually be legislation that would require gas service stations to provide that additional staff person that's available to come out and actually operate the pumps for someone that couldn't do it themselves, or is he anticipating some sort of a retrofit program, for instance, like the city of Edmonton has in place where businesses can apply for a grant to help them retrofit buildings for accessibility for persons with disabilities? Exactly how is he anticipating the follow-through in getting this idea in place? I'm interested if he can expand upon that, please.

Now that he's clarified that what he was really talking about is access to the fueling system in gas stations, that makes it much easier for me to support this. If I can get the clarification on whether he's anticipating legislation that would require additional staff or somehow that all staff that are working in gas stations are capable of leaving their cash register and going out and doing this or how he is anticipating the implementation of this.

Good ideas are gratefully received, but if they don't ever make their way to implementation, they just become a frustration for us. So I'm pressing him to follow through on the rest of how he sees this coming to be, and I'm sure that in the time – he will probably have another week before he does his closing comments. It gives him time to seek guidance from some of the excellent agencies that we have working in Alberta, like the ACA or the Premier's Council on the Status of Persons with Disabilities or agencies like the ones in my riding like EmployAbilities or DECSA, all of which I'm sure would be more than willing to give him advice on this very important issue.

Thank you for the opportunity to speak to this. I am willing to vote in favour of Motion 510. Thank you.

The Acting Speaker: The hon. Member for Lac La Biche-St. Paul.

Mr. Danyluk: Thank you very much, Mr. Speaker. It gives me great pleasure to be able to stand up and speak to Motion 510. My constituents feel that the government already makes too many laws, and really they don't want any more restrictions on how they do their work. Albertans just want to work. Business does not want government to get involved in private business.

I guess one thing that I do want to say is: maybe the situations could be a little different in urban Alberta as opposed to rural Alberta. I need to talk about rural Alberta a little bit because I need to talk about small-town Alberta. Sometimes we only have one service station that's open, and if we are going to legislate business to have to operate with two people on duty, then that provides such a restriction because there isn't enough money being made to be able to support it.

You have to also remember that now we don't have service stations that only serve gas, where you can have an attendant that leaves the service station, goes to serve the gas, and the only thing that's left maybe in the service station is a till. Most of the service stations are a convenience store at the same time. It wouldn't take long for people to realize that if you have one attendant and he has to go outside to serve people, the money that he may make on the gas could be lost on chips and pop that might be underneath the coat.

I also say that, you know, there has been some allusion made to seniors needing assistance, and I would suggest that in my constituency, at least from my experience – and I have seniors coming to my office – they have a tremendous network. They know where there are service stations that have attendants that do pump gas in the daytime. They know exactly where they can go to get the service, and I don't think they need to go to the Internet to find out where those service stations are. It doesn't take them long in the pipeline of knowledge to find out where those places are.

I would also like to say that I really believe that having self-serves teaches kids how to maintain their vehicles a little bit and at least try to identify some of the problems that vehicles may have, checking the oil, looking at the fan belt, doing some of this checking. If you have a situation where you are going to have attendants that are going to take care of this, they are never going to go to the place where they have to do the self-serve. It's just easier to have someone else do it and thereby not have that much information or knowledge gathering.

I believe that we just cannot afford to impose restrictions on businesses on the amount of staff that they need. I think the service stations are operating very well. They want the business, and they are doing the work that is going to acquire the most business possible, and I very much would like to speak against those types of restrictions which are in Motion 510.

The Acting Speaker: The hon. Member for Edmonton-Meadowlark.

Mr. Maskell: Mr. Speaker, thank you for giving me the opportunity to rise tonight and speak in favour of Motion 510. I'd like to begin my remarks by commending the hon. Member for Edmonton-Norwood for introducing this motion. Not only that; a motion such as Motion 510 requires that the sponsor be a caring person as well as someone who is cognizant of the barriers that some members of our society face each and every day. The hon. Member for Edmonton-Norwood is such a person.

Humility is a virtue and one that perhaps we do not accord the status it deserves in daily life. In a society as dependent on the automobile as ours we sometimes forget that driving a car is not a right, but rather it is a privilege, as well it should be. While a car offers great convenience and ease of use, it is also something that requires a great deal of responsibility. In the wrong hands any car can become a deadly weapon. To put it quite simply, Motion 510 deals with matters of fairness and safety. As has already been stated, the purpose of Motion 510 is to enact legislation . . .

The Acting Speaker: I hesitate to interrupt the hon. Member for Edmonton-Meadowlark, but the time limit for consideration of this item of business has concluded.

9:00 head: **Government Bills and Orders**
head: Committee of the Whole

[Mr. Shariff in the chair]

The Deputy Chair: I'll call the committee to order.

Bill 18
Energy Statutes Amendment Act, 2003

The Deputy Chair: Are there any comments, questions, or amendments to be offered with respect to this bill? The hon. Member for Calgary-Bow.

Ms DeLong: Thank you, Mr. Chairman. It's my pleasure to speak to Bill 18 today. I have listened to the questions and concerns of the members opposite with great interest and would like to take this opportunity to address them.

It's important to keep the intent of this bill in mind as we move forward. This bill is designed to allow the Department of Energy to deal more effectively with land tenure and collection issues. It allows for a more effective collection process by providing certainty around which leaseholder has the natural gas rights when natural gas is found in coal seams or solution gas is found in conjunction with oil sands. This clarifies which leaseholder is responsible for paying royalty and which royalty regime applies. It codifies joint liability so that the Crown will not have to argue the common-law precedents in every case where a lessee defaults on a royalty payment. It clarifies that provisions governing royalty recalculations apply to royalty and to associated interest and penalties, and it sets out reasonable time periods to complete recalculations of royalty and related interest and penalties.

First, I'd like to highlight the fact that the Auditor General's report for the past two years has indicated that the gas royalty calculation and collection process has shown no outstanding issues or concerns. In fact, production data reported to the Alberta Energy and Utilities Board and to the Department of Energy has been enhanced through the implementation of the Petroleum Registry of Alberta. Up-front audits and validation processes ensure that only accurate data is accepted. Missing or incomplete data is identified and subject to compliance mechanisms such as penalties.

The Auditor General has also made recommendations with respect to the disclosure of costs related to royalty reduction programs. It's my understanding that the department addressed the Auditor General's concerns regarding these programs as part of the most recent completed audit.

Regarding individual meters on oil and gas wells, in Alberta today there is essentially a meter at every wellhead with some minor exceptions. The main exception is for the very low-producing wells in southern Alberta, where a number of wells can be measured through a common metering site. This means that the combined production for a cluster of wells is measured. There is a second set of metering for virtually all gas production in the province, which is the measurement of natural gas and natural gas liquids leaving natural gas plants. When the gaseous and liquid components have been separated and water and other impurities removed, the plant custody measurement is even more accurate than the wellhead meters. To make wellhead meters as accurate as plant custody meters would require building a miniature gas plant at each well, which is just not feasible.

Regarding new technologies, new technologies could result in better allocations back to the wellhead and could conceivably improve even the highly accurate plant gate custody meters. Metering affects the distribution of revenues between pipeline owners and well owners, so there is a very healthy interest in using the most accurate metering that is practically available. Mr. Chairman, accurate measurement of oil and gas is important to ensure that Albertans receive their fair share of royalties and the government ensures that production and disposition are properly calculated and reported.

Mr. Chairman, a member of the opposition asked about the extent of the problem in recalculating freehold mineral tax. The answer is that the total adjustments are approximately 2 percent of what is collected, or about $2 million; that is, 2 percent of the mineral rights tax that is collected. The Department of Energy is very diligent in collecting all the tax that's due.

Mr. Chairman, a member of the opposition also raised some concern over the use of the word "may" in section 3 of the Freehold Mineral Rights Tax Act. The word "may" empowers the minister to recalculate the tax payable. One should look at the entire act along with the regulation under the act to see if there are any conditions prescribing and exercising that power. Section 6 of the Freehold Mineral Rights Tax Act clearly states that where the tax owed on a single tract is less than $20, then no tax is owed. The use of the word "may" in the proposed section 3 of the act ensures consistency with section 6 of the regulation.

A question of why the minister is being given the power to determine the order of payment has also been raised. The order of payment to gas accounts is specified in the natural gas royalty regulation, 2002. With respect to freehold mineral tax, allocation to specific tax years may be required to ensure that the oldest outstanding arrears are paid first. This helps ensure that a freehold mineral owner's title does not go into default.

In relation to the legal question a member of the opposition asked in regard to ownership of the gas underneath the tar sands and bitumen mines, the provisions in Bill 18 are proposed to resolve the ownership of gas and solution gas in oil sands areas. The Crown identified the ownership conflict situation and provided industry more clarity surrounding the issue. The new definition is contained in Bill 18. On Crown land Albertans own all the resources: gas, petroleum, and bitumen. Bill 18 explains the issue of which lessee has the right to the solution gas.

The Member for Edmonton-Gold Bar raised some questions regarding venting and how this will affect the development of coal bed methane. The venting of methane ahead of the mining operation for safety reasons will have a very minor impact on the total volume of coal bed methane that will be developed in Alberta. There are a total of 24 permits to develop a mine in the province, which on an area basis represents only three out of a thousand of the total coal available for coal bed methane development. That's .3 percent. Explosions caused by coal bed methane during mining have historically been a bane to miners. This requirement to vent coal gas ahead of the mining operation is critical for the continued safe mining operations in Alberta.

Coal bed methane is in the early stages of development in Alberta. The Alberta government intends to proceed carefully with the development of this untapped resource so that it can learn from the experience of other jurisdictions and from data collected from Alberta operations. Coal bed methane is natural gas, and it is subject to the same legislation, regulations, and administrative practices as conventional natural gas. Alberta Energy, the EUB, Alberta Environment, and Sustainable Resource Development have existing regulations that apply to coal bed methane development.

In October 2002 the Department of Energy announced a cross-ministry review and external consultation process to determine if the existing regulations and policies are appropriate for responsible coal bed methane development or if any changes should be made. The planned cross-government external consultation process, that includes public input, will address a broad range of issues associated with coal bed methane development, including water, to ensure that recommendations balance industry interests with landowner, resident, and environmental considerations.

The Department of Energy is continuously reviewing its existing rules as well as developing new rules to ensure that the Crown and Albertans receive the intended shares of royalties from the development of energy resources. The royalty regime for oil sands delays taking a large up-front royalty due to the significant investment required to start up a project. The regime is designed to allow the Crown and industry to receive a fair share of the profits from oil sands over the entire cycle of a project. The Department of Energy

requires all large oil sands projects to be audited on an annual basis by an external accounting firm. The department also performs its own audits on all projects to ensure accurate collection of royalty revenues.

9:10

Regarding water flow, it is a requirement in Alberta to obtain a well licence from the EUB to drill an oil and gas well and to ensure that groundwater resources are protected. As part of the EUB application process, Alberta Environment has input by requiring surface casing, which I'm sure you've all heard of, to be set at a depth below the base of groundwater protection. This cemented surface casing protects any water aquifers that may be in the area from possible damage while the well is being drilled. If anyone suspects that the drilling or production of a well is causing disruptions in their water flow, they should contact the EUB, who will investigate their complaints.

To finish my comments, I strongly support Bill 18 as it advances Alberta's land tenure and collection capabilities. Thank you very much, Mr. Chairman.

The Deputy Chair: The hon. Member for Edmonton-Gold Bar.

Mr. MacDonald: Thank you very much, Mr. Chairman. It's a pleasure to rise this evening and participate in the debate on Bill 18 at committee stage. Certainly, I appreciate the answers to my questions from earlier in debate from the hon. Member for Calgary-Bow.

One cannot find too much fault with this legislation if one is just to look at the intent, which I believe is to provide legislative clarity for investors as well as to ensure that the rules are clear and effective for someone drilling a well. When we think of this and we think of the fact that the hon. member just concluded by saying that the coal bed methane industry is in its early stages of development in this province and that coal bed methane and natural gas are supposedly one and the same and that it's an industry that is in its infancy, I have to question at this time if this legislation is what the coal bed methane industry needs at this point in its development.

Now, there certainly are other initiatives presented here, Mr. Chairman. You know, we are going to amend the Mines and Minerals Act and the Freehold Mineral Rights Tax Act. We've already discussed that. We are going to permit the government to enhance its tenure and its collection practices, and at this time I would like to know from the hon. member if this is just for Crown tenure or if it is also for private tenure.

Last week I had the pleasure of attending a public meeting in Camrose with many of the landowners in Camrose, some of whom have rights that are older than the province. These have been passed down from one generation of the family to another. We had quite an interesting discussion. First and foremost, these individuals certainly wanted to talk about electricity and natural gas deregulation but were very interested to also talk about the coal bed methane industry. They recognized that there were a number of wells that could be drilled on a section, sometimes a lot more wells. In some rural areas 64 wells a section were proposed for coal bed methane development, and this number of wells was not, to say the least, popular with the farmers or the landowners. There was the issue of compressor noise. There was the issue of water disposal.

I thought at that time: well, this would be an ideal time to do some research into development in other jurisdictions and just what exactly other jurisdictions have done. The hon. member mentioned that in her remarks, and certainly I would think that this government would not like to lag behind other jurisdictions. I didn't have to go far in my research, encouraged by the farmers, to find out that B.C. in this legislative session has a bill, Bill 16, the Coalbed Gas Act, introduced by the hon. Minister of Energy and Mines in British Columbia, and it's a lot different, I must say, than what we are looking at in this province. After reading through it, it gave this member cause for concern.

Now, it looks like in proposing the Coalbed Gas Act, the British Columbia government has taken the lead as the most coal bed methane-friendly jurisdiction in Canada. The Minister of Energy and Mines in B.C. is developing a coal bed methane strategy. I do know that there are some pilot projects going on on Vancouver Island, and the government has made a commitment to coal bed gas development that is going to encourage and promote confidence for investors and also promote confidence in exploration opportunities throughout B.C.

I don't know what is going to happen with this bill if it is going to be assumed by investors that B.C. is a little bit more friendly towards exploration and investment and if people are going to vote with their feet and go there. That's why I would urge caution on Bill 18, and if there's a way to improve this legislation through amendment, well, perhaps the time is right for this House to consider it.

As I said earlier, we have Bill 18, and British Columbia has Bill 16, and the purpose of Bill 16 in B.C. is simply to promote economic activity in that province by removing any uncertainty that surrounds entitlement to coal bed gas underlying both Crown and freehold lands in that province. Our Bill 18 is going to amend, certainly, section 67 of the Mines and Minerals Act to clarify, as I understand it, that Alberta Crown coal tenure does not include "rights to any natural gas, including coalbed methane." If that is wrong, if the hon. member could clarify that, I would be very grateful.

Now, the proposed Bill 16 in British Columbia is, as I understand it, declaratory legislation that confirms a long-standing B.C. government policy that coal bed gas is a natural gas owned by the owner of the natural gas rights by deeming natural gas to be and to always have been a mineral and deeming coal bed gas to be and to always have been natural gas. It is further confirmed that a natural gas tenure issue pursuant to the Petroleum and Natural Gas Act includes coal bed gas rights and that a coal tenure issue pursuant to the Coal Act does not, regardless of when such tenures were issued.

9:20

The Alberta Bill 18 is, on the other hand, much more limited, or it has restrictions. The proposed legislation, as our research indicates and as I've been told, is that the legislation certainly clarifies that coal bed gas is not included in Crown coal tenure but does not specifically include such substances in natural gas tenure although the definition of natural gas leaves little doubt in this regard on a go-forward basis. Significantly, the Alberta legislation is silent as to its retroactive effect on the vested property rights of current tenure holders. Existing natural gas tenure holders must rely on the regulatory incorporation provisions contained in the Crown tenure documents. Mr. Chairman, the contractual provision in Crown dispositions whereby the grantee agrees to incorporate into the contract compliance with further legislation enactments. We also have to consider that the statutory compliance provision in section 4 of the Mines and Minerals Act provides that the act applies to an agreement made, entered into, or renewed under the former act notwithstanding anything in the agreement.

The Mines and Minerals Act here in Alberta applying to an agreement must be recognized as less effective language than, for example, the province of Saskatchewan Crown Minerals Act, which provides that all existing Crown dispositions shall be deemed to be issued under that act. Without specific retroactive enactment