COM-Jan 14, 2026

COURT FILE NUMBER	B301-276975
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c B-3, AS AMENDED AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF BLUE SKY RESOURCES LTD.
DOCUMENT	**BENCH BRIEF OF CENOVUS ENERGY INC.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	LAWSON LUNDELL LLP Barristers and Solicitors 1100, 225 – 6th Avenue SW Calgary, AB T2P 1N2 **Attention: Alexis Teasdale / Eloise Hirst** TEL: (403) 218-7564 / (403) 218-7509 FAX: (403) 269-9494 EMAIL: ateasdale@lawsonlundell.com ehirst@lawsonlundell.com FILE: 30186.190090

Bench Brief of Cenovus Energy Inc.

APPLICATION BEFORE THE HONOURABLE JUSTICE BOURQUE
ON JANUARY 14, 2026 AT 10:00 a.m.
ON THE CALGARY COMMERCIAL LIST

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I. INTRODUCTION

1. This Brief is submitted by Cenovus Energy Inc. ("**Cenovus**") in support of the application filed by Canadian Natural Resources Limited ("**Canadian Natural**") in these proceedings on November 27, 2025, to be heard on January 14, 2026 (the "**Application**").

2. These proceedings (the "**NOI Proceedings**") began on September 24, 2025, when Blue Sky Resources Ltd. ("**Blue Sky**") filed a Notice of Intention to Make a Proposal (the "**NOI**"), pursuant to s. 50.14(1) of the Bankruptcy and Insolvency Act, RSC 1985, c B-3, as amended (the "**BIA**").

3. The Application relates to a letter issued by His Majesty the King in right of Alberta as represented by the Minister of Energy and Minerals ("**Alberta Energy**") in respect of arrears owing on certain petroleum and natural gas leases (together the "**PNG Leases**", and each, a "**PNG Lease**") in which Blue Sky holds a lessee interest (the "**Royalty Default Letter**"), which was copied to 36 co-lessees under the PNG Leases, including Cenovus (collectively, the "**Co-Lessees**").[1]

4. The Royalty Default Letter advised that Blue Sky was in default in the amount of $1,872,563.84 pursuant to the PNG Leases (the "**Blue Sky Royalty Arrears**"), and that the co-lessees of each PNG Lease were responsible for the Blue Sky Royalty Arrears. The Royalty Default Letter stated that Alberta Energy may cancel the PNG Leases if the Blue Sky Royalty Arrears were not satisfied.

5. The Application seeks, among other things,

   (a) a declaration that:

      (i) the Blue Sky Royalty Arrears constitute a claim provable in the NOI Proceedings, and must first be advanced therein prior to seeking recoveries from the co-lessees;

[1] The Royalty Default Letter is attached to the Affidavit Erin Lunn, sworn November 14, 2025 (the "**Lunn Affidavit**") as Exhibit E.

(ii) the Royalty Default Letter and all demands for payment by Alberta Energy are subject to the stay of proceedings in the NOI proceedings and any attempt to exercise any remedies with respect thereto constitutes a breach of the stay of proceedings imposed by section 69 of the BIA (the "**Stay**"); and

(iii) Alberta Energy is precluded from collecting payments related to the Blue Sky Royalty Arrears until the Stay is terminated or expires; and

(b) an order requiring Alberta Energy to immediately return any payments made to Alberta Energy by any leaseholder on account of the Blue Sky Royalty Arrears, plus interest accrued from the date of payment by the applicable leaseholder until the date of repayment by Alberta Energy, calculated in accordance with section 37 of the *Natural Gas Royalty Regulation*, 2017, Alta Reg 211/2016.

6. Alberta Energy's attempts to seek and obtain payment of the insolvent company's royalty arrears, before the conclusion of the insolvency proceedings disproportionately places the risks of insolvency on co-lessees, despite the fact that Alberta Energy has a powerful tool at its disposal to protect itself, namely the ability to refuse to transfer leases unless royalty arrears are paid in full. Condoning Alberta Energy's attempt to collect from the Co-Lessees would unfairly reallocate the risk of insolvency and place unwarranted strain on industry participants.

7. Further, allowing Alberta Energy to jump the queue and obtain payment of the insolvent entity's royalty arrears before the treatment of the arrears in the insolvency proceedings is determined is contrary to a central tenet of insolvency law, namely the equitable distribution of the debtor's estate amongst its creditors, which is embodied in the single proceeding model and the *pari passu* rule. To the extent Alberta Energy relies on s. 20(2.1) of the *Mines and Minerals Act* to justify proceeding against the Co-Lessees, it frustrates the BIA's purpose of equitable distribution, thus rendering s. 20(2.1) inoperative.

II. FACTS

8. The relevant facts and background are set out in the Affidavit of Canadian Natural.

9. As described therein, Blue Sky filed its NOI on September 24, 2025. The next day, Alberta Energy issued the Royalty Default Letter to Blue Sky and the Co-Lessees.

10. On October 16, 2025, following receipt of the Royalty Default Letter, Canadian Natural sent a letter to Alberta Energy describing its concerns and requesting that Alberta Energy stay its enforcement of the Blue Sky Royalty Arrears until the matter could be fully determined by this Court (the "**Canadian Natural Response Letter**").[2]

11. On October 22, 2025, Alberta Energy responded by letter advising, among other things, that it would not stay enforcement of the Blue Sky Royalty Arrears (the "**Alberta Energy Response Letter**").[3]

12. Following delivery of the Alberta Energy Response letter, a number of Co-Lessees, including Cenovus, paid Alberta Energy their proportionate share of the Blue Sky Royalty Arrears under protest. Cenovus's proportionate share of the Blue Sky Royalty Arrears is $75,217.37, which Cenovus remitted to Alberta Energy on or around October 22, 2025.[4]

13. Similar letters were sent by Ovintiv Canada ULC, Whitecap Resources Inc., and Sinopec Canada Energy Ltd.,[5] indicating they each disagreed with the position taken by Alberta Energy, but that they would nonetheless be remitting payment for their proportionate share of the Blue Sky Royalty Arrears to Alberta Energy under protest.

14. Alberta Energy has since confirmed it will not take remedial action against the Co-Lessees with respect to the Blue Sky Royalty Arrears until the Application is resolved.

III. LAW AND ARGUMENT

A. Alberta Energy's Enforcement Actions are Premature and Fundamentally Unfair

15. There is a possibility, if not a strong possibility, that Blue Sky's interest in the PNG Leases that generated the Blue Sky Royalty Arrears will be sold in the NOI Proceedings, which

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[2] Lunn Affidavit, Exhibit G.
[3] Lunn Affidavit, Exhibit H.
[4] Lunn Affidavit, Exhibit I.
[5] Lunn Affidavit, Exhibits J, K and L.

may reduce or negate the Blue Sky Royalty Arrears, making Alberta Energy's attempt to collect them from the Co-Lessees both premature and highly prejudicial to the Co-Lessees.

16. On November 20, 2025, this Court approved a Sale and Investment Solicitation Process (the "**SISP**") in respect of the assets, undertakings and property of Blue Sky (the "**Property**").[6] The SISP contemplates, among other things, that interested parties must submit non-binding letters of intent on or before January 29, 2026. In the Third Report of the Proposal Trustee dated December 16, 2025, the Proposal Trustee states that based on the number of confidentiality agreements signed in the SISP, the asset offering is showing strong interest from prospective purchasers.[7]

17. If any PNG Leases are sold pursuant to the SISP, the transferee will be required by Alberta Energy to pay the associated portion of the Blue Sky Royalty Arrears to effect the transfer. Contrary to Alberta Energy's assertion in the Alberta Energy Response Letter, requiring a purchaser in an insolvency asset transaction to assume and pay royalty arrears owing on the purchased assets is fair, commercially reasonable and expected by purchasers, because it accords with the governing legislation, Alberta Energy's own policy documents, and recent case law.

18. Under the *Crown Minerals Registration Regulation*, Alberta Energy must approve every transfer of a PNG Lease in Alberta.[8] Alberta Energy's Information Letter issued on September 26, 2024, states that "if, during…insolvency proceedings [a receiver, monitor or trustee] considers selling and transferring active mineral agreements to a purchaser [Alberta Energy] requires full payment of any outstanding rental, royalty and debt obligations prior to approving the transfer of any mineral agreements."[9] Alberta Energy's assertion that it is unreasonable to expect a purchaser to pay royalty arrears associated with purchased leases is undercut by its own policy documents.

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[6] Order granted by Justice Johnston on November 20, 2025, and filed November 21, 2025.
[7] Third Report of the Proposal Trustee, dated December 16, 2025 at para 3.1.4.
[8] *Crown Minerals Registration Regulation*, AR 264/1997, s 5(1)(g) [**TAB 1**].
[9] Lunn Affidavit, Exhibit T.

19. Alberta Energy's position is incompatible with this Court's recent decision in *Cleo Energy Corp (Re)*.[10] In *Cleo*, the Alberta Energy Regulator (the "**AER**") opposed an application by Cleo's receiver for the approval of a transaction because it did not contemplate the payment of arrears owing under certain petroleum and natural gas leases to be sold thereunder. Justice Feasby of this Court refused to grant the reverse vesting order sought, finding that the purchaser was required to pay the arrears owing under Cleo's petroleum and natural gas leases, because the arrears were cure costs that had to be paid to allow the purchaser to retain the benefits of the leases.[11]

20. Indeed, Alberta Energy filed affidavit evidence in the Cleo proceedings, in which it stated that it requires the payment of cure costs to transfer leases to a purchaser, and that it "routinely" enforces this requirement in insolvency asset transactions, noting that Alberta Energy is authorized to refuse a transfer in circumstances where cure costs are not paid.[12]

21. Considering the clear state of the law, and Alberta Energy's own information letter and evidence filed in Cleo's receivership proceedings, it is virtually certain that, should a transaction be consummated in respect of the Property during the NOI Proceedings, the purchaser will be required to pay the Blue Sky Royalty Arrears associated with the interest in any leases transferred pursuant to that transaction.

22. If Blue Sky's interest in the Crown leases giving rise to the Blue Sky Royalty Arrears is not sold, transferred or otherwise dealt with in the NOI Proceedings (or any further insolvency proceedings of Blue Sky), because there is no willing buyer, Cenovus does not dispute that it may have to satisfy its proportionate share of the arrears associated with those leases that remain with Blue Sky or its estate. However, Cenovus strongly objects to Alberta Energy refusing to first participate in the NOI Proceedings before looking to the Co-Lessees for payment of the Blue Sky Royalty Arrears.

23. Pursuant to the decision rendered in *Cleo*, and considering Alberta Energy's ability to require the payment of all defaults prior to approving the transfer of the PNG Leases,

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[10] *Cleo Energy Corp. (Re)*, 2025 ABKB 621 [*Cleo*] [**TAB 2**].
[11] *Cleo* at paras 35-39 [**TAB 2**].
[12] *Cleo* at para 31 [**TAB 2**]; Lunn Affidavit, Exhibit V.

Alberta Energy is far more likely to be paid in full for the Blue Sky Royalty Arrears in the NOI Proceedings than any of the Co-Lessees, who will be left to recover the payment of such arrears as unsecured creditors of Blue Sky. Put another way, the prejudice to Alberta Energy is at most delayed recovery in respect of Blue Sky; this should be contrasted with the prejudice to Blue Sky's other stakeholders, including the Co-Lessees, many of whom will likely recover nothing.

24. Alberta Energy's refusal to stay enforcement until the completion of the NOI Proceedings is therefore inappropriate and fundamentally unfair to Cenovus and the other Co-Lessees, who must abide by the NOI Proceedings.

25. Additionally, Alberta Energy makes the curious assertion in the Alberta Energy Response Letter that "collection from co-lessees incentivises efficiency in the insolvency process to the benefit of creditors" and that payment of the Blue Sky Royalty Arrears by the Co-Lessees makes it "more likely that Blue Sky will strike a successful proposal."[13]

26. Presumably, Alberta Energy is suggesting that if the Blue Sky Royalty Arrears are paid by the Co-Lessees, purchasers will pay more for the Property. There are two issues with this assertion. First, the Co-Lessees should not be required to subsidize the recovery of Blue Sky's secured creditors by paying the cure costs that a purchaser would otherwise be made to pay to effect the transfer of the PNG Leases. Such a result flies in the face of the overarching principles of fairness and equitable treatment in court-supervised insolvencies. Second, during asset valuation, if the royalty liabilities are removed because they have already been paid, the assets could be sold at discounted price.

27. Further, if the Co-Lessees pay the Blue Sky Royalty Arrears, they will have a claim against Blue Sky for the amounts they paid, thus increasing the amount of unsecured claims against Blue Sky, which is not to the benefit of the unsecured creditors.

[13] Lunn Affidavit, Exhibit H, page 2.

B. Alberta Energy's Enforcement Actions Contravene the Single Proceeding Model

28. Cenovus agrees with Canadian Natural's position that Alberta Energy's issuance of the Royalty Default Letter contravenes the single proceeding model, which favours litigation concerning an insolvent company to be dealt with in a single jurisdiction, rather than fragmented across separate proceedings.[14]

29. The single proceeding model applies to restructuring proceedings under the BIA and other insolvency legislation.[15] The model "… favours the enforcement of stakeholder rights through a centralized judicial process" (emphasis added); its purpose is to centralize all claims related to a debtor's insolvency before a single court, thereby expeditiously resolving the aftermath of a financial collapse and avoiding the "inefficiencies and chaos" that may otherwise arise if creditors were entitled to enforce liabilities outside of insolvency proceedings.[16]

30. A BIA court may assert control over proceedings outside the insolvency under s. 183(1) of the BIA, "… both to ensure the timely resolution of the parties' dispute and protect the public interest in the orderly restructuring or dissolution of the debtor and the equal treatment of its creditors.[17] Claims are appropriately brought into the umbrella of an insolvency proceeding where doing so will assist in the restructuring and further the remedial purposes of the relevant insolvency statue.[18]

31. Granting the relief sought by Canadian Natural under the Application serves the remedial purposes of the BIA, by providing for an orderly, efficient and equitable distribution of the proceeds of the Property to Blue Sky's creditors. Requiring the Co-Lessees to pay the Blue Sky Royalty Arrears will generate more claims against Blue Sky, and potentially, will result in a windfall to Alberta Energy, who may recover all or part of the Blue Sky Royalty Arrears through the sale of PNG Leases comprising the Property.

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[14] *Alderbridge Way GP Ltd (Re)*, 2023 BCSC 1718, at para 51 [*Alderbridge*] [**TAB 3**], citing *Mundo Media Ltd (Re),* 2022 ONCA 607, at para 6 [*Mundo*] [**TAB 4**].
[15] *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41 at para 63 [*Petrowest*] [**TAB 5**].
[16] *Petrowest* at para 55 and 62 [**TAB 5**].
[17] *Petrowest* at para 73 [**TAB 5**].
[18] *Alderbridge* at para 56 [**TAB 3**].

32. Alberta Energy argues that "[c]o-lessee collection does not violate the single proceeding model because no action is taken against Blue Sky or their property." This too narrowly construes the single proceeding model.

33. In *Alderbridge Way GP Ltd (Re)*, the British Columbia Supreme Court considered an application by a secured creditor to have certain litigation against it and by it, heard and determined summarily in the context of the CCAA proceedings of, among others, Alderbridge Way GP Ltd. Justice Fitzpatrick concluded that a CCAA court has authority, informed by the single proceeding model, to centralize both claims against and claims related to the debtor company, including a claim against the secured creditor by another secured creditor.[19]

34. Like Alberta Energy, the subordinate secured creditor resisting the application in *Alderbridge* argued that no party to its claim was under CCAA protection and did not seek relief against the CCAA debtors or their assets.[20] Fitzpatrick J. held that:

> [t]here is a manifest relationship between the Related Actions, [the secured creditors], the CCAA Debtors/Guarantors and these CCAA proceedings. None of [the secured creditors] or the CCAA Debtors/Guarantors can be characterized as "strangers" to these proceedings.[21]

35. The reference to "strangers" is to the decision in *Tron Construction & Mining Limited Partnership & Tron Construction & Mining Inc.*, where the Court held that where a claim involves a "stranger" to the insolvency proceeding, this is an exception to the single proceeding model. Alberta Energy is not a "stranger" to these proceedings – it is a key creditor and stakeholder with a significant claim against Blue Sky, and a party with an interest in, and influence on, any future transaction to purchase the Property pursuant to the SISP.

36. Further, in the Bellatrix Exploration Ltd. ("**Bellatrix**") CCAA proceedings, the purchaser of substantially all of Bellatrix's assets made an application respecting Alberta Energy's

[19] *Alderbridge* at paras 48-57 [**TAB 3**].
[20] *Alderbridge* at para 60 [**TAB 3**].
[21] *Alderbridge* at para 72 [**TAB 3**].

efforts to pursue Bellatrix's co-lessees for royalty arrears owing under various petroleum and natural gas leases acquired by the purchaser.

37. Justice Gill found that Alberta Energy was precluded from collecting the royalty arrears from Bellatrix's co-lessees for several reasons, including that Alberta Energy did not pursue those arrears in the CCAA proceedings, despite appearing on the service list. Justice Gill noted that Alberta Energy's attempts to enforce the royalty arrears undermined the integrity of the CCAA process and emphasized that the single proceeding model captures all claims *related to* insolvency.[22] Although Justice Gill also held that the vesting order in the Bellatrix matter had extinguished Alberta Energy's claims against Bellatrix, and thus its claim against the co-lessees, the Court's comments about the single proceeding model remain apposite.

C. Alberta Energy's Enforcement Actions Contravene the *Pari Passu* Rule

38. Relatedly, Alberta Energy's attempt to enforce the Blue Sky Royalty Arrears against the Co-Lessees contravenes the *pari passu* rule, a central tenet of Canadian bankruptcy legislation.[23] The *pari passu* rule serves one of the dual purposes of the BIA, namely to achieve the orderly and fair distribution of the bankrupt's property amongst their creditors on a pro rata basis.[24]

39. In *Canada North*, the Supreme Court of Canada held that the BIA includes a comprehensive scheme for the liquidation process, and "provide[s] an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules."[25] The Court further held that the *BIA*'s comprehensive nature ensures, among other things, that there is a single proceeding in which creditors are placed on an equal footing and know their rights.[26]

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[22] Lunn Affidavit, Exhibit CC – *In the Matter of the Plan of Compromise or Arrangement of Bellatrix Exploration Ltd* (14 March 2025), Edmonton, ABQB EVK25BELLATRIX, page 40, lines 11-22.
[23] *Olympia & York Developments (re)*, 1998 OJ No 4903 at para 25 [**TAB 6**].
[24] *Canada v Canada North Group Inc*, 2021 SCC 30 at para 139 [*Canada North*] [**TAB 7**].
[25] *Canada North* at para 140 [**TAB 7**], citing *Ted Leroy Trucking (Century Services) Ltd, Re*, 2010 SCC 60 at para 13 [**TAB 8**] and *Husky Oil Operations Ltd v Minister of National Revenue*, 1995 CanLII 69 (SCC) at para 85 [**TAB 9**].
[26] *Canada North* at para 140 [**TAB 7**].

40. The reallocation of a debtor's estate amongst the creditors violates the pari passu rule.[27] By attempting to enforce against the Co-Lessees before the outcome of the NOI Proceedings is known, Alberta Energy is effectively reallocating Blue Sky's estate. If all or part of Blue Sky's interest in the PNG Leases are sold, Alberta Energy can look to the purchaser of those assets to pay the associated portion of the Blue Sky Royalty Arrears, thus reducing its claim against Blue Sky's estate, and against the Co-Lessees, whose claims against Blue Sky will also be reduced accordingly. Enforcing the entire amount of the Blue Sky Royalty Arrears against Co-Lessee results in greater claims by Blue Sky's Co-Lessees against Blue Sky's estate than they would otherwise have.

D. Section 20(2.1) Frustrates the BIA's Purpose of Equitable Distribution

41. Alberta Energy relies on s. 20(2.1) of the *Mines and Minerals Act*, which provides that co-lessees are jointly responsible for the obligations and liabilities arising under an oil and gas lease, to do an end run around the insolvency process and obtain payment of Blue Sky's unsecured indebtedness to the Crown outside of that process, to the detriment of Blue Sky's unsecured creditors.

42. Pursuant to the doctrine of federal paramountcy, provincial legislation may be deemed inoperative to the extent that powers conferred by that legislation conflict with the BIA.[28] Two distinct forms of conflict have been recognized in the application of the doctrine of federal paramountcy: operational conflict and frustration of purpose. Frustration of purpose occurs where the operation of a valid provincial law is incompatible with a federal legislative purpose – *i.e.*, where the effect of a provincial law frustrates the purpose of the federal law, even though it does not entail a direct violation of the federal law's provisions.[29]

43. Alberta Energy's use of s. 20(2.1) to obtain priority payment of its unsecured claim against Blue Sky's estate frustrates the BIA's valid legislative purpose of equitable distribution, as embodied in the pari passu principle and the single proceeding model. As such, Alberta

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[27] *Chandos Construction v Deloitte Restructuring*, 2020 SCC 25 at para 35 [**TAB 10**].
[28] *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 at para 63 [*Redwater*] [**TAB 11**].
[29] *Redwater* at para 65 [**TAB 11**].

Energy cannot rely on s. 20(2.1) to obtain payment of the Blue Sky Royalty Arrears from the Co-Lessees until the BIA process has run its course.

E. Alberta Energy's Enforcement Actions Constitute a Breach of the Stay

44. Cenovus agrees with Canadian Natural that the Royalty Default Letter and Alberta Energy's demands for payment constitute a breach of the statutory stay of proceedings under s. 69(1) of the BIA (the "**Stay**") and adopts Canadian Natural's argument that Alberta Energy is precluded from collecting any payments related thereto until the Stay is terminated or otherwise expires.

45. Alberta Energy takes the position that the Stay does not apply to the solvent Co-Lessees. This is incorrect.

46. Under s. 69(1) of the BIA, "on the filing of a [NOI] 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." (Emphasis added.)[30]

47. Alberta Energy's enforcement of the Blue Sky Royalty Arrears is an indirect remedy against Blue Sky's Property. Although Alberta Energy has now resiled from its overt threat to cancel the PNG Leases if the Co-Lessees did not pay the Blue Sky Royalty Arrears, proceeding against the Co-Lessees for payment of the arrears still exposes Blue Sky to claims by the Co-Lessees. Further, Alberta Energy's enforcement actions constitute a proceeding for the recovery of a claim provable in Blue Sky's proposal proceedings.

48. The purpose of the stay of proceedings is to provide a debtor with the necessary "breathing room" to negotiate with its creditors and work towards a restructuring.[31] Any remedies that hinder or impair that process are stayed.[32] In the instant case, Alberta Energy's pursuit of the Co-Lessees is an issue that detracts from the purpose of the Stay, namely, to enhance Blue Sky's restructuring efforts.

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[30] *BIA*, s. 69(1)(a) [**TAB 12**].
[31] *Blade Energy Services Corp (Re)*, 2024 ABKB 100 at para 22 [*Blade*] [**TAB 13**].
[32] *Blade* at para 22 [**TAB 13**].

F. Alberta Energy Must Provide a List of the PNG Leases

49. Finally, Cenovus echoes Canadian Natural's request for a list of the impacted PNG Leases that are the subject of the Blue Sky Royalty Arrears and adopts Canadian Natural's arguments that Alberta Energy's refusal to do so contradicts the fundamental principles of fairness and defies rationality.

IV. CONCLUSION

50. For the reasons outlined above, there is no legal basis for allowing Alberta Energy to retain the Co-Lessees' payments, and numerous practical and principled reasons to require Alberta Energy to wait for the NOI Proceedings to run their course before it can enforce the remaining amount of the Blue Sky Royalty Arrears. In so doing, Alberta Energy will be in the same position as Blue Sky's creditors as a whole.

V. RELIEF SOUGHT

51. Cenovus supports Canadian Natural's Application for the relief sought therein.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of January, 2026.

LAWSON LUNDELL LLP

Per: Alexis Teasdale
Counsel for Cenovus Energy Inc.

VI. TABLE OF AUTHORITIES

TAB

1. *Crown Minerals Registration Regulation*, AR 264/1997

2. *Cleo Energy Corp. (Re)*, 2025 ABKB 621

3. *Alderbridge Way GP Ltd (Re)*, 2023 BCSC 1718

4. *Mundo Media Ltd (Re),* 2022 ONCA 607

5. *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41

6. *Olympia & York Developments (re)*, 1998 OJ No 4903

7. *Canada v Canada North Group Inc*, 2021 SCC 30

8. *Ted Leroy Trucking (Century Services) Ltd, Re*, 2010 SCC 60

9. *Husky Oil Operations Ltd v Minister of National Revenue*, 1995 CanLII 69 (SCC)

10. *Chandos Construction v Deloitte Restructuring*, 2020 SCC 25

11. *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5

12. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3

13. *Blade Energy Services Corp (Re)*, 2024 ABKB 100

TAB 1

Province of Alberta

MINES AND MINERALS ACT

CROWN MINERALS REGISTRATION REGULATION

Alberta Regulation 264/1997

With amendments up to and including Alberta Regulation 218/2022

Current as of November 16, 2022

Office Consolidation

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document and record on the document the provisional registration number and the date on which it is assigned.

(3) The Minister shall keep a record of each document to which a provisional registration number has been assigned.

(4) If the registration of a document is refused by the Minister, the provisional registration number assigned to that document is automatically cancelled.

(5) If a document submitted to the Minister for registration is determined by the Minister as acceptable for registration, the Minister shall record the registration of the document and, on doing so, the provisional registration number becomes the registration number of the document.

(6) If registration of a document is recorded in accordance with subsection (5), registration of the document is effective as of the date on which the provisional registration number is assigned to the document.

(7) Any record required or permitted to be made by the Minister under this Regulation may be made in any manner that the Minister may determine.

Registration of ministerial transfers

3(1) When a ministerial transfer is made,

(a) the Minister shall assign a registration number to the transfer and record on the transfer the registration number and the date on which it was assigned, and

(b) the Minister shall record the registration of the transfer.

(2) When the registration of the ministerial transfer is recorded, the registration is effective as of the date on which the registration number is assigned to the transfer.

Registration fees

4 The Minister may refuse to register a document submitted for registration unless the prescribed registration fee for that document has been paid to the Minister.

Transfers

Registration of transfers

5(1) The Minister may refuse to register a transfer submitted for registration on any of the following grounds:

(a) the transfer is not in the prescribed form or is not completed in accordance with the prescribed form;

(b) the transfer is not executed in the manner required by the prescribed form;

(c) the proof of execution of the transfer is not satisfactory to the Minister;

(d) the transfer would, if registered, result in the agreement being held by 2 or more lessees in a manner inconsistent with section 8 of the *Mines and Minerals Administration Regulation* (AR 262/97);

(e) the transfer would, if registered, result in one or more lessees holding less than a 1% undivided interest in the agreement;

(f) a specified undivided interest being conveyed by the transfer

(i) is expressed other than in decimal form, or

(ii) is expressed in decimal form but to more than 7 decimal places;

(g) the transferor or transferee is in default of payment of any debt owing to the Crown in right of Alberta or to a Provincial agency as defined in the *Financial Administration Act*;

(h) the transfer conveys part of the location of an agreement and the prescribed issuance fee for the new agreement resulting from the transfer has not been paid to the Minister.

(2) A transfer shall not be registered if

(a) a provision of the Act, the regulations under the Act or the agreement affected by the transfer requires the consent of the Minister to the transfer and the consent is refused or a decision respecting the consent has not yet been made, or

(b) the Minister has actual notice of a judgment or order of a court that prohibits the transfer or the registration of the transfer.

AR 264/97 s5;82/2014

TAB 2

Court of King's Bench of Alberta

Citation: Cleo Energy Corp (Re), 2025 ABKB 621

Date: 20251110
Docket: B301 163430
Registry: Calgary

IN THE MATTER OF THE ***BANKRUPTCY AND INSOLVENCY ACT***, RSC 1985, C B-3, AS AMENDED
AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF CLEO ENERGY CORP.

Corrected judgment: A corrigendum was issued on November 10, 2025; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision
of the
Honourable Justice Colin C.J. Feasby

I. Introduction

[1] Reverse Vesting Orders ("RVOs") burst on to the scene in 2019. Since then, RVOs have gone from "extraordinary to ordinary."[1] The present application by the Receiver of Cleo Energy Corp. ("Cleo") for approval of an RVO involves what before 2019 would likely have been a standard oil and gas transaction implemented through a *Companies' Creditors Arrangement*, RSC 1985, c C-36 ("*CCAA*") plan or a traditional approval and vesting order ("AVO"). The present application raises two questions relevant to insolvency and restructuring practice in the oil and gas industry and a third question of broader application.

[2] The first question that must be decided is if the RVO structure is necessary in the present case. ***Harte Gold (Re)***, 2022 ONSC 653, the leading RVO case, held that an RVO must be necessary. The Receiver asserts that the proposed RVO transaction is necessary because it is

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[1] Victor Olusegun, "The Journey of Reverse Vesting Orders from 'Extraordinary' to Ordinary: Is it Time for Parliamentary Intervention?" (2024) 22 Annual Review of Insolvency Law 16.

more efficient than alternative transaction structures and it is required by the purchaser. The second question that must be decided is whether the RVO structure may be used to shed liability for cure costs relating to unpaid royalties owing pursuant to Crown petroleum and natural gas leases. The third question, raised by Employment and Social Development Canada ("Employment Canada"), concerns potential adverse consequences for employees who made Wage Earner Protection Program ("WEPP") claims because of use of the RVO structure.

II. The Cleo Energy Corp. Receivership Proposal

[3] Cleo is a private oil and gas company that owned and operated assets in East Central Alberta. Cleo filed a Notice of Intention to Make a Proposal ("NOI") pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*") on December 8, 2024. During the NOI proceedings, some of Cleo's assets were sold through a sales and investment solicitation process. However, not all Cleo's assets were sold within six months of Cleo filing the NOI. So, to avoid a deemed bankruptcy pursuant to s 50.4(8) of the *BIA*, uCapital – uLoan Solutions Inc. (the "Interim Financier") applied for and was granted a receivership order on June 2, 2025. Alvarez & Marsal Canada Inc. was appointed as receiver (the "Receiver").

[4] The Receiver conducted what it called a remarketing process to sell the Cleo assets that were not sold in the sales and investment solicitation process conducted during the NOI proceedings. The remarketing process engaged with 37 potential interested parties of which 11 signed non-disclosure agreements to gain access to the virtual data room. Eight non-binding bids resulted from the remarketing process. The receiver selected 2698902 Alberta Corporation (the "Purchaser") as the successful bidder.

[5] The Receiver proposes that the transaction be effected by way of an RVO. The proposed RVO contemplates the creation of ResidualCo that will take on assets, liabilities, and contracts that the Purchaser does not want. Cleo, which will be acquired by the Purchaser, will retain, among other things, "the Retained Contracts, the Title and Operating Documents, Petroleum and Natural Gas Rights...."

[6] The Receiver stated in its First Report that the RVO structure is "essential to maximize value...." The Receiver explained that "[b]y using an RVO, the Purchaser can avoid seeking AER approval for multiple licence transfers, a process that could be lengthy and introduce additional risk and cost to the Transaction and deplete the remaining cash on hand for distribution to creditors." Further, the Receiver reported that "[t]he Purchaser has advised the Receiver that it is only prepared to proceed with a reverse vesting transaction, rather than a traditional asset purchase, as this structure allows for the efficient transfer of applicable licences and contracts." The Receiver stated that it "considers the Purchase Price being paid to reflect:

> (i) the importance and value of the time it would take to undertake the additional steps required by the AER under a traditional asset sale/vesting order transaction; and
>
> (ii) the value attributable to certain of Cleo's attributes which may be preserved.

[7] Despite offering this opinion, the Receiver gave no estimate of the time it would take to complete AER licence transfers or any explanation of what "attributes" of Cleo that would be preserved or why such attributes might have value sufficient to justify proceeding by way of

RVO. Presumably, if the Receiver is prepared to offer an opinion to the Court concerning the purchase price and the "value of time" required to effect licence transfers, it must have conducted some analysis to support that opinion. There is no support for the Receiver's opinion to be found in either its First Report or Supplement to the First Report.

[8] The Receiver asserts that alternatives to the proposed RVO "would in all likelihood result in material environmental liabilities and abandonment and reclamation obligations being transferred to the OWA." Again, no evidence or analysis was offered to substantiate this claim other than to point out that other bids contemplated environmental liabilities being assumed by the OWA.

[9] The proposed RVO provides that Cleo will retain Crown mineral leases with the liabilities for unpaid royalties and rent being transferred to ResidualCo. As I will explain, this is a departure from the usual insolvency and restructuring treatment of executory contracts.

III. Reverse Vesting Orders ("RVOs")

[10] Courts often say that a RVO is an "extraordinary" remedy: see, for example, ***British Columbia v Peakhill Capital Inc***, 2024 BCCA 246 at para 32. Courts also say this about injunctions: see, for example, ***Unifor, Local 707A v Suncor Energy Inc***, 2018 ABCA 75 at para 8. This is not helpful and needs to stop. Using the adjective "extraordinary" to describe something indicates it is unusual or remarkable. A conclusion that something is extraordinary is a product of observation, not legal analysis. As I said in ***R v TGB***, 2023 ABKB 526 at para 5, "[e]mphasizing the extraordinary nature of a remedy, its rarity, or that it is a last resort says nothing about the legal test to be applied; instead, it encourages the trial judge to close her mind to the availability of the remedy." A bigger problem with saying that RVOs are extraordinary is that it is not true. RVOs are now a common way for insolvency and restructuring matters to be resolved. I refuse to subscribe to the polite fiction that RVOs are extraordinary in 2025.

[11] Justice Penny's framework in ***Harte Gold*** at para 38 for analyzing if an RVO should be granted has been adopted widely, including by the Alberta Court of King's Bench: see, for example, ***Delta 9 Cannabis Inc (Re)***, 2025 ABKB 52 at para 61and ***Long Run Exploration Ltd (Re)***, 2024 ABKB 710 at para 18. Justice Penny in ***Harte Gold*** explained that before an RVO is granted, a court must consider four questions:

(a) Why is the RVO necessary in this case?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

[12] Penny J in ***Harte Gold*** at para 38 also observed that an RVO should not be approved just because "it may be more convenient or beneficial for the purchaser."

[13] Justice Marion in ***Delta 9*** at paras 61-62 explained other criteria that may be considered by a court before granting an RVO, but for the present case I will focus on the ***Harte Gold***

factors as that is how all the interested parties framed their submissions. And, further, I will address only the two ***Harte Gold*** factors that were disputed by the parties.

IV. Should the Receiver's Application to Approve the Cleo RVO be Granted?

A. Is the RVO Structure Necessary in this Case?

[14] An important preliminary question is whether the necessity criterion should be taken seriously. The RVO criteria from ***Harte Gold*** are a recent judicial invention; the ink is not yet dry. Outside the cannabis industry, which is arguably a special case, RVOs are often used in restructurings where previously *CCAA* plans or AVOs would have been used. Though the RVO cases have repeatedly affirmed the necessity criterion, the proliferation of RVOs and what courts have found to constitute necessity suggests that a lower standard is being applied. The analysis that follows takes the caselaw at face value and proceeds on the basis that necessary means necessary. With that said, appellate guidance on the question of whether an RVO must be necessary before it may be approved would be of great assistance to lower courts and insolvency and restructuring professionals.

[15] Justice Simard, shortly before his appointment to the bench, and his co-authors compared AVO transactions with RVO transactions with a focus on the oil and gas industry in Chris Simard, et al, "Restructuring and Insolvency Deals in the Oil Patch: Recent Trends and Developments" (2022) 60 Alberta Law Review 363 at 388-92. An AVO, they explained, "allows for the removal of the *assets* from the debtor's insolvent estate." A shortcoming of a standard AVO is that it does not "allow for the purchase and sale of attributes of the debtor company that are *not* assets."

[16] The traditional way for non-asset attributes to be conveyed in insolvency proceedings is via a plan under the *CCAA* or a proposal pursuant to the *BIA*. Both *CCAA* plans and *BIA* proposals provide creditors the right to vote and a claims process. Justice Simard explained at 389, "a court-approved Plan can, in essence, deliver to a third party the ownership of a debtor company that has been 'cleansed' of all creditor claims but that still retains all its assets, along with all inherent corporate attributes that are not assets (such as tax attributes and regulatory licences)." An RVO delivers the benefits of a *CCAA* plan or *BIA* proposal without the messiness and expense associated with creditor democracy: see, Daniel Alievsky, "Reverse Vesting Orders: Did We Forget About Creditor Democracy?" (2023) 12:7 IIC-ART 143 at 149.

[17] The Receiver has identified one reason why an RVO structure must be used in the present case – to avoid the transfer of licences issued by the Alberta Energy Regulator ("AER"). The Receiver asserts that the transfer of licences will take time and cost money which, in turn, will create more risk and reduce the return to Cleo creditors. The Receiver also states that the Purchaser made proceeding by RVO a condition of its offer. I agree with Mr. Alievsky who contends at 152 that "courts should compel parties to explain why and on what evidentiary basis they assert the RVO is not just economically advantageous to its stakeholders, but also better than any alternative." Where it is claimed that there is an obstacle to proceeding using alternative structures such as the cost, risk, and delay of licence transfers, that must be substantiated.

[18] The proposed transaction could be completed by way of a *CCAA* plan. Proceeding by way of a *CCAA* plan would allow Cleo to avoid the licence transfer problem that it has identified. But proceeding by way of a *CCAA* plan would mean that Cleo would have to deal with the

inconvenience and expense of affording creditors their statutory rights under the *CCAA* when there will be no recovery for most creditors. I note that neither the Receiver's First Report nor its Supplement to the First Report offers any reasons why a *CCAA* plan is not feasible. Nevertheless, I will consider the Receiver's contention that the transfer of licences necessitates use of an RVO structure.

[19] The cost, delay, and risk associated with the transfer of licences has been found to justify the use of an RVO structure. For example, the non-transferability of licences in the cannabis industry has been a significant factor driving the increased use of RVOs: ***Atlas Global Brands Inc***, 2024 ONSC 5570 at para 36; ***Delta 9*** at para 69. But the transfer of licences has also been used to justify RVOs in the mining industry and the oil and gas industry where licences are transferrable: see, for example, ***Harte Gold*** and ***Razor Energy Corp, Razor Holdings GP Corp, and Blade Energy Services Corp (Re)***, 2025 ABKB 30 at para 32. Justice Penny in ***Harte Gold*** at para 71 explained:

> The principal objective and benefit of employing the RVO approach in this case is the preservation of Harte Gold's many permits and licences necessary to conduct operations at the Sugar Loaf Mine. Under a traditional asset sale and AVO structure, the purchaser would have to apply to the various agencies and regulatory authorities for transfers of existing licences and permits or, if transfers are not possible, for new licences and permits. This is a process that would necessarily involve risk, delay, and cost. The RVO sought in this case achieves the timely and efficient preservation of the necessary licences and permits necessary for the operations of the Mine.

[20] Justice Penny later noted at para 73 that these were "<u>material</u> risks, delays, and costs" [emphasis added]. Presumably the applicant provided him with evidence to substantiate the materiality of risks, delays, and costs associated with the licence transfers.

[21] The problem in the present case is that delays, risks, and costs associated with the transfer of AER licences are asserted but not proved. Sometimes in Commercial List matters, the Court will accept assertions made by insolvency and restructuring professionals who serve as Monitors, Trustees, and Receivers. But I cannot do so here because the claim runs contrary to common sense.

[22] Oil and gas licence transfers are an everyday part of business in the oilpatch. Part of the AER's job is to process licence transfers. While it is true that parties sometimes structure transactions as share deals or, in the context of insolvency, use *CCAA* plans to avoid the hassle and expense of licence transfers that does not mean that avoidance of licence transfers is always necessary. If the Receiver claims that the burdens associated with licence transfers necessitate that this transaction use an RVO structure, those claims must be substantiated.

[23] To be clear, I am not saying that the Court requires sworn testimony from the Receiver. Rather, I mean that the Receiver's report should show that the Receiver has done the work to determine what the delays, risks, and costs associated with licence transfers are likely to be. For example, instead of asserting that there will be delays, costs, and risks associated with the licence transfers, the Receiver should specify what delays, costs, and risks are apprehended and why the Receiver believes those concerns to be genuine and material. Put differently, the Receiver must provide backup to justify its conclusion respecting the materiality of the risks, delays, and costs associated with the required licence transfers.

[24] I accept that it is possible that the cost of AER licence transfers may be material to the proposed transaction given that much of the deal consideration is comprised of assumed liabilities that would otherwise be transferred to the Orphan Well Association ("OWA"). But for me to reach such a conclusion, the Receiver must provide an estimate of the costs associated with the AER licence transfers and a reasoned explanation why the estimated amount is material to the proposed transaction.

[25] The fact that the Purchaser requires that the proposed transaction proceed by way of an RVO does not move me. Purchasers always demand what is most favourable from their perspective. The Purchaser has agreed to acquire Cleo's assets for a substantial consideration which includes cash and assumed environmental liabilities. The Court must assume that the Purchaser will behave rationally. Under the circumstances, if an RVO is not available as a deal structure, the economically rational thing for the Purchaser to do is not to walk away but to negotiate a reduction of the purchase price by the amount that it estimates it will have to pay to effect the licence transfers. Perhaps there are other factors, such as tax, that might affect the price the Purchaser is prepared to pay but that is not clear from anything before the Court. The bottom line is that there is no cogent explanation offered by the Receiver as to what the financial impact is of using structures other than the proposed RVO. Assertions that the transaction must be an RVO are not enough to establish that it is necessary.

B. Is Any Stakeholder Worse Off Under the RVO Structure?

i. Viable Alternative?

[26] ***Harte Gold*** requires the Court to consider if any stakeholder is worse off under the RVO structure than they would have been under any other viable alternative. The Receiver submits that there are no viable alternatives to the proposed transaction. The Receiver says that the proposed transaction is the only bid received in the remarketing process that would not result in properties being transferred to the OWA. The Receiver further submits that "[a]ny proceeds derived from these hypothetical alternative transactions would not result in proceeds going to satisfy Alberta Energy's alleged cure costs. Instead, the proceeds would be paid to the OWA...."

[27] The Receiver's argument attacks a straw man. The viable alternative is not one of the seven rejected bids; it is a differently structured transaction with the successful bidder. As I noted before, the Court must assume that the Purchaser will act in an economically rational way. The viable alternative to the current RVO structure that absolves the Purchaser of responsibility for paying Alberta Energy cure costs is an RVO where the Purchaser is required to pay cure costs. That means that the Purchaser would take on a liability of $150,000 that it is not under the current structure. A rational economic actor would not walk away; it would reduce the purchase price by a corresponding amount. I note that even with a $150,000 reduction in purchase price, the Purchaser would still have the highest bid.

[28] Since I have found that the Receiver has not established that an RVO is necessary, it is appropriate to also consider if there is a non-RVO viable alternative. The difficulty with this is that the Receiver has constructed a binary choice between the proposed RVO and the seven unsuccessful bids. Given value that the Purchaser has offered under the proposed RVO structure, it is possible, that a restructured version of the transaction without using the RVO mechanism would still be preferable to the seven other bids. The failure of the Receiver to engage with this possibility leaves the Court unable to assess whether there is a non-RVO viable alternative.

ii. Crown Lease Cure Costs

[29] Cleo owes Alberta $170,000 in unpaid royalties and $70,000 in unpaid rent in respect of its Mineral Leases. Of the total $240,000 owing by Cleo to Alberta, $90,000 is post-filing debt which the Receiver has confirmed will be paid. The RVO contemplates that "Crown Liabilities," which is the $150,000 pre-filing debt for unpaid royalties and rent, will be vested in ResidualCo while the Mineral Leases will remain in Cleo. The RVO allows Cleo to retain the Mineral Leases without paying the arrears to Alberta.

[30] Most oil and gas rights in the province are owned by Alberta. From time to time, Alberta conducts public sale processes where oil and gas companies may bid for Crown oil and gas rights. After a sale, Alberta Energy will issue the successful bidder a petroleum and natural gas lease which is sometimes called a PNG Lease or Mineral Lease. A Mineral Lease grants the lessee the right to drill for, and recover, oil and gas within the leased area. A Mineral Lease does not grant mineral ownership to the lessee; Alberta remains the owner. In exchange, the lessee is required to pay royalties and rent to Alberta.

[31] Tracy Wadson, Alberta's Director, Royalty Operations swore an affidavit describing how Alberta Energy approaches the transfer of Mineral Leases in insolvency matters as follows:

> Upon sale of an insolvent's Mineral Leases (in an asset sale, not a share purchase arrangement), the receiver or trustee requests that Alberta Energy transfer those Mineral Leases to the name of the purchaser.
>
> Under s 18(2) of the [*Mines and Minerals*] Act [RSA 2000, c M-17], and, in particular, s 5(1)(g) of the *Crown Minerals Registration Regulation*, AR 264/1997 (the **Regulation**"), the Minister (through Alberta Energy) is authorized to refuse the transfer of a Crown agreement.
>
> Alberta Energy requires payment of cure costs (i.e. the Crown Liabilities – the monetary defaults under the Mineral Lease) before it will transfer Mineral Leases to the purchaser (the "**Transfer Requirement**").
>
> Alberta Energy routinely enforces the Transfer Requirement in insolvency asset transactions and, based on my experience, both industry and receivers/trustees are aware of the Transfer Requirement.

[32] Ms. Wadson's affidavit did not speak to Alberta Energy's approach when a debtor is restructured pursuant to a *CCAA* plan. She did, however, explain that Alberta Energy's standard approach when royalties and rent are not paid is to issue a Notice of Default as a first step toward cancelling the relevant Mineral Lease. Presumably this means that where a debtor retains Mineral Leases under a *CCAA* plan, Alberta Energy requires payment of royalty and rental arrears to maintain the Mineral Leases going forward.

[33] Cleo's Mineral Leases are what are sometimes called executory contracts because there are ongoing obligations: ***Kary Investment Corporation v. Tremblay***, 2005 ABCA 273 at paras 19-20. Receivers have the power to adopt or reject executory contracts: Frank Bennett, *Bennett on Receiverships*, 4th ed, (Toronto: Thomson Reuters, 2021) at 557-65; ***Spyglass Resources Corp v Bonavista Energy Corporation***, 2017 ABQB 504 at para 67. Executory contracts that are rejected give rise to claims that may be proved in the receivership process: ***Bellatrix Exploration Ltd (Re)***, 2021 ABCA 85 at para 44. Receivers adopt executory contracts when they help to maximize value for creditors. This occurs when the executory contract is advantageous or

essential to a restructuring business and will make the business more attractive to a potential purchaser. When a receiver adopts an executory contract, monetary defaults in respect the executory contract must be cured: Simard et al, "Restructuring and Insolvency Deals in the Oil Patch" at 373. Put differently, if a receiver decides to keep a contract, it must keep both the benefits and the burdens of the contract.

[34] The treatment of executory contracts in the *CCAA* context is similar. Where a debtor company is restructured and an executory contract is retained, the counterparty may demand payment of cure costs as a condition of ongoing performance. Where a *CCAA* plan calls for the assignment of an executory contract, *CCAA* s 11.3(4) precludes a court from making an assignment order "unless it is satisfied that all monetary defaults in relation to the agreement ... will be remedied on or before the day fixed by the Court."

[35] 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.

[36] The present application is the second time in the last two months before this Court where a restructuring entity sought to retain the benefit of an executory contract while absolving itself of the responsibility to remedy monetary defaults through the device of an RVO. In ***AlphaBow Energy Ltd (Re)***, 2025 ABKB 550, many months after the approval of an RVO, the applicant sought to amend the RVO to retain a contract with a third party for the purchase of carbon dioxide while shedding liabilities associated with the contract. Justice Johnston observed at para 52 that that the applicant had disclaimed the contract in the first instance because it hoped to negotiate a new contract that would avoid payment of cure costs. Justice Johnston declined to exercise her discretion to permit the amendment of the RVO to permit the applicant to retain the contract while shedding the associated liabilities.

[37] Though the Receiver did not provide any cases where courts have approved RVOs where the receiver or purchaser is not required to pay cure costs for retained contracts, I note that it has occurred: see, for example, ***Acerus Pharmaceuticals Corporation (Re)***, 2023 ONSC 3314 at para 31. The language used by Justice Penny in ***Acerus*** suggests, however, that parties whose contracts were retained in that case were allowed to choose to perform or terminate the contracts where cure costs are not paid. He explains at para 31 that the RVO "does not require FGC to cure pre-filing arrears under the Retained Contracts," and that such parties "have the opportunity to continue supplying goods and services to the applicants post-CCAA proceedings if they choose to do so." This is quite different than what is proposed in the present case. I also note that despite the precedent in ***Acerus***, RVOs continue to require the payment of cure costs: see, for example, ***Razor Energy Corp*** at para 60.

[38] I remain open to the possibility that there may be cases where an RVO that provides for the retaining contracts without a corresponding obligation to pay cure costs can be justified, but this is not one of them. The payment of cure costs to Alberta Energy is a reasonable price for the Purchaser to pay to get the ongoing value of the Mineral Leases and it will cause a justified decrease in the value to be received by the creditors of Cleo on their claims.

[39] The use of RVOs to allow contracts to be retained without payment of cure costs alters the incentive structure around insolvency. Moreover, allowing contracts to be retained without payment of cure costs is a curtailment of the principle of freedom of contract beyond what is normal in insolvency proceedings. These are matters that demand consideration by appellate courts and legislators.

iii. Potential Clawback of WEPP Payments

[40] Employment Canada appeared at the application to advise the Court of potential adverse consequences of the RVO for former employees. Employment Canada, however, maintained that it was not taking a position on the appropriateness of the RVO.

[41] Employment Canada advised the Court that pursuant to the *Wage Earner Protection Payment Act*, S.C. 2005, c. 47 ("*WEPPA*") former employees of Cleo who had received payments pursuant to WEPP could have their payments clawed back if the RVO is approved.

[42] *WEPPA* s 5 outlines the eligibility criteria for employees whose former employer is in receivership. The key requirements are that "the former employer is subject to a receivership" and that "the individual is owed eligible wages by the former employer."

[43] Employment Canada submits:

> Should the RVO be granted, the liabilities related to unpaid wages of the former employees of Cleo would be transferred to ResidualCo. Equally, Cleo would emerge from the receivership proceedings and continue to carry on its business operations as a viable corporation.
>
> Following the issuance of the RVO, the eligibility criteria under s. 5(1)(b)(ii) and 5(1)(c) of the WEPPA would no longer be met and, the objective of the WEPP would equally be undermined. As a result, this would likely affect the former employees' entitlement to WEPP benefits and lead to an overpayment of program benefits, which would be subject to recovery.

[44] Employment Canada further states that whether the conditions for eligibility are met is within the exclusive discretion of the Minister responsible for *WEPPA*, subject to an appeal before the Canada Industrial Relations Board, which, in turn, is subject to judicial review under the exclusive jurisdiction of the Federal Court of Appeal.

[45] Employment Canada's submission is, in essence, a warning that following the approval of the Cleo RVO, payments to former employees of Cleo may be clawed back followed by a warning that this Court has no say in the matter. I beg to differ. Justice Collier in ***Arrangement relatif à Former Gestion Inc***, 2024 QCCS 3645 at para 34 dispensed with a similar argument by Employment Canada as follows:

> [T]he relevant time for determining when WEPPA applies is the moment at which all an insolvent entity's employees are terminated due to a bankruptcy or restructuring. That is when the employee's entitlement to compensation arises and neither the Act nor the regulations indicate that circumstances arising after the termination are relevant.

[46] I agree. WEPP exists to protect employees from the adverse consequences of the insolvency of their employer. Terminated employees have no control over how insolvency and restructuring transactions are structured after their termination. Terminated employees who have

received WEPPs payment and have no inkling of the possibility of a clawback may have used the money to pay for groceries or rent. A choice to clawback payments made to terminated employees of an insolvent corporation because of subsequent events beyond their control would be to the immense discredit of the Minister and, I would hope, be swiftly reversed by the Canada Industrial Relations Board or the Federal Court of Appeal.

V. Conclusion

[47] The Receiver's application is dismissed without prejudice to its ability to apply again for approval of the proposed transaction with additional supporting material and/or for a restructured transaction.

Heard on the 17th day of October, 2025 with additional written submissions received on the 22nd and 24th of October.
Dated at the City of Calgary, Alberta this 28th day of October, 2025.

Colin C.J. Feasby
J.C.K.B.A.

Appearances:

Sam Gabor and Tom Cumming, Gowling WLG (Canada) LLP
for Cleo Energy Corp.

James Reid and Pavin Takhar, Miller Thomson LLP
for the Proposal Trustee, Alvarez & Marsal

Melissa N. Burkett, Alberta Justice
for Alberta Energy

Daniel Segal, Department of Justice Canada
for Employment and Social Development Canada

George Wong,
for the Alberta Energy Regulator

Ryan Zahara, MLT Aikins,
for the Orphan Well Association

Corrigendum of the Reasons for Decision
of
The Honourable Justice Colin C.J. Feasby

A change was made to the list of lawyers who appeared in this case.

TAB 3

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Alderbridge Way GP Ltd. (Re),* 2023 BCSC 1718

Date: 20231003
Docket: S222758
Registry: Vancouver

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

- and -

In the Matter of a Plan of Compromise and Arrangement of 0989705 B.C. Ltd., Alderbridge Way GP Ltd. and Alderbridge Way Limited Partnership

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment (re Procedural Orders)

Counsel for the Petitioners:	H. Shapray, K.C. S.D. Coblin
Counsel for The Bowra Group Inc, Monitor:	K. Jackson M. Gill
Counsel for Romspen Investment Corp.:	P. Rubin P. Bychawski R. Lou
Counsel for GEC (Richmond) GP Inc. and GEC (Richmond) Limited Partnership:	J.P. Sullivan S.Y. Bhura
Place and Date of Hearing:	Vancouver, B.C. August 3-4, 2023
Place and Date of Judgment:	Vancouver, B.C. October 3, 2023

INTRODUCTION

[1] This is a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 [*CCAA*]. The subject matter of this proceeding is a development property undertaken by the petitioners (the "CCAA Debtors"). In April 2022, I granted an Initial Order in these proceedings. To date, efforts toward arranging a sale of the development property have been stalled.

[2] The backdrop to today's application is that significant disputes have arisen between the CCAA Debtors and a secured creditor, on the one hand, and another secured creditor, Romspen Investment Corporation ("Romspen"), on the other. Those disputes have crystallized in various actions filed in this Court against Romspen and an action by Romspen against the CCAA Debtors and guarantors of that debt (collectively, the "Related Actions").

[3] Romspen seeks procedural orders with respect to the Related Actions. In summary, the order sought would: (a) provide that the Related Actions would be tried together in the context of the *CCAA* proceedings; and (b) set various deadlines for the filing of pleadings, listing of documents and examinations for discovery, consistent with case plan orders that have been regularly granted in this Court.

[4] The respondents to this application oppose the relief sought, arguing that the Court has no jurisdiction under the *CCAA* to grant the relief sought; alternatively, they contend that such orders are inappropriate. In the main, the respondents wish to have the Related Actions resolved in the fullness of time and in the usual civil trial process outside of these *CCAA* proceeding without the *CCAA* court imposing any case management deadlines at any time.

[5] For the reasons set out below, I agree with Romspen on all of the issues and grant the orders sought.

BACKGROUND

[6] The development in question, which was to be known as "The Atmosphere", was an ambitious large-scale real estate project that included seven residential and

> c) the court did not have authority under the *CCAA* to apply the doctrine of equitable subordination, if that doctrine exists in Canadian law: paras. 38–53.

[40] As such, the remaining issue to be determined in *U.S. Steel SC* was: what would be the forum for the adjudication of the USW and the Milbournes' objections to USS' claims and whether the *CCAA* court had jurisdiction to address those issues?

[41] Justice Wilton-Siegel concluded that the *CCAA* court did have jurisdiction under s. 11 to address the other claims *if* it was in furtherance of the *CCAA*'s remedial purposes. He stated:

> [72] I acknowledge that the purpose of the CCAA is to facilitate 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] <u>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</u>. 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.
>
> …
>
> [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. <u>I do, however, think that the discretion or authority of a court under section 11 of the CCA A extends to the determination of inter-creditor matters within a</u>

> CCAA proceeding if, on balance, such action would appear to further the remedial purpose of the CCAA.
>
> …
>
> [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 purpose of the CCAA.
>
> [Emphasis added.]

[42] GEC and the CCAA Debtors/Guarantors take the position that the decision in *U.S. Steel CA* did not endorse Wilton-Siegel J.'s conclusions on jurisdiction. They point to the appeal court's statement:

> [82] There is no support for the concept that the phrase "any order" in s. 11 provides an at-large equitable jurisdiction to reorder priorities or to grant remedies as between creditors. The orders reflected in the case law have addressed the business at hand: the compromise or arrangement.

[43] For the reasons stated by Romspen's counsel, I disagree that the Ontario Court of Appeal's decision calls into question the lower court's decision, as relevant here.

[44] The sole issue on appeal in *U.S. Steel CA* was whether the court below erred in finding that a *CCAA* court did not have the jurisdiction to apply the doctrine of equitable subordination so as to subordinate USS' claims to those of USW and the Milbournes. Ultimately, the court in *U.S. Steel CA* agreed with Wilton-Siegel J. that the *CCAA* court had no jurisdiction to apply the doctrine of equitable subordination, but for different reasons, namely that the doctrine would not further the remedial purposes of the *CCAA*: *U.S. Steel CA* at paras. 100–102.

[45] As relevant to the arguments here, Wilton-Siegel J.'s conclusion that the inter-creditor claims could be determined in the *CCAA* proceedings under s. 11, if appropriate, was noted in *U.S. Steel CA* at para. 18. The conclusion in the court below was not the issue under appeal in the *U.S. Steel CA* decision and was not overturned.

[46] All of the parties have also made substantial submissions on the issue of jurisdiction having regard to the "single proceeding model" in insolvency proceedings (including under the *CCAA*) that has been endorsed in the past. While the respondents have addressed the "single proceeding model" as a separate jurisdictional basis for Romspen's application, I agree that the only jurisdictional basis is s. 11 of the *CCAA*, which is informed by this concept.

[47] In *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60 at para. 22, the Court endorsed that the purpose of the model was to provide a "collective proceeding" that "supersedes the usual civil process available to creditors to enforce their claims," so as to avoid a "free-for-all" among creditors in enforcing remedies against the debtor and its assets.

[48] 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.

[49] The case authorities, however, do not support the narrow scope of the single proceeding model asserted by GEC and the CCAA Debtors/Guarantors.

[50] The model has been applied to prevent fragmentation of proceedings in relation to arbitration proceedings.

[51] In *Mundo Media Ltd. (Re)*, 2022 ONCA 607 [*Mundo*], the court stated:

> [6] The single proceeding model applies to insolvency proceedings. This model favours litigation concerning an insolvent company to be dealt with in a single jurisdiction rather than fragmented across separate proceedings. A creditor "who cannot claim to be a 'stranger to the bankruptcy,' has the burden of demonstrating 'sufficient cause' to have the proceedings fragmented across multiple jurisdictions."

[52] At para. 24 in *Mundo*, the court noted that the motion judge had held that, where a third party was not a stranger to the bankruptcy, the model was not limited

to claims against a debtor, but could also support addressing claims by a debtor in the insolvency proceeding. At para. 52, the appeal court agreed, stating:

> … the single proceeding model is typically used as a ‘shield’ to protect debtors from having to defend claims in multiple proceedings or jurisdictions, rather than as a ‘sword’ to enable receivers to pursue claims against a third party. However, I see nothing in the jurisprudence precluding this result. …

[53] The single proceeding model was also discussed in *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41, again in the context of arbitration proceedings versus insolvency proceedings. At paras. 54-55, the Court stated that the model protects the “clear ‘[p]ublic interest in the expeditious, efficient and economical clean-up of the aftermath of financial collapse’”.

[54] Finally, Romspen refers to *Tron Construction & Mining Limited Partnership & Tron Construction & Mining Inc*., 2022 SKKB 203 [*Tron*] where the court exercised its jurisdiction under s. 183(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*] to impose a claims process for determining liens against certain lands, rather than have those claims adjudicated in other civil proceedings in the usual fashion. At para. 51, the court stated, after citing *Century Services* and *Mundo*, that the single proceeding model, which has “long been applied in bankruptcies, receiverships and *CCAA* proceedings, is extremely well-established”.

[55] 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.

[56] 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*.

[57] I conclude that this Court in these *CCAA* proceedings does have the jurisdiction to grant the order sought by Romspen pursuant to s. 11 of the *CCAA*. It remains to be determined whether it is appropriate to exercise that jurisdiction in these circumstances, as I will discuss below.

Is the Procedural Order Appropriate?

[58] The CCAA Debtors/Guarantors have advanced various arguments against the proposed Order.

[59] As a preliminary point, GEC and the CCAA Debtors/Guarantors contend that the single proceeding model has no application here since the Related Actions are just inter-creditor disputes or disputes towards determining the amount of the debt, matters that are not central to the *CCAA* proceedings at all, which is simply focussed on a sales or liquidating process.

[60] GEC states that no party to its dispute is under *CCAA* protection. GEC further says that it does not seek relief against the CCAA Debtors or their assets (the Development), just as Romspen does not in its counterclaim in the GEC Action.

[61] Further, the CCAA Debtors/Guarantors say that the dispute between Romspen and GEC is entirely separate and distinct from the issues raised in the Romspen Action and the CCAA Debtors/Guarantors Action and that the GEC Action is purely an inter-creditor dispute.

[62] In substance, the respondents say that the single proceeding model is simply focussed on stopping a “free-for-all” by creditors against a debtor’s assets so as to bring all claims within the ambit of the insolvency proceeding. In the context of this *CCAA*, they say that the only focus here is the sales process. They say that, once the issues in the Related Actions are determined, only then should the stakeholders’ rights to enforce any claims against the Development be “collectivised” in the *CCAA* proceeding. In the meantime, they say that the Related Actions do not impact the prospects for any sale or prejudice any other stakeholder or impair the *CCAA*

proceedings in any way. They say that Romspen is attempting to turn this liquidating *CCAA* proceeding into a "litigation forum" under the guise of a *CCAA* proceeding.

[63] With all due respect, I agree with Romspen that this approach is in error to the extent that it narrows the focus of these *CCAA* proceedings to the one singular point of allowing the Development to be sold through the SISP. That said, as I will discuss below, even that prospect is fraught with issues arising from the Related Actions.

[64] I start from the point that liquidating *CCAA*s have been endorsed as achieving the remedial objectives of the *CCAA*, even when no plan of arrangement will ever be presented by the debtor company so as to allow the debtor to continue in business: *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 [*Callidus*] at paras. 39-45. In *Callidus*, the Court emphasized that different objectives may come into play depending on the circumstances:

> [46] Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, <u>when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus</u>. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.
>
> [Emphasis added.]

[65] No stakeholder here—let alone GEC and the Guarantors—objected to the *CCAA* proceedings being commenced and continued toward the objective of selling

the Development. Needless to say, it was the CCAA Debtors that commenced the proceedings in the first place.

[66] The objectives in the *CCAA* proceeding are clear and they have been clear from the outset. The stakeholders are seeking to monetize the Development as soon as possible. That goal will achieve many purposes. Firstly, it will stem the significant and ongoing costs of maintaining the Development in its current state, a cost that is currently being borne by Romspen. Secondly, it will achieve a financial result for the stakeholders depending on how the respective secured claims are determined and ranked. More general social benefits will be achieved by a completion of the Development in the community.

[67] In *U.S. Steel CA*, the court stated:

> [69] The scheme of the *CCAA* focuses on the determination of the validity of claims of creditors against the company and the determination of classes of claims for the purpose of voting on a compromise or arrangement. Except as contemplated by ss. 2(1), 6(8), 22.1 and 36.1, the statute does not address either conflicts between creditors or the order of priorities of creditors. <u>Priorities are, however, part of the background against which the plan of compromise or arrangement is negotiated</u>.
>
> [Emphasis added.]

[68] Similarly, priorities are the background against which a sale of the Development is to be negotiated. However, here, the priority issues have moved from the background to the forefront of this restructuring proceeding in light of the Related Actions.

[69] I would emphasize again the Monitor's comments in the Report at paras. 9 and 15, which I have summarized above, about how the priority issue is expected to negatively impact the Monitor's ability to arrange a sale of the Development if the disputes in the Related Actions are not resolved beforehand. The Monitor does not describe the resolution of the Related Actions as merely "desirable"; rather it is described as "important" and "essential" to achieving the objectives that are before the stakeholders in this insolvency proceeding.

[70] It cannot be seriously questioned that, in these unique circumstances, it is critical and necessary to determine who holds debt and security against the Development and, if security is held, what is its priority.

[71] As was noted in *Tron*, an exception to the single proceeding model is where the claim involves a "stranger" to the insolvency proceeding (similarly, it might be said that bringing claims within *CCAA* proceedings that involve a "stranger" would not further the remedial purposes of the *CCAA*). In *Tron*, the court stated:

> [53] …Where a party is genuinely a stranger to the insolvency proceeding, there is room for that party to make a case that it should not be swept into the proceeding. Similarly, an insolvent party could argue that there is no relationship between its insolvency proceeding and another party, such that any dispute concerning that party should be resolved outside of the insolvency proceeding…

[72] I am not persuaded by the respondent's arguments that attempt to distance themselves and their claims from this *CCAA* proceeding. There is a manifest relationship between the Related Actions, GEC, Romspen, the CCAA Debtors/Guarantors and these *CCAA* proceedings. None of GEC, Romspen or the CCAA Debtors/Guarantors can be characterized as "strangers" to these *CCAA* proceedings.

[73] These *CCAA* proceedings are an insolvency proceeding involving the CCAA Debtors and each of the Related Actions concerns the CCAA Debtors. The Guarantors are in each case either the economic stakeholders of the CCAA Debtors, their controlling minds, or were otherwise involved in their business operations leading up to the commencement of these *CCAA* proceedings.

[74] The Romspen Action is a claim against the CCAA Debtors/Guarantors. It is a claim that is required to be resolved pursuant to s. 20 of the *CCAA*. The CCAA Debtors/Guarantors Action is in substance a cross claim to, and a denial of, the claims asserted in the Romspen Action. The Romspen Action cannot be adjudicated in accordance with s. 20 of the *CCAA* apart from the CCAA Debtors/Guarantors Action.

[75] The GEC Action also concerns the CCAA Debtors. GEC's claims against Romspen in the GEC Action relate to and arise from the affairs of the CCAA Debtors and their insolvency. GEC is a major secured creditor of the CCAA Debtors. The contractual relationship between GEC and Romspen pertains solely to the CCAA Debtors. GEC hopes, through the GEC Action, to elevate its secured claim against the Development in relation to the Romspen Security.

[76] I conclude that there is considerable interconnection between the Related Actions and the conduct of these *CCAA* proceedings, as the Monitor notes in its Report.

[77] In addition, this is not a case where the stakeholders enjoy the luxury of taking their time to have the litigation unfold in the Related Actions to resolve those claims in the fulness of time. As the saying goes, this is real-time litigation and the clock is ticking in terms of the need to achieve a resolution as soon as possible for an asset that is expensive to maintain and where further delay may seriously compromise the outcome.

[78] The CCAA Debtors/Guarantors say that Romspen is guilty of inordinate delay in filing the Romspen Action, which I do not accept. Clearly, Romspen was hoping for a result through the SISP by late 2022—a result that may have fully repaid its debts. That result may also have avoided some or all of the substantive issues that arise in the CCAA Debtors/Guarantors Action. When no bid arose, Romspen acted. I also accept Romspen's submission that the Romspen Action was filed in order to avoid any limitation issues, a step that was expressly allowed under para. 13 of the Initial Order.

[79] Other arguments raised by GEC and the CCAA Debtors/Guarantors can only be described as hyperbole and inflated concerns in terms of the prejudice said by them to arise from the Procedural Order.

[80] GEC and the CCAA Debtors/Guarantors say that Romspen is seeking to "impose an arbitrary, 'fast track' schedule" that is "impossible to meet without

compromising [their] full rights to gather evidence” in defence of Romspen’s claims. They say that Romspen is hoping to benefit from an “unreasonably truncated schedule”. They say that Romspen is attempting to deny their rights to natural justice and a fair hearing of their claims on the merits. Finally, they say that Romspen is attempting to have its “preferred judge appointed case management and trial judge”.

[81] GEC’s initial objection to the Procedural Order was that it was entitled to the “full panoply of procedural rights that an action entails”. Similarly, the CCAA Debtors/Guarantors stressed the importance of their rights to “discovery and other procedural rights”.

[82] However, notwithstanding s. 20 of the *CCAA*, by which there is a statutory presumption that the Romspen Action and certain defences raised in the CCAA Debtors/Guarantors Action be determined on a summary basis, Romspen does not seek an order from this Court that these actions be determined summarily.

[83] Counsel for the CCAA Debtors/Guarantors suggests that document discovery will be fraught with issues and that significant time and “intense investigations” will be required even before the parties could consider proceeding to examinations for discovery. Graham Thom, a representative of the CCAA Debtors, says that he is searching for documents and he is aware that there are more than 10,000 pages of documents relevant to the issues. His counsel says that he expects “vast amounts” of expert evidence, suggestive of lengthy delays. He suggests that his client’s action would not be ready for trial in less than 18 months. Finally, he suggests that the granting of the Procedural Order, to bring the Related Actions into the *CCAA* proceedings, could entail “chaos” that will delay the proceeding for years.

[84] The Procedural Order sought allows for the usual civil litigation process with which counsel are very much aware. It includes the filing of the outstanding pleadings, delivery of lists of documents, potential demands for further documents, potential applications to the court to resolve document issues, examinations for discovery and case planning conferences. The Procedural Order does not address the question of the process for determining the claims asserted in the Related

TAB 4

COURT OF APPEAL FOR ONTARIO

CITATION: Mundo Media Ltd. (Re), 2022 ONCA 607
DATE: 20220822
DOCKET: M53436

Thorburn J.A. (Motion Judge)

In the Matter of Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

BETWEEN

Royal Bank of Canada

Applicant

and

Mundo Media Ltd., Mundo Inc., 2538853 Ontario Ltd., 2518769 Ontario Ltd., 2307521 Ontario Inc., 36 Labs, LLC., Active Signal Marketing, LLC, Find Click Engage, LLC, FLI Digital, Inc., Mundo Media (US), LLC, M Zone Marketing Inc., Appthis Holdings, Inc., Movil Wave S.A.R.L., Mundo Media (Luxembourg) S.A.R.L., and Mogenio S.A.

Respondents

Matthew P. Gottlieb, Bradley Vermeersch and Xin Lu (Crystal) Li, for the moving party SPay Inc.

Scott McGrath, Rachel Nicholson and Stuart Clinton, for the responding party Ernst & Young Inc., solely in its capacity as the court-appointed receiver of Mundo Media Ltd. and its subsidiaries

Heard: July 25, 2022 by video conference

ENDORSEMENT

OVERVIEW

[1] The issue to be decided on this motion is whether the moving party, SPay Inc. ("SPay"), should be granted leave to appeal the motion judge's decision not to stay the receiver's motion for judgment.

[2] On April 9, 2019, Mundo Media Ltd. ("Mundo") was placed in receivership by the Ontario Superior Court of Justice pursuant to s. 243 of the *Bankruptcy and Insolvency Ac*t, R.S.C. 1985, c. B-3, as amended (the "*BIA*"). The responding party, Ernst & Young Inc., is the court-appointed receiver and manager of all assets belonging to Mundo and its subsidiaries (the "receiver").

[3] The receiver brought a motion for an order directing SPay to pay US$4,124,000 to Mundo for a number of unpaid invoices, pursuant to contractual agreements between Mundo and SPay or its predecessor. These agreements were signed in 2017, prior to the receivership.

[4] SPay sought to stay the receiver's motion on the basis that the agreements contain an international commercial arbitration clause which requires all disputes to be resolved by arbitration in New York pursuant to New York law.

[5] The motion judge refused SPay's request. He held that the arbitration provisions in the agreements were rendered inoperative by the "single proceeding model" in Ontario.

[6] The single proceeding model applies to insolvency proceedings. This model favours litigation concerning an insolvent company to be dealt with in a single jurisdiction rather than fragmented across separate proceedings. A creditor "who cannot claim to be a 'stranger to the bankruptcy', has the burden of demonstrating 'sufficient cause'" to have the proceedings fragmented across multiple jurisdictions: *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, 2001 SCC 92, [2001] 3 S.C.R. 978, at para. 76.

[7] The motion judge held that SPay is not a "stranger" to the insolvency proceeding as it will seek to set off some or all of the monies owing to Mundo. As such, it is part of the single proceeding model.

[8] SPay claims that the proposed appeal should be allowed to proceed as it meets the three-prong test for granting leave to appeal: (i) there is a real prospect of success as SPay is a stranger to the bankruptcy and its set-off does not render it an interested party to the proceeding; (ii) the proposed appeal involves an issue of public importance that will provide guidance to receivers, third parties and insolvency courts in addressing the enforceability of international arbitration agreements with third parties where a defence of set-off is raised by the third party; and (iii) the short time required to hear the appeal will not prejudice the receiver.

[9] The receiver claims the chances of success are unlikely as SPay's intended set-off of Mundo's single largest account receivable is in substance a claim such that it should be part of one proceeding along with all other creditors of Mundo, as contemplated by the single proceeding model. The receiver further claims that this appeal does not involve a matter of general importance; rather, the decision below is rooted in the motion judge's specific findings of fact, to which deference is owed. Moreover, the receiver claims that allowing the motion for leave to appeal would result in undue delay and additional costs.

[10] For the reasons that follow, the motion for leave to appeal is dismissed.

BACKGROUND FACTS

[11] The moving party, SPay, is a sports management technology company incorporated in Delaware and headquartered in Texas. It provides an integrated technology platform for sports league management, payment administration, sports recruiting, event support and sponsorship.

[12] Mundo is an advertising technology company that provided online marketing services to clients. It carried on business in Canada, the United States and Luxembourg.

[13] In or around March 2017, Mundo began to provide SPay's predecessor, Stack Media, Inc. with services, the terms of which were set out in a Publisher

TAB 5

Peace River Hydro Partners, Acciona Infrastructure Canada Inc., Samsung C&T Canada Ltd., Acciona Infraestructuras S.A. and Samsung C&T Corporation *Appellants*

v.

Petrowest Corporation, Petrowest Civil Services LP by its general partner, Petrowest GP Ltd., carrying on business as RBEE Crushing, Petrowest Construction LP by its general partner Petrowest GP Ltd., carrying on business as Quigley Contracting, Petrowest Services Rentals LP by its general partner Petrowest GP Ltd., carrying on business as Nu-Northern Tractor Rentals, Petrowest GP Ltd., as general partner of Petrowest Civil Services LP, Petrowest Construction LP and Petrowest Services Rentals LP, Trans Carrier Ltd. And Ernst & Young Inc. in its capacity as court-appointed receiver and manager of Petrowest Corporation, Petrowest Civil Services LP, Petrowest Construction LP, Petrowest Services Rentals LP, Petrowest GP Ltd. and Trans Carrier Ltd. *Respondents*

and

Canadian Commercial Arbitration Center, Arbitration Place, Chartered Institute of Arbitrators (Canada) Inc., Insolvency Institute of Canada and Canadian Federation of Independent Business *Interveners*

Peace River Hydro Partners, Acciona Infrastructure Canada Inc., Samsung C&T Canada Ltd., Acciona Infraestructuras S.A. et Samsung C&T Corporation *Appelantes*

c.

Petrowest Corporation, Petrowest Civil Services LP représentée par sa commanditée, Petrowest GP Ltd., faisant affaire sous le nom de RBEE Crushing, Petrowest Construction LP représentée par sa commanditée Petrowest GP Ltd., faisant affaire sous le nom de Quigley Contracting, Petrowest Services Rentals LP représentée par sa commanditée Petrowest GP Ltd., faisant affaire sous le nom de Nu-Northern Tractor Rentals, Petrowest GP Ltd., en sa qualité de commanditée de Petrowest Civil Services LP, Petrowest Construction LP et Petrowest Services Rentals LP, Trans Carrier Ltd. et Ernst & Young Inc. en sa qualité de séquestre et d'administratrice nommée par le tribunal de Petrowest Corporation, Petrowest Civil Services LP, Petrowest Construction LP, Petrowest Services Rentals LP, Petrowest GP Ltd. et Trans Carrier Ltd. *Intimées*

et

Centre canadien d'arbitrage commercial, Arbitration Place, Chartered Institute of Arbitrators (Canada) Inc., Insolvency Institute of Canada et Fédération canadienne de l'entreprise indépendante *Intervenants*

Indexed as: Peace River Hydro Partners *v.* Petrowest Corp.

2022 SCC 41

File No.: 39547.

2022: January 19; 2022: November 10.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and insolvency — Court-ordered receivership — Enforceability of arbitration agreement — Receiver commencing civil action for payment of amounts allegedly owed to debtors under agreements that include mandatory arbitration clauses — Defendants seeking stay of proceedings of receiver's action under provincial arbitration legislation on basis that arbitration clauses govern dispute — Receiver opposing stay and arguing that court authorized to assert centralized judicial control over matter under federal bankruptcy and insolvency legislation — Whether receiver's action should be stayed — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 183(1), 243(1) — Arbitration Act, R.S.B.C. 1996, c. 55, s. 15.

Peace River is a partnership formed to build a hydroelectric dam in northeastern British Columbia. Peace River subcontracted work to Petrowest, an Alberta-based construction company, and its affiliates. The parties executed several clauses providing that disputes arising from their relationship were to be resolved through arbitration ("Arbitration Agreements"). When Petrowest encountered financial difficulties, the Alberta Court of Queen's Bench granted an order ("Receivership Order"), pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act* ("*BIA*"), appointing a receiver ("Receiver") to manage the assets and property of Petrowest and its affiliates. The Receiver then brought a civil claim against Peace River seeking to collect funds allegedly owed to Petrowest and its affiliates for subcontracted work. Peace River applied under s. 15 of British Columbia's *Arbitration Act* for a stay of proceedings on the ground that the Arbitration Agreements governed the

Répertorié : Peace River Hydro Partners *c.* Petrowest Corp.

2022 CSC 41

N° du greffe : 39547.

2022 : 19 janvier; 2022 : 10 novembre.

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

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

Faillite et insolvabilité — Mise sous séquestre ordonnée par le tribunal — Caractère exécutoire d'une convention d'arbitrage — Action civile intentée par le séquestre à l'égard du paiement de sommes qui auraient été dues aux débitrices en vertu de conventions comportant des clauses d'arbitrage obligatoires — Défenderesses sollicitant, en vertu de la loi provinciale sur l'arbitrage, la suspension de l'action du séquestre au motif que les clauses d'arbitrage régissent le différend — Opposition à cette demande par le séquestre et argument invoqué par celui-ci selon lequel le tribunal est autorisé à exercer un contrôle judiciaire centralisé sur l'affaire en vertu de la loi fédérale sur la faillite et l'insolvabilité — Y a-t-il lieu de suspendre l'action du séquestre? — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3, art. 183(1), 243(1) — Arbitration Act, R.S.B.C. 1996, c. 55, art. 15.

Peace River est une société de personnes qui a été constituée en vue de la construction d'un barrage hydroélectrique dans le Nord-Est de la Colombie-Britannique. Peace River a sous-traité des travaux à Petrowest, une entreprise de construction basée en Alberta, et à ses sociétés affiliées. Les parties ont prévu plusieurs clauses stipulant que les différends découlant de leur relation seraient réglés par voie d'arbitrage (« Conventions d'arbitrage »). Lorsque Petrowest a rencontré des difficultés financières, la Cour du Banc de la Reine de l'Alberta a prononcé une ordonnance (« Ordonnance de mise sous séquestre ») en vertu du par. 243(1) de la *Loi sur la faillite et l'insolvabilité* (« *LFI* »), nommant un séquestre (« Séquestre ») afin qu'il gère les actifs et les biens de Petrowest et de ses sociétés affiliées. Le Séquestre a, par la suite, intenté une poursuite civile contre Peace River tentant de recouvrer des fonds qu'il estimait être dus à Petrowest et à ses sociétés affiliées pour to resolve their disputes (*Wellman*, at para. 52, citing *Astoria Medical Group v. Health Insurance Plan of Greater New York*, 182 N.E.2d 85 (N.Y. 1962), at p. 87; M. Pavlović and A. Daimsis, "Arbitration", in J. C. Kleefeld et al., eds., *Dispute Resolution: Readings and Case Studies* (4th ed. 2016), 483, at p. 485). Party autonomy is closely related to freedom of contract (*Hofer v. Hofer*, [1970] S.C.R. 958, at p. 963). Modern arbitration legislation is premised on these principles, which inform the policy choices embodied in provincial arbitration statutes like the *Arbitration Act* (*Wellman*, at para. 52).

[50] Party autonomy and freedom of contract go hand in hand with the principle of limited court intervention in arbitral proceedings. This latter principle is "fundamental" to modern arbitration law and "finds expression throughout modern Canadian arbitration legislation" (*Wellman*, at paras. 52-55; McEwan and Herbst, at § 10:2; Casey, at ch. 7.1). For instance, s. 4(a) of British Columbia's new *Arbitration Act*, S.B.C. 2020, c. 2, provides that "[i]n matters governed by this Act, <u>a court must not intervene</u> unless so provided in this Act". Similar expressions of principle are found in provincial arbitration legislation across the country. It follows that, generally speaking, judicial intervention in commercial disputes governed by a valid arbitration clause should be the exception, not the rule.

(2) <u>Dispute Resolution in Insolvency</u>

[51] On the other hand, insolvency proceedings are creatures of statute subject to close judicial oversight.

[52] Insolvency engages broad public interests. It "affects all of the stakeholders of the insolvent business enterprise", including creditors, employees, landlords, suppliers, shareholders, and customers (K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at ¶1.1). In the case of very large companies, an insolvency may even "threaten the existence of whole communities" (¶1.1). Canadian

sont libres de [TRADUCTION] « charge[r] [. . .] un tribunal privé » de régler leurs différends (*Wellman*, par. 52, citant *Astoria Medical Group c. Health Insurance Plan of Greater New York*, 182 N.E.2d 85 (N.Y. 1962), p. 87; M. Pavlović et A. Daimsis, « Arbitration », dans J. C. Kleefeld et autres, dir., *Dispute Resolution : Readings and Case Studies* (4e éd. 2016), 483, p. 485). L'autonomie des parties est étroitement liée à la liberté contractuelle (*Hofer c. Hofer*, [1970] R.C.S. 958, p. 963). La législation moderne en matière d'arbitrage est fondée sur ces principes, lesquels sous-tendent les choix de politique enchâssés dans les lois provinciales sur l'arbitrage comme l'*Arbitration Act* (*Wellman*, par. 52).

[50] L'autonomie des parties et la liberté contractuelle vont de pair avec le principe de l'intervention limitée des tribunaux dans les procédures arbitrales. Ce principe est « fondamental » au droit moderne de l'arbitrage et « est exprimé à maintes reprises dans la législation canadienne moderne en matière d'arbitrage » (*Wellman*, par. 52-55; McEwan et Herbst, § 10:2; Casey, c. 7.1). Par exemple, l'al. 4(a) du nouveau *Arbitration Act*, S.B.C. 2020, c. 2, de la Colombie-Britannique indique que [TRADUCTION] « [p]our toutes les questions régies par la présente loi, <u>le tribunal ne peut intervenir</u> que dans les cas où celle-ci le prévoit ». Des énoncés de principe semblables se retrouvent dans les lois provinciales en matière d'arbitrage partout au pays. Il s'ensuit que, de façon générale, l'intervention des tribunaux dans les différends commerciaux régis par une clause d'arbitrage valide devrait être l'exception, et non la règle.

(2) <u>Règlement des différends en cas d'insolvabilité</u>

[51] Par ailleurs, les procédures d'insolvabilité sont d'origine législative et soumises à une surveillance judiciaire étroite.

[52] L'insolvabilité met en cause de larges intérêts publics. Elle [TRADUCTION] « touche toutes les parties prenantes de l'entreprise commerciale insolvable », y compris les créanciers, les employés, les locateurs, les fournisseurs, les actionnaires et les clients (K. P. McElcheran, *Commercial Insolvency in Canada* (4e éd. 2019), ¶1.1). Dans le cas de très grandes entreprises, une situation d'insolvabilité peut

legislation therefore offers stakeholders a wide range of judicial procedures to resolve problems presented by an insolvency (¶¶1.1-1.12).

même [TRADUCTION] « menacer l'existence de communautés entières » (¶1.1). La législation canadienne offre donc aux parties prenantes un vaste éventail de procédures judiciaires pour régler les problèmes qui interviennent en raison de l'insolvabilité (¶1.1-1.12).

[53] This procedural flexibility has allowed Canadian courts to become instrumental in (a) providing a forum for the orderly resolution of the competing rights and objectives of individual stakeholders of insolvent business enterprises, and (b) creating mechanisms for the preservation of the value of the insolvent business or its assets for the benefit of all stakeholders (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at paras. 2 and 22; McElcheran, at ¶¶1.1-1.14). I elaborate on these two points below.

[53] Cette souplesse procédurale a permis aux tribunaux canadiens de jouer un rôle important a) en offrant une instance où régler de manière ordonnée les questions relatives aux droits et objectifs concurrents de chacune des parties prenantes d'entreprises commerciales insolvables, et b) en créant des mécanismes permettant de préserver la valeur de l'entreprise insolvable ou de ses actifs au profit de toutes les parties prenantes (*Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, par. 2 et 22; McElcheran, ¶1.1-1.14). J'examine ces deux points ci-après.

(a) *Single Proceeding Model*

a) *Modèle de la procédure unique*

[54] The central role of courts in ensuring the equitable and orderly resolution of insolvency disputes is reflected in the "single proceeding model".

[54] Le rôle central que jouent les tribunaux dans le règlement équitable et ordonné des différends en matière d'insolvabilité se reflète dans le « modèle de la procédure unique ».

[55] This model favours the enforcement of stakeholder rights through a centralized judicial process. The legislative policy in favour of "single control" is reflected in Canadian bankruptcy, insolvency, and winding-up legislation (*Century Services*, at paras. 22-23). 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. In other words, the single proceeding model protects the clear "public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse" (*Sam Lévy & Associés Inc. v. Azco Mining Inc.*, 2001 SCC 92, [2001] 3 S.C.R. 978, at para. 27, citing *Stewart v. LePage* (1916), 53 S.C.R. 337). This Court has held that s. 183(1) 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" (*Sam Lévy*, at para. 38).

[55] Ce modèle favorise la protection des droits des parties prenantes dans le cadre d'un processus judiciaire centralisé. La politique législative favorable au « contrôle unique » se reflète dans la législation canadienne en matière de faillite, d'insolvabilité et de liquidation (*Century Services*, par. 22-23). Le modèle de la procédure unique vise à atténuer l'inefficacité et le chaos qu'il y aurait si chaque partie prenante dans un cas d'insolvabilité présentait une réclamation distincte pour faire valoir ses droits. Autrement dit, ce modèle protège l'« intérêt public [manifeste] à la gestion expéditive, efficace et économique des retombées d'un effondrement financier » (*Sam Lévy & Associés Inc. c. Azco Mining Inc.*, 2001 CSC 92, [2001] 3 R.C.S. 978, par. 27, citant *Stewart c. LePage* (1916), 53 R.C.S. 337). Notre Cour a conclu que le par. 183(1) de la *LFI* confère une « vaste compétence » aux cours supérieures pour trancher la plupart des litiges en matière de faillite, car toute compétence moindre « compliquerait et entraverait inutilement la liquidation économique et expéditive de l'actif du failli » (*Sam Lévy*, par. 38).

(b) *Court-Ordered Receiverships Under the BIA*

[56] Court-ordered receiverships under s. 243 of the *BIA*, like the receivership in the present case, are one available tool for enhancing the judicial oversight and flexibility underlying Canadian insolvency law. Section 243(1) of the *BIA* confers broad authority on a court to appoint a receiver if the court "considers it to be just or convenient to do so". Under s. 243(1), a court may appoint a receiver to do any of the following, with a view to enhancing and facilitating the preservation and realization of the debtor's assets for the benefit of all creditors: (a) take possession of all or substantially all of the debtor's inventory, accounts receivable or other property that was acquired for or used in relation to a business carried on by the debtor; (b) exercise any control that the court considers advisable over that property and over the debtor's business; or (c) take "any other action that the court considers advisable" (R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 553-54).

[57] Given the breadth of their powers, court-appointed receivers are necessarily subject to close judicial oversight. Receivers represent neither a security holder nor the debtor; they are officers of the court whose "sole authority is derived from . . . Court appointment and from the directions given [to them] by the Court" (*Ostrander v. Niagara Helicopters Ltd.* (1973), 1 O.R. (2d) 281 (H.C.), at p. 286). In most cases, including the one at bar, a court order under s. 243 of the *BIA* gives a receiver wide-ranging powers.

[58] Despite this flexibility, court-appointed receivers have a fiduciary duty to act honestly and in the best interests of *all* interested parties. For example, a receiver is generally not permitted to terminate existing contracts between third parties and the debtor, but must apply to the court to discharge onerous contracts, such as those which would be unduly costly to perform (F. Bennett, *Bennett on Receiverships* (3rd ed. 2011), at p. 42; *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160 (P.C.), per Viscount Haldane L.C.).

b) *Mise sous séquestre ordonnée par le tribunal en vertu de la LFI*

[56] La mise sous séquestre ordonnée par le tribunal en vertu de l'art. 243 de la *LFI*, comme la mise sous séquestre en l'espèce, est l'un des outils disponibles pour accroître la surveillance et la souplesse judiciaires qui sous-tendent le droit de l'insolvabilité au Canada. Le paragraphe 243(1) de la *LFI* confère au tribunal un vaste pouvoir de nommer un séquestre si le tribunal « est convaincu que cela est juste ou opportun ». En vertu du par. 243(1), le tribunal peut, dans le but de favoriser et de faciliter la protection et la réalisation de l'actif du débiteur au profit de tous les créanciers, nommer un séquestre qu'il habilite : a) à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — que le débiteur a acquis ou utilisés dans le cadre de ses affaires; b) à exercer sur ces biens ainsi que sur les affaires du débiteur le degré de prise en charge qu'il estime indiqué; c) à prendre « toute autre mesure qu'il estime indiquée » (R. J. Wood, *Bankruptcy and Insolvency Law* (2e éd. 2015), p. 553-554).

[57] Vu l'étendue de ses pouvoirs, le séquestre nommé par le tribunal fait nécessairement l'objet d'une surveillance judiciaire étroite. Il ne représente ni un détenteur de garantie ni le débiteur; il est un officier de justice dont [TRADUCTION] « le pouvoir exclusif provient de [sa] nomination par la Cour et des directives que celle-ci lui donne » (*Ostrander c. Niagara Helicopters Ltd.* (1973), 1 O.R. (2d) 281 (H.C.), p. 286). Dans la plupart des cas, y compris en l'espèce, une ordonnance judiciaire fondée sur l'art. 243 de la *LFI* confère au séquestre de vastes pouvoirs.

[58] Malgré cette souplesse, le séquestre nommé par le tribunal a une obligation fiduciaire d'agir avec intégrité et aux mieux des intérêts de *toutes* les parties intéressées. Par exemple, il n'est généralement pas autorisé à mettre fin à des contrats existants entre des tiers et le débiteur. Pour ce faire, il doit demander au tribunal la décharge de contrats à titre onéreux, tels que ceux dont l'exécution serait trop coûteuse (F. Bennett, *Bennett on Receiverships* (3e éd. 2011), p. 42; *Parsons c. Sovereign Bank of Canada*, [1913]

This demonstrates the key supervisory role that courts play in receivership proceedings.

(3) Commonalities Between Arbitration Law and Insolvency Law

[59] Notwithstanding the differences just described, arbitration law and insolvency law also have much in common. Below, I address three commonalities that are particularly relevant to this appeal.

(a) *Efficiency and Expediency*

[60] First and foremost, arbitration law and insolvency law each prioritize efficiency and expediency.

[61] Commercial arbitration is a "process designed to enable parties to deal with disputes efficiently, effectively and economically" (McEwan and Herbst, at § 2:1, citing *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230, at para. 1). As such, it is expected to be "less formal, more expeditious and therefore faster than a court determination of issues" (*Rosenberg v. Minster*, 2014 ONSC 845, 119 O.R. (3d) 27, at para. 58).

[62] Likewise, the *raison d'être* of the single proceeding model in Canadian insolvency law is the "expeditious, efficient and economical clean-up of the aftermath of a financial collapse". To maximize global recovery for creditors, this model avoids "inefficiencies and chaos" by "favouring an orderly collective process" (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 33; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 7).

[63] As noted, the single proceeding model applies to proceedings under the *BIA*, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), and other insolvency legislation. For example, s. 243 of the *BIA* authorizes a court to appoint a receiver with

A.C. 160 (C.P.), le vicomte Haldane, lord chancelier). Ceci démontre le rôle de surveillance essentiel que jouent les tribunaux dans le cadre des procédures de mise sous séquestre.

(3) Points communs entre le droit de l'arbitrage et le droit de l'insolvabilité

[59] Malgré les différences décrites ci-haut, le droit de l'arbitrage et le droit de l'insolvabilité ont plusieurs points en commun. J'examine ci-après trois points communs qui sont particulièrement pertinents en l'espèce.

a) *Efficacité et célérité*

[60] D'abord et avant tout, le droit de l'arbitrage et le droit de l'insolvabilité priorisent tous deux l'efficacité et la célérité.

[61] L'arbitrage commercial est un [TRADUCTION] « processus conçu pour permettre aux parties de régler leurs différends de manière efficace et économique » (McEwan et Herbst, § 2:1, citant *Hayes Forest Services Ltd. c. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230, par. 1). Ainsi, il est [TRADUCTION] « moins formel, plus expéditif et donc plus rapide qu'un règlement judiciaire des questions en litige » (*Rosenberg c. Minster*, 2014 ONSC 845, 119 O.R. (3d) 27, par. 58).

[62] De même, la raison d'être du modèle de la procédure unique en droit canadien de l'insolvabilité est la « gestion expéditive, efficace et économique des retombées d'un effondrement financier ». Pour maximiser le recouvrement global au profit des créanciers, ce modèle fait échec « à l'inefficacité et au chaos » en « favoris[ant] un processus collectif ordonné » (*Alberta (Procureur général) c. Moloney*, 2015 CSC 51, [2015] 3 R.C.S. 327, par. 33; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, par. 7).

[63] Comme je l'ai déjà mentionné, le modèle de la procédure unique s'applique aux procédures intentées sous le régime de la *LFI*, de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (« *LACC* »), et d'autres lois en

the power to act nationally. This promotes efficiency "by removing the need to have a receiver appointed in each jurisdiction in which the debtor's assets are located" (Houlden, Morawetz and Sarra, at § 12:3).

(b) *Procedural Flexibility*

[64] Further, procedural flexibility is a hallmark of both arbitration law and insolvency law.

[65] Chief among the reputed advantages of arbitration is the freedom of parties to choose their own procedural rules rather than being bound by rules of court (*Seidel*, at para. 22; *Wellman*, at paras. 48-56; L. Y. Fortier, "Delimiting the Spheres of Judicial and Arbitral Power: 'Beware, My Lord, of Jealousy'" (2001), 80 *Can. Bar Rev.* 143). This enhances expediency and cost-effectiveness in arbitral proceedings, where discovery procedures can be curtailed, written submissions can be used instead of witness testimony, and strict evidentiary rules can be relaxed (McEwan and Herbst, at §§ 2:1 and 7:12).

[66] Flexibility is likewise a characteristic of Canadian insolvency law. But in the insolvency context, both the court *and* the parties can tailor proceedings to fit a particular case. Indeed, the *BIA* and the *CCAA* both accord broad judicial discretion to, among other things, authorize the assignment and disclaimer of contracts and the sale of assets, impose and lift stays of proceedings, grant extensions of time, terminate proceedings, and approve creditor proposals (Wood, at pp. 432-33). Much like arbitration law does for arbitrating parties, Canadian insolvency law thus allows debtors, creditors, and courts "to design a process and [an] outcome that is appropriate for individual . . . cases" (McElcheran, at ¶¶5.11-5.12).

matière d'insolvabilité. Par exemple, l'art. 243 de la *LFI* autorise le tribunal à nommer un séquestre pouvant agir dans l'ensemble du pays, ce qui favorise l'efficacité [TRADUCTION] « puisque l'on supprime la nécessité de nommer un séquestre dans chacun des ressorts où se trouvent les biens du débiteur » (Houlden, Morawetz et Sarra, § 12:3).

b) *Souplesse procédurale*

[64] De plus, la souplesse procédurale est une caractéristique commune au droit de l'arbitrage et au droit de l'insolvabilité.

[65] Parmi les avantages reconnus de l'arbitrage figure, au premier chef, la liberté qu'ont les parties de choisir leurs propres règles de procédure plutôt que d'être liées par celles du tribunal (*Seidel*, par. 22; *Wellman*, par. 48-56; L. Y. Fortier, « Delimiting the Spheres of Judicial and Arbitral Power : "Beware, My Lord, of Jealousy" » (2001), 80 *R. du B. can.* 143). Cela accroît la célérité et la rentabilité des procédures arbitrales, où les procédures de communication préalable peuvent être simplifiées, où l'on peut utiliser des observations écrites plutôt que des témoignages et où des règles de preuve strictes peuvent être assouplies (McEwan et Herbst, § 2:1 et 7:12).

[66] La souplesse est également une caractéristique du droit canadien de l'insolvabilité. Cependant, dans le contexte de l'insolvabilité, le tribunal *et* les parties peuvent adapter la procédure judiciaire à un cas donné. En effet, la *LFI* et la *LACC* confèrent aux tribunaux un vaste pouvoir discrétionnaire leur permettant entre autres d'autoriser la cession de contrats, la renonciation à des contrats et la vente d'actifs, d'imposer ou de lever la suspension d'une instance, d'accorder des prorogations de délai, de mettre fin à une instance, et d'approuver des propositions de créanciers (Wood, p. 432-433). À l'instar de ce que le droit de l'arbitrage permet aux parties à un arbitrage de faire, le droit canadien de l'insolvabilité permet donc aux débiteurs, aux créanciers et aux tribunaux [TRADUCTION] « de concevoir un processus et un résultat [. . .] qui convient à chaque affaire » (McElcheran, ¶5.11-5.12).

(c) *Decision Makers With Specialized Expertise*

[67] Finally, both arbitration law and insolvency law often rely on specialized decision makers to achieve their respective objectives.

[68] One "great merit" of arbitration is that parties are able to select a decision maker with "special expertise in the field of their dispute" (*3GS Inc. v. Altus Group Ltd.*, 2011 ONSC 5755, 96 B.L.R. (4th) 268, at para. 19; McEwan and Herbst, at § 4:1).

[69] Similarly, specialized judicial expertise is essential to meet the challenges of complex restructuring and insolvency proceedings, often called the "hothouse of real-time litigation" (*Century Services*, at para. 58, quoting R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484).

[70] The interests of expediency and procedural flexibility inform the need for judicial specialization in the realm of bankruptcy and insolvency. Indeed, in many provinces, there are specialist judges who take carriage of restructuring proceedings and all related issues. Their expertise and "file knowledge" allow them to find the right balance of procedural formality while meeting the need for timely resolution of disputes within the overall restructuring process (McElcheran, at ¶5.85).

[71] In sum, reliance on a decision maker with expertise in the relevant field is a core feature of both arbitration law and insolvency law, and for good reason. Specialized expertise can assist in capitalizing on other attributes that are also common to both bodies of law, such as expediency and procedural flexibility.

c) *Décideurs possédant une expertise spécialisée*

[67] Enfin, le droit de l'arbitrage et le droit de l'insolvabilité comptent souvent sur des décideurs spécialisés pour atteindre leurs objectifs respectifs.

[68] L'un des [TRADUCTION] « grands avantages » de l'arbitrage est que les parties peuvent choisir un décideur possédant « une expertise particulière dans le domaine de leur différend » (*3GS Inc. c. Altus Group Ltd.*, 2011 ONSC 5755, 96 B.L.R. (4th) 268, par. 19; McEwan et Herbst, § 4:1).

[69] De même, posséder une expertise judiciaire spécialisée est essentiel pour relever les défis liés aux procédures complexes de restructuration et d'insolvabilité, souvent appelées le [TRADUCTION] « foyer du contentieux en temps réel » (*Century Services*, par. 58, citant R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 484).

[70] Les intérêts relatifs à la célérité et à la souplesse procédurale sont à la base de la nécessité de la spécialisation judiciaire dans le domaine de la faillite et de l'insolvabilité. En effet, dans de nombreuses provinces, des juges spécialisés se chargent des procédures de restructuration et de toutes les questions connexes. Leur expertise et leur [TRADUCTION] « connaissance du dossier » leur permettent d'atteindre un bon équilibre entre le maintien de la formalité procédurale et la nécessité de régler rapidement les différends dans le cadre du processus global de restructuration (McElcheran, ¶5.85).

[71] En résumé, le fait de recourir à un décideur possédant une expertise dans le domaine pertinent constitue une caractéristique essentielle tant du droit de l'arbitrage que du droit de l'insolvabilité, et ce, pour une bonne raison. Une expertise spécialisée peut aider à tirer profit d'autres attributs qui sont aussi communs aux deux ensembles de règles de droit, telles la célérité et la souplesse procédurale.

(d) *Conclusion on the Interplay Between Arbitration Law and Insolvency Law*

[72] In many cases, the shared interests in expediency, procedural flexibility, and specialized expertise will converge through arbitration. In such a scenario, the parties should be held to their agreement to arbitrate notwithstanding ongoing insolvency proceedings. In other words, the court should grant a stay of legal proceedings in favour of arbitration, and any dispute as to the scope of the arbitration agreement or the arbitrator's jurisdiction should be left to the arbitrator to resolve. As is evident from the foregoing, valid arbitration agreements are generally to be respected. This presumption in favour of arbitral jurisdiction is supported by this Court's longstanding jurisprudence, the pro-arbitration stance adopted in provincial and territorial legislation nationwide, and the foundational principle that contracting parties are free to structure their affairs as they see fit.

[73] However, in certain insolvency matters, it may be necessary to preclude arbitration in favour of a centralized judicial process. This may occur when arbitration would compromise the orderly and efficient conduct of a court-ordered receivership. In such a scenario, a court may assert control over the proceedings, both to ensure the timely resolution of the parties' dispute and to protect the public interest in the orderly restructuring or dissolution of the debtor and the equal treatment of its creditors. This authority arises from the statutory jurisdiction conferred on superior courts under ss. 243(1) and 183(1) of the *BIA*.

[74] This exercise is necessarily a highly factual one. It requires the court to carefully review the particular statutory regimes and arbitration agreements in play, having regard to the principles of party autonomy and freedom of contract as well as the policy imperatives underpinning bankruptcy and insolvency law.

d) *Conclusion sur l'interaction entre le droit de l'arbitrage et le droit de l'insolvabilité*

[72] Bien souvent, les intérêts communs de célérité, de souplesse procédurale et d'expertise spécialisée convergeront grâce à l'arbitrage. Dans un tel cas, les parties devraient être tenues de respecter leur convention d'arbitrage, malgré une procédure d'insolvabilité en cours. Autrement dit, le tribunal devrait suspendre l'instance en faveur de l'arbitrage, et tout différend concernant la portée de la convention d'arbitrage ou la compétence de l'arbitre devrait être réglé par l'arbitre. Comme il ressort de ce qui précède, les conventions d'arbitrage valides doivent généralement être respectées. Cette présomption en faveur de la compétence arbitrale trouve appui dans la jurisprudence de longue date de notre Cour, la position favorable à l'arbitrage adoptée dans les lois provinciales et territoriales partout au pays ainsi que le principe fondamental selon lequel les parties contractantes sont libres de structurer leurs affaires comme bon leur semble.

[73] Cependant, dans certaines affaires d'insolvabilité, il peut s'avérer nécessaire d'écarter l'arbitrage en faveur d'un processus judiciaire centralisé. Cela peut se produire lorsque l'arbitrage compromettrait le déroulement ordonné et efficace d'une mise sous séquestre ordonnée par le tribunal. Dans un tel cas, le tribunal peut exercer un contrôle sur la procédure, tant pour veiller au règlement rapide du différend entre les parties que pour protéger l'intérêt public dans la restructuration ou la liquidation ordonnées du débiteur et le traitement égal de ses créanciers. Ce pouvoir découle de la compétence que les par. 243(1) et 183(1) de la *LFI* confèrent aux cours supérieures.

[74] Cet exercice est nécessairement hautement factuel. Il oblige le tribunal à examiner attentivement les régimes législatifs et les conventions d'arbitrage en cause en tenant compte des principes de l'autonomie des parties et de la liberté contractuelle ainsi que des choix de politique générale sous-tendant le droit de la faillite et de l'insolvabilité.

[75] To guide this exercise, I will briefly summarize the two-part stay framework that is implicit in provincial arbitration legislation like the *Arbitration Act*.

C. *Two-Part Framework for Stays of Proceedings in Favour of Arbitration*

[76] There are two general components to the stay provisions in provincial arbitration legislation across the country. As the framework is similar across jurisdictions, it will be useful to provide a general overview before turning to the interpretation of s. 15 of the *Arbitration Act* itself. The two components are as follows:

(a) the technical prerequisites for a mandatory stay of court proceedings; and

(b) the statutory exceptions to a mandatory stay of court proceedings.

[77] Though interrelated, these two components ought to remain analytically distinct. This distinction is necessary because the burden of proof shifts between the first component and the second.

[78] Under the first component, the applicant for a stay in favour of arbitration must establish the technical prerequisites on the applicable standard of proof (McEwan and Herbst, at § 3:43; *Hosting Metro Inc. v. Poornam Info Vision Pvt, Ltd.*, 2016 BCSC 2371, at paras. 29-30 (CanLII)).

[79] If the applicant discharges this burden, then under the second component, the party seeking to avoid arbitration must show that one of the statutory exceptions applies, such that a stay should be refused (McEwan and Herbst, at § 3:43; Casey, at ch. 3.4). Otherwise, the court must grant a stay and cede jurisdiction to the arbitral tribunal.

[80] I will briefly elaborate on each component and its respective standard of proof.

[75] Pour guider cet exercice, je résume brièvement le cadre d'analyse en deux volets applicable aux suspensions d'instance qui est implicite dans les lois provinciales en matière d'arbitrage comme l'*Arbitration Act*.

C. *Cadre d'analyse en deux volets applicable aux suspensions d'instance en faveur de l'arbitrage*

[76] Les dispositions relatives à la suspension d'instance dans les lois provinciales en matière d'arbitrage partout au pays comportent deux volets généraux. Comme le cadre d'analyse est semblable d'une province à l'autre, il est utile de présenter un aperçu général avant de s'attarder à l'interprétation de l'art. 15 de l'*Arbitration Act*. Les deux volets sont :

a) les conditions préliminaires à la suspension obligatoire d'une instance judiciaire; et

b) les exceptions statutaires à la suspension obligatoire d'une instance judiciaire.

[77] Bien qu'ils soient interreliés, ces deux volets doivent demeurer distincts sur le plan analytique. Cette distinction est nécessaire, car il y a inversion du fardeau de la preuve entre le premier et le second volet.

[78] Sous le premier volet, la partie qui requiert la suspension d'une instance en faveur de l'arbitrage doit établir que les conditions préliminaires sont remplies selon la norme de preuve applicable (McEwan et Herbst, § 3:43; *Hosting Metro Inc. c. Poornam Info Vision Pvt, Ltd.*, 2016 BCSC 2371, par. 29-30 (CanLII)).

[79] Si le requérant s'acquitte de ce fardeau, la partie qui cherche à se soustraire à l'arbitrage doit, sous le second volet, démontrer que l'une des exceptions prévues par la loi s'applique, de sorte que la suspension devrait être refusée (McEwan et Herbst, § 3:43; Casey, c. 3.4). Sinon, le tribunal doit suspendre l'instance et laisser la procédure d'arbitrage suivre son cours.

[80] J'examine brièvement chaque volet et la norme de preuve applicable à chacun d'eux.

TAB 6

Olympia & York Developments (Re)

Ontario Judgments

Ontario Court of Justice (General Division)

In Bankruptcy

Blair J.

November 26, 1998.

Court File No. 97-CL-000161

[1998] O.J. No. 4903 | 80 O.T.C. 369 | 4 C.B.R. (4th) 189 | 84 A.C.W.S. (3d) 15

IN THE MATTER OF the Bankruptcy of Olympia & York Developments Limited, a corporation incorporated under the laws of the Province of Ontario and having its principal place of business in the City of Toronto, in the Municipality of Metropolitan Toronto

(30 pp.)

Counsel

Geoffrey B. Morawetz and Benjamin T. Glustein, for Pricewater-house Coopers Inc. (formerly Coopers & Lybrand Limited), in its capacity as the trustee in bankruptcy of Olympia & York Developments Limited. Benjamin Zarnett, PricewaterhouseCoopers Inc., (fomerly Coopers & Lybrand Limited, in its capacity as the trustee in bankruptcy of Olympia & York Developments Limited. John A. MacDonald and Arthur Peltomaa, for Credit Lyonnais Canada, in its capacity as security agent for the A&G Lenders, and Deloitte & Touche, in its capacity as trustee in bankruptcy of Olympia & York Resources Credit Corporation.

BLAIR J.

I. OVERVIEW AND BACKGROUND

Overview

1 The issues on this appeal turn on what is known as the rule against double proof in bankruptcy matters.

2 Olympia & York Developments Limited ("OYDL") and Olympia & York Resources Credit Corporation ("OYRCC") are bankrupt corporations.[1] OYRCC is a wholly owned subsidiary of OYDL created for the single purpose of receiving the sum of US $2.5 billion by way of what was termed a "Jumbo Loan" from a syndicate of lenders known as the "A&G Lenders". Immediately upon receipt, the monies were advanced by OYRCC to OYDL, which gave back a Promissory Note and entered into a Repayment Agreement with OYRCC. OYDL also guaranteed the OYRCC indebtedness to the A&G Lenders.

3 It is admitted that the A&G Lenders comprise substantially all of the creditors of OYRCC. In fact, they are the only creditors who have filed proofs of claim in the OYRCC bankruptcy. All of the inspectors in that bankruptcy are representatives of the A&G Lenders.

4 Deloitte & Touche, the trustee in bankruptcy for OYRCC, has filed a proof of claim in the OYDL bankruptcy for the principal amount of the loan -- which remained outstanding in full at the time of the insolvency proceedings -- together with interest. At the same time, the A&G Lenders have also filed a proof of claim in the OYDL bankruptcy, based upon the OYDL guarantee of the OYRCC indebtedness, together with interest.

5 OYDL's Trustee disallowed the claims on the ground that they constitute a double proof of claim against the estate for the same debt. It was, and is, prepared to acknowledge one claim, by either OYRCC or the A&G Lenders. The amount the Trustee is prepared to acknowledge is the sum of $1,759,108,979 (Cdn), representing the outstanding principal on the Jumbo Loan less the sum of $1,281,281,018 (Cdn) recovered by the A&G Lenders on security pledged to it to guarantee the Jumbo Loan by certain OYRCC subsidiaries.[2]

Peck International plc (in administration) [1996], 2 All E.R. 433 (Ch. Div.) ("Polly Peck"), a case with facts similar to the case at bar.

Positions of the Parties

20 The Respondents argue that the interrelationship which OYDL and OYRCC have set up between the Repayment Agreement, the Promissory Note and the Term Loan Agreements is irrelevant to the proof of claim issue and of no Concern to the A&G Lenders. They contend that there were two separate loans and thus, there are two separate debts. They argue that the Registrar correctly applied the rule against double proof in bankruptcies by concluding that the rule did not apply because the claim of OYRCC (on the OYDL debt) and the claim of the A&G Lenders (on the guarantee of the OYRCC debt) are not claims in relation to the same debt. Furthermore, he properly relied upon and applied the principles set out in Polly Peck.

21 The Trustee of OYDL submits that the Registrar erred in concluding that the OYRCC claim and the A&G claim did not amount to claims for the same debt twice over, thereby constituting a double proof. He says the Registrar misconstrued or failed to consider the constating documents relating to the Jumbo Loan and in particular, the provisions of the Promissory Note and the Repayment Agreement cited earlier in these Reasons. The Registrar erred in requiring a finding that OYRCC had no real separate corporate existence or that there was no genuine debtor/creditor relationship between OYDL and OYRCC before he could find that the claims were based on the same debt. The Trustee states that the substance of the transaction, not the form counts and here there is in substance only one debt, namely the US $2.5 billion Jumbo Loan.

II. LAW AND ANALYSIS

Standard of Review

22 An appeal from the Registrar in Bankruptcy is a true appeal, and not a hearing de novo. The appellant must satisfy this Court that the Registrar arrived at an incorrect result in law. Rosenberg J. summarized this standard of review in the following fashion, in Re Kenny (1997), 149 D.L.R. (4th) 508 (Ont. Gen. Div.), at pp. 514-515:

> An appeal under s. 192(4) of the BIA from an "order" of a Registrar is a true appeal and not a hearing de novo. Accordingly, the appellant must satisfy the court that the Registrar erred in principle or in law in the way he has applied or exercised his discretion or that he omitted the consideration of, or misconstrued some fact (citations omitted).

The Rule Against Double Proof

23 The rule against double proof in bankruptcy matters prohibits two proofs of claim in the same estate for the same debt. That the two claims may be based on separate contracts is of no matter, provided they are in respect of the same debt. Sir G. Mellish L.J. put the concept very succinctly in Re Oriental Commercial Bank; Ex parte European Bank (1871), 7 L.R. Ch. App. 99, where he stated (at pp. 103-104):

> [T]he true principle is, that there is only to be one dividend in respect of what is in substance the same debt, although there may be two separate contracts. (Emphasis added)

24 See also, Barclays Bank Ltd. v. TOSG Trust Fund Ltd., [1984] 1 All E.R. 628 (C.A.), at pp. 636-637, affirmed on different grounds [1984] 1 All E.R. 1060 (H.L.); Houlden & Morawetz, Bankruptcy and Insolvency Law of Canada 3rd ed., at paragraph G-40; Re Melton; Milk v. Towers [1918] 1 Ch 37, at p. 47.

25 There is a reason for this rule. It was developed to ensure the pari passu distribution of the assets of the bankrupt on a pro rata basis amongst the unsecured creditors -- the central tenet of bankruptcy legislation.[7] In the words of Oliver L.J. in Barclays Bank, supra, at p. 653:

> p. 653 ... The purpose of the rule is, of course, to ensure pari passu distribution of the assets comprised in the estate of an insolvent in pro rata discharge of his liabilities. The payment of more than one dividend in respect of what is in substance the same debt would give the relevant proving creditors a share of the available assets larger than the share properly attributable to the debt in question.

26 The Parties do not disagree as to the foregoing statement of the rule against double proof, or as to the rationale underlying it. They simply disagree as to its application in the circumstances of this case.

The Authorities

27 Whether or not a "double proof" has been lodged with respect to what is in substance the same debt is a matter to be determined on the facts of each individual case. From my understanding of the authorities, the underlying principles which should frame this analysis in group corporate insolvency situations may be summarized as follows. First, where the interests of different creditors of the various corporate entities come into play, the courts should be careful to respect the axiom regarding separate corporate existence enunciated by the House of Lords in Salomon v. Salomon [1897] A.C. 22. At the same time, however, the courts should strive to give effect to the ethic of pari passu distribution and to the fundamental underlying principle of justice as between all creditors. Balancing these sometimes competing principles calls for a consideration of the true nature of the transaction, and the relationship between, and the presumed common intention of the parties. Finally, in seeking a just solution in novel situations the court may engage in an analysis which, while not ignoring the separate corporate being of the members of the corporate group, nonetheless transcends the mere legal fact of that existence. See in particular, as to the foregoing summary, Ford & Carter Ltd. v. Midland Bank Ltd. (1979) 129 NLJ 543, per Lord Wilberforce at p. 544; Polly Peck, supra, at pp. 444-445; and Barclays Bank, supra, per Kerr L.J., at pp. 645 and 647-648, and per Oliver L.J. at pp. 636 and 640.

28 In insolvency cases -- as in, for example, tax cases -- the court will not allow technicalities to obscure the essence of the transaction. This includes, in my opinion, not being either too dazzled or too immobilized by intricate corporate footwork which is designed to accomplish legitimate business and tax purposes, but which may not be as directly dispositive in resolving insolvency cases. This point was emphasized by Oliver L.J. in Barclays Bank at pp. 640 and 636:

> p. 640: This argument is perfectly intelligible, and indeed almost unanswerable if one regards the payment of those customers who were paid to TOSG as an entirely separate transaction isolated from any other arrangement made with the agency, but to my mind it ignores the

TAB 7

Her Majesty The Queen in Right of Canada
Appellant

v.

**Canada North Group Inc.,
Canada North Camps Inc.,
Campcorp Structures Ltd.,
DJ Catering Ltd.,
816956 Alberta Ltd.,
1371047 Alberta Ltd.,
1919209 Alberta Ltd.,
Ernst & Young Inc. in its capacity as monitor and
Business Development Bank of Canada**
Respondents

and

**Insolvency Institute of Canada and
Canadian Association of Insolvency and
Restructuring Professionals** *Interveners*

Indexed as: Canada *v.* Canada North Group Inc.

2021 SCC 30

File No.: 38871.

2020: December 1; 2021: July 28.

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

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Bankruptcy and insolvency — Priority — Source deductions — Priming charges — Employee source deductions not remitted to Crown by companies in receivership — Judge supervising restructuring proceedings under Companies' Creditors Arrangement Act ordering priming charges over debtor companies' assets in favour of interim lender, monitor and directors — Order giving priority to priming charges over claims of secured creditors and providing that they are not to be limited or impaired in any way by provisions of any federal or

Sa Majesté la Reine du chef du Canada
Appelante

c.

**Canada North Group Inc.,
Canada North Camps Inc.,
Campcorp Structures Ltd.,
DJ Catering Ltd.,
816956 Alberta Ltd.,
1371047 Alberta Ltd.,
1919209 Alberta Ltd.,
Ernst & Young Inc. en sa qualité de contrôleur et
Banque de développement du Canada**
Intimées

et

**Institut d'insolvabilité du Canada et
Association canadienne des professionnels
de l'insolvabilité et de la réorganisation**
Intervenants

Répertorié : Canada *c.* Canada North Group Inc.

2021 CSC 30

N[o] du greffe : 38871.

2020 : 1[er] décembre; 2021 : 28 juillet.

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

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

Faillite et insolvabilité — Priorité — Retenues à la source — Charges super prioritaires — Retenues à la source des employés non versées à la Couronne par les compagnies mises sous séquestre — Juge chargé de surveiller la procédure de restructuration intentée sous le régime de la Loi sur les arrangements avec les créanciers des compagnies ordonnant que les actifs des compagnies soient grevés de charges super prioritaires en faveur du prêteur temporaire, du contrôleur et des administrateurs — Ordonnance accordant aux charges super any consequences that would undermine the remedial purposes of the *CCAA*.

qu'il appartient de faire preuve de souplesse afin d'éviter toute conséquence qui compromettrait l'objet réparateur de la *LACC*.

Cases Cited

By Côté J.

Distinguished: *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; **considered:** *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94; **referred to:** *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521; *Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368; *Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128; *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169; *In the Matter of a Plan of Compromise or Arrangement of Green Growth Brands Inc.*, 2020 ONSC 3565, 84 C.B.R. (6th) 146; *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1; *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299; *Triton Électronique inc. (Arrangement relatif à)*, 2009 QCCS 1202; *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84; *Canada (Attorney General) v. Caisse populaire d'Amos*, 2004 FCA 92, 324 N.R. 31; *Bank of Nova Scotia v. Thibault*, 2004 SCC 29, [2004] 1 S.C.R. 758; *Valard Construction Ltd. v. Bird Construction Co.*, 2018 SCC 8, [2018] 1 S.C.R. 224; *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795; *Csak v. Aumon* (1990), 69 D.L.R. (4th) 567; *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182; *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029; *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846; *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715.

By Karakatsanis J.

Considered: *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009]

Jurisprudence

Citée par la juge Côté

Distinction d'avec l'arrêt : *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; **arrêts examinés :** *First Vancouver Finance c. M.R.N.*, 2002 CSC 49, [2002] 2 R.C.S. 720; *Sun Indalex Finance, LLC c. Syndicat des Métallos*, 2013 CSC 6, [2013] 1 R.C.S. 271; *Colombie-Britannique c. Henfrey Samson Belair Ltd.*, [1989] 2 R.C.S. 24; *Caisse populaire Desjardins de l'Est de Drummond c. Canada*, 2009 CSC 29, [2009] 2 R.C.S. 94; **arrêts mentionnés :** *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274; *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379; *9354-9186 Québec inc. c. Callidus Capital Corp.*, 2020 CSC 10, [2020] 1 R.C.S. 521, [2020] 1 R.C.S. 521; *Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368; *Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128; *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169; *In the Matter of a Plan of Compromise or Arrangement of Green Growth Brands Inc.*, 2020 ONSC 3565, 84 C.B.R. (6th) 146; *Ernst & Young Inc. c. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1; *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299; *Triton Électronique inc. (Arrangement relatif à)*, 2009 QCCS 1202; *Chef Ready Foods Ltd. c. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84; *Canada (Procureur général) c. Caisse populaire d'Amos*, 2004 CAF 92, 324 N.R. 31; *Banque de Nouvelle-Écosse c. Thibault*, 2004 CSC 29, [2004] 1 R.C.S. 758; *Valard Construction Ltd. c. Bird Construction Co.*, 2018 CSC 8, [2018] 1 R.C.S. 224; *Pecore c. Pecore*, 2007 CSC 17, [2007] 1 R.C.S. 795; *Csak c. Aumon* (1990), 69 D.L.R. (4th) 567; *Dauphin Plains Credit Union Ltd. c. Xyloid Industries Ltd.*, [1980] 1 R.C.S. 1182; *Banque nationale de Grèce (Canada) c. Katsikonouris*, [1990] 2 R.C.S. 1029; *McDiarmid Lumber Ltd. c. Première Nation de God's Lake*, 2006 CSC 58, [2006] 2 R.C.S. 846; *Placer Dome Canada Ltd. c. Ontario (Ministre des Finances)*, 2006 CSC 20, [2006] 1 R.C.S. 715.

Citée par la juge Karakatsanis

Arrêts examinés : *First Vancouver Finance c. M.R.N.*, 2002 CSC 49, [2002] 2 R.C.S. 720; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379; *Québec (Revenu) c. Caisse populaire Desjardins de Montmagny*, 2009 CSC 49, [2009] how the deemed trust for unremitted source deductions should be treated.

[134] I now turn to that half of the equation: Parliament's insolvency regime.

B. *How Is the Crown's Deemed Trust for Unremitted Source Deductions Treated in Parliament's Insolvency Regime?*

(1) Parliament's Insolvency Regime

[135] There are three main statutes in Parliament's insolvency regime: the *CCAA*, which is at issue in this appeal, the *BIA* and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 (*WURA*). (The *WURA* covers insolvencies of financial institutions and certain other corporations, like insurance companies, and is not relevant to this appeal (s. 6(1); *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521, at para. 39)). In *Century Services*, Deschamps J., writing for the majority, described insolvency as

> the factual situation that arises when a debtor is unable to pay creditors . . . . Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation. [para. 12]

[136] The *BIA* contains both a liquidation regime and a restructuring regime (*Century Services*, at paras. 13 and 78). The liquidation regime provides a detailed statutory scheme of distribution whereby the debtor's assets are liquidated and distributed to creditors. In contrast, the restructuring regime allows

et l'insolvabilité, L.R.C. 1985, c. B-3 (*LFI*), et la *LACC* énoncent précisément la façon dont la fiducie réputée créée à l'égard des retenues à la source non versées devrait être traitée.

[134] Je passe maintenant à cette autre moitié de l'équation : le régime d'insolvabilité du législateur.

B. *De quelle façon la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées est-elle traitée dans le régime d'insolvabilité du législateur?*

(1) Régime d'insolvabilité du législateur

[135] Le régime d'insolvabilité du législateur comporte trois lois principales : la *LACC*, qui est en cause dans le présent pourvoi, la *LFI* et la *Loi sur les liquidations et les restructurations*, L.R.C. 1985, c. W-11 (*LLR*). (La *LLR* porte sur l'insolvabilité d'institutions financières et d'autres sociétés en particulier, telles les compagnies d'assurance, et elle n'est pas pertinente en l'espèce (par. 6(1); *9354-9186 Québec inc. c. Callidus Capital Corp.*, 2020 CSC 10, [2020] 1 R.C.S. 521, par. 39)). Dans l'arrêt *Century Services*, la juge Deschamps, se prononçant au nom de la majorité, a décrit l'insolvabilité ainsi :

> . . . la situation de fait qui se présente quand un débiteur n'est pas en mesure de payer ses créanciers [. . .] Certaines procédures judiciaires peuvent être intentées en cas d'insolvabilité. Ainsi, le débiteur peut généralement obtenir une ordonnance judiciaire ayant pour effet de suspendre les mesures d'exécution de ses créanciers, puis tenter de conclure avec eux une transaction à caractère exécutoire contenant des conditions de paiement plus réalistes. Ou alors, les biens du débiteur sont liquidés et ses dettes sont remboursées sur le produit de cette liquidation, selon les règles de priorité établies par la loi. Dans le premier cas, on emploie habituellement les termes de réorganisation ou de restructuration, alors que dans le second, on parle de liquidation. [par. 12]

[136] La *LFI* comporte à la fois un régime de liquidation et un régime de restructuration (*Century Services*, par. 13 et 78). Le régime de liquidation contient des dispositions législatives détaillées en matière de distribution selon lesquelles l'actif du débiteur est liquidé et le produit de la liquidation

debtors to make proposals to their creditors for the adjustment and reorganization of debt. The *BIA* is available to debtors, either natural or legal persons, owing $1,000 or more (s. 43(1)).

est distribué aux créanciers. À l'inverse, le régime de restructuration permet au débiteur de présenter à ses créanciers des propositions de rajustement et de réorganisation des dettes. Les débiteurs — personnes physiques ou personnes morales — qui doivent 1 000 $ ou plus peuvent recourir à la *LFI* (par. 43(1)).

[137] The *CCAA* is predominantly a restructuring statute and access is restricted to companies with liabilities in excess of $5 million (s. 3(1)). As Deschamps J. explained in *Century Services*, the purpose of the *CCAA* is remedial; it provides a means for companies to avoid the devastating social and economic consequences of commercial bankruptcies (paras. 15 and 59, quoting *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 (C.A.), at p. 306, per Doherty J.A., dissenting). Liquidations do not only harm creditors, but employees and other stakeholders as well. The *CCAA* permits companies to continue to operate, "preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all" (*Century Services*, at para. 77). In enacting a restructuring statute, Parliament recognized that companies have more value as going concerns, especially since they are "key elements in a complex web of interdependent economic relationships" (para. 18).

[137] La *LACC* est avant tout une loi de restructuration, et seules les compagnies dont le passif dépasse cinq millions de dollars peuvent s'en prévaloir (par. 3(1)). Comme l'a expliqué la juge Deschamps dans l'arrêt *Century Services*, la *LACC* est de nature réparatrice; elle fournit aux compagnies un moyen d'éviter les effets dévastateurs, tant sur le plan social qu'économique, d'une faillite commerciale (par. 15 et 59, citant *Elan Corp. c. Comiskey* (1990), 1 O.R. (3d) 289 (C.A.), p. 306, le juge Doherty, dissident). Les liquidations nuisent non seulement aux créanciers, mais aussi aux employés et aux autres intéressés. La *LACC* permet aux compagnies de continuer à exercer leurs activités et de « préserver le statu quo pendant qu'on tente de trouver un terrain d'entente entre les intéressés en vue d'une réorganisation qui soit juste pour tout le monde » (*Century Services*, par. 77). En édictant une loi de restructuration, le législateur a reconnu que la valeur des compagnies demeure plus grande lorsque celles-ci peuvent poursuivre leurs activités, surtout puisqu'elles constituent « des volets essentiels d'un réseau complexe de rapports économiques interdépendants » (par. 18).

[138] Due to its remedial nature, the *CCAA* is famously skeletal in nature (*Century Services*, at paras. 57-62). It does not "contain a comprehensive code that lays out all that is permitted or barred" (para. 57, quoting *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, per Blair J.A.). Under s. 11, for example, the court may make any order that it considers appropriate in the circumstances, subject to the restrictions set out in the Act. Section 11 has been described as "the engine that drives this broad and flexible statutory scheme" (*Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at para. 36; see also *9354-9186 Québec inc.*, at para. 48). Deschamps J. observed in *Century Services* that these discretionary grants of jurisdiction to the courts have been key in allowing the *CCAA* to adapt and evolve to meet contemporary

[138] Étant donné son caractère réparateur, la *LACC* est notoirement schématique par nature (*Century Services*, par. 57-62). Elle ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (par. 57, citant *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). En vertu de l'art. 11, par exemple, le tribunal peut rendre toute ordonnance qu'il estime indiquée, sous réserve des restrictions prévues par la *LACC*. L'article 11 a été décrit comme étant [TRADUCTION] « le moteur de ce régime législatif large et souple » (*Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 36; voir aussi *9354-9186 Québec inc.*, par. 48). Dans l'arrêt *Century Services*, la juge Deschamps a fait observer que l'exercice discrétionnaire de ces pouvoirs par les tribunaux a permis à la *LACC*

business and social needs. Although judicial discretion must always be exercised in furtherance of the *CCAA*'s remedial purpose, it takes many forms and has proven to be flexible, innovative, and necessary (paras. 58-61; *U.S. Steel Canada Inc., Re*, 2016 ONCA 662, 402 D.L.R. (4th) 450, at para. 102).

[139] This is in contrast to the liquidation regime in the *BIA*, which has slightly different purposes. In *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, Gonthier J. explained that bankruptcy serves two goals: it "ensure[s] the equitable distribution of a bankrupt debtor's assets among the estate's creditors *inter se* [and it ensures] the financial rehabilitation of insolvent individuals" (para. 7; see also *9354-9186 Québec inc.*, at para. 46). Similarly, Sarra and Houlden and Morawetz JJ. describe the purposes of the *BIA* as permitting both "an honest debtor, who has been unfortunate, to secure a discharge so that he or she can make a fresh start and resume his or her place in the business community" and "the orderly and fair distribution of the property of a bankrupt among his or her creditors on a *pari passu* basis" (*The 2020-2021 Annotated Bankruptcy And Insolvency Act* (2020), at p. 2).

[140] To realize its goals, the *BIA* is strictly rules-based and has a comprehensive scheme for the liquidation process (*Century Services*, at para. 13; *Husky Oil*, at para. 85). It "provide[s] an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules" (*Century Services*, at para. 15). The *BIA*'s comprehensive nature ensures, among other things, that there is a single proceeding in which creditors are placed on an equal footing and know their rights. It also ensures that, post-discharge, the bankrupt will have enough to live on and can have a fresh start (*Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Ltd.*, 2013 ONCA 769, 118 O.R. (3d) 161, at para. 41). While proposals under the *BIA*'s restructuring regime similarly serve a remedial purpose, "this is achieved through

d'évoluer et de s'adapter aux besoins commerciaux et sociaux contemporains. Bien que l'exercice du pouvoir discrétionnaire du tribunal doive toujours tendre vers la réalisation de l'objectif réparateur de la *LACC*, il peut prendre plusieurs formes et il s'est avéré souple, novateur et nécessaire (par. 58-61; *U.S. Steel Canada Inc., Re*, 2016 ONCA 662, 402 D.L.R. (4th) 450, par. 102).

[139] Ce régime contraste avec le régime de liquidation prévu par la *LFI*, dont les objectifs diffèrent légèrement. Dans *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, le juge Gonthier a expliqué que le régime de faillite a deux objectifs : il « assur[e] un partage équitable des biens du débiteur failli entre les créanciers de l'actif [et il assure] la réhabilitation financière de la personne insolvable » (par. 7; voir aussi *9354-9186 Québec inc.*, par. 46). Dans le même ordre d'idées, les juges Houlden et Morawetz de même que la professeure Sarra écrivent que la *LFI* vise à la fois à permettre [TRADUCTION] « à l'honnête débiteur, frappé de malchance, de se libérer de toute responsabilité afin de pouvoir prendre un nouveau départ et de réintégrer le milieu des affaires [ainsi qu'à permettre] une distribution ordonnée et équitable des biens du failli entre ses créanciers, *pari passu* » (*The 2020-2021 Annotated Bankruptcy and Insolvency Act* (2020), p. 2).

[140] Pour réaliser ses objectifs, la *LFI* repose strictement sur des règles et elle établit un régime complet pour le processus de liquidation (*Century Services*, par. 13; *Husky Oil*, par. 85). Elle « peut être appliqué[e] pour répartir de manière ordonnée les biens du débiteur entre les créanciers, en fonction des règles de priorité qui y sont établies » (*Century Services*, par. 15). Le caractère exhaustif de la *LFI* garantit, entre autres choses, qu'il existe une procédure unique dans le cadre de laquelle les créanciers sont placés sur un pied d'égalité et connaissent leurs droits. Elle garantit également qu'après la libération, le failli disposera de ressources suffisantes pour subvenir à ses besoins et qu'il pourra prendre un nouveau départ (*Canada (Superintendent of Bankruptcy) c. 407 ETR Concession Company Ltd.*, 2013 ONCA 769, 118 O.R. (3d) 161, par. 41). Les propositions

a rules-based mechanism that offers less flexibility" (*Century Services*, at para. 15).

faites en vertu du régime de restructuration de la *LFI* répondent elles aussi à un objectif réparateur, « mais au moyen d'un mécanisme fondé sur des règles et offrant moins de souplesse » (*Century Services*, par. 15).

[141] Importantly, the specific goals of restructuring in the *CCAA*, in contrast to liquidation, result in the introduction of a key player: the interim lender. Interim financing, previously referred to as debtor-in-possession financing, is a judicially-supervised mechanism whereby an insolvent company is loaned funds for use during and for the purposes of the restructuring process. Before the 2009 amendments, there were no statutory provisions on interim financing in the *CCAA*, but the institution was well-established in the jurisprudence (L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. rev. (loose-leaf)), vol. 4, at N§93; see also *Century Services*, at para. 62). The 2009 amendments codified much of the existing jurisprudence, and I discuss the statutory provisions in detail below.

[141] Fait important, les objectifs de restructuration propres à la *LACC*, contrairement à la liquidation, permettent l'entrée en scène d'un acteur essentiel : le prêteur temporaire. Le financement temporaire, que l'on appelait auparavant le financement du débiteur-exploitant, est un mécanisme sous supervision judiciaire par lequel des fonds sont prêtés à une compagnie insolvable afin d'être utilisés au cours du processus de restructuration et pour les besoins de celui-ci. Avant les modifications de 2009, il n'existait pas de dispositions législatives sur le financement temporaire dans la *LACC*, mais le concept était bien établi dans la jurisprudence (L. W. Houlden, G. B. Morawetz et J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4e éd. rév. (feuilles mobiles)), vol. 4, N§93; voir aussi *Century Services*, par. 62). Les modifications apportées en 2009 ont codifié l'essentiel de la jurisprudence existante, et j'examinerai les dispositions législatives en détail ci-dessous.

[142] Interim financing is crucial to the restructuring process. It allows the debtor to continue to operate on a day-to-day basis while a workout solution is being arranged. A plan of compromise would be futile if, in the interim six months, the debtor was forced to close its doors. For this reason, Farley J., in *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. C.J. (Gen. Div.)), at para. 1, quoting *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. C.J. (Gen. Div.)), at para. 24, observed that interim financing helps "keep the lights . . . on". Similarly, in *Indalex*, Deschamps J. explained that giving interim lenders super-priority "is a key aspect of the debtor's ability to attempt a workout" (para. 59, quoting J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). Without interim financing and the ability to prime (i.e., to give it priority) the interim lender's loan, the remedial purposes of the *CCAA* can be frustrated (para. 58).

[142] Le financement temporaire est essentiel au processus de restructuration. Il permet au débiteur de continuer à exercer ses activités au quotidien pendant qu'un arrangement est mis en place. Un plan de transaction serait vain si, dans les six mois suivants, le débiteur était forcé de cesser ses activités. Pour cette raison, le juge Farley a fait observer dans *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (C.J. Ont. (Div. gén.)), par. 1, citant *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (C.J. Ont. (Div. gén.)), par. 24, que le financement temporaire aide à [TRADUCTION] « payer les frais courants ». De même, dans l'arrêt *Indalex*, la juge Deschamps a expliqué que le fait d'accorder une super priorité aux prêteurs temporaires constituait [TRADUCTION] « un élément clé de la capacité du débiteur de tenter de conclure un arrangement » (par. 59, citant J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 97). Sans le financement temporaire et la capacité d'accorder la priorité au prêt du prêteur temporaire, la réalisation des objectifs réparateurs de la *LACC* pourrait être compromise (par. 58).

[143] With this background in mind, I turn now to consider the treatment of the Crown's deemed trust for unremitted source deductions in Parliament's insolvency regime.

(2) The Deemed Trust for Unremitted Source Deductions in the *BIA* and *CCAA*

[144] The statutes in this case are all federal statutes. The *ITA*, *BIA*, and *CCAA* make up a co-existing and harmonious statutory scheme, enacted by one level of government (see, e.g., R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 337, on the presumption of coherence). An example of this co-existence is when, in the insolvency regime, Parliament modifies entitlements that it otherwise grants the Crown outside of insolvency. For example, through s. 222(3) of the *ETA*, Parliament provides for a statutory deemed trust in favour of the Crown for unremitted GST. Parliament also renders that deemed trust, which is nearly identical in language to s. 227(4.1) of the *ITA*, ineffective in the *BIA* and *CCAA* (*BIA*, ss. 67(2) and 86(3); *CCAA*, s. 37(1); *Century Services*, at paras. 51-56). As I shall explain, Parliament also deals specifically with the deemed trust in s. 227(4.1) of the *ITA* in the *BIA* and *CCAA*, albeit in different ways.

[145] In the *BIA*, the deemed trust for unremitted source deductions appears in s. 67(3). Section 67 is under the heading "Property of the Bankrupt". Section 67(1)(a) excludes property held in trust by the bankrupt from property of the bankrupt that is divisible among creditors. Section 67(2) provides that any provincial or federal deemed trust in favour of the Crown does not qualify as a trust under s. 67(1)(a) unless it would qualify as a trust absent the deeming provision (in other words, unless it would qualify as a common law or true trust) (see *Caisse populaire Desjardins de Montmagny*, at para. 15; *Urbancorp Cumberland 2 GP Inc. (Re)*, 2020 ONCA 197, 444 D.L.R. (4th) 273, at paras. 32-33). Section 67(3) states that s. 67(2) does not apply in respect of the Crown's deemed trust for unremitted

[143] Ayant ce contexte à l'esprit, je me pencherai maintenant sur le traitement de la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées dans le cadre du régime d'insolvabilité du législateur.

(2) La fiducie réputée créée à l'égard des retenues à la source non versées — *LFI* et *LACC*

[144] Les lois en cause dans la présente affaire sont toutes fédérales. La *LIR*, la *LFI* et la *LACC* coexistent au sein d'un régime législatif harmonieux, édicté par un seul ordre de gouvernement (voir, p. ex., R. Sullivan, *Sullivan on the Construction of Statutes* (6e éd. 2014), p. 337, sur la présomption de cohérence). Cette coexistence se manifeste par exemple lorsque, dans le régime d'insolvabilité, le législateur modifie les droits qu'il accorde autrement à la Couronne en dehors de ce régime. Par exemple, au moyen du par. 222(3) de la *LTA*, le législateur prévoit la création d'une fiducie réputée en faveur de la Couronne à l'égard de la TPS non versée. Le législateur rend aussi cette fiducie réputée, qui est quasi identique à celle prévue au par. 227(4.1) de la *LIR*, inopérante sous les régimes de la *LFI* et de la *LACC* (*LFI*, par. 67(2) et 86(3); *LACC*, par. 37(1); *Century Services*, par. 51-56). Comme je l'expliquerai, dans la *LFI* et la *LACC*, le législateur traite aussi expressément de la fiducie réputée prévue au par. 227(4.1) de la *LIR*, quoique de manière différente.

[145] Dans la *LFI*, la fiducie réputée créée à l'égard des retenues à la source non versées figure au par. 67(3). L'article 67 figure sous la rubrique « Biens du failli ». L'alinéa 67(1)a) exclut du patrimoine attribué aux créanciers du failli les biens détenus par le failli en fiducie. Le paragraphe 67(2) prévoit que toute fiducie réputée créée en faveur de la Couronne en vertu d'une disposition législative fédérale ou provinciale ne peut être considérée comme une fiducie au sens de l'al. 67(1)a), si elle ne le serait pas en l'absence de la disposition législative en question (autrement dit, à moins qu'elle puisse être considérée comme une fiducie de common law ou une fiducie véritable) (voir *Caisse populaire Desjardins de Montmagny*, par. 15; *Urbancorp Cumberland 2 GP Inc. (Re)*, 2020 ONCA 197, 444 D.L.R. (4th) 273,

TAB 8

Century Services Inc. *Appellant*

v.

Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada *Respondent*

Indexed as: Century Services Inc. *v.* Canada (Attorney General)

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

Century Services Inc. *Appelante*

c.

Procureur général du Canada au nom de Sa Majesté la Reine du chef du Canada *Intimé*

Répertorié : Century Services Inc. *c.* Canada (Procureur général)

2010 CSC 60

N^{o} du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

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

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith JJ.A.), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, reversing a judgment of Brenner C.J.S.C., 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

Mary I. A. Buttery, *Owen J. James* and *Matthew J. G. Curtis*, for the appellant.

Gordon Bourgard, *David Jacyk* and *Michael J. Lema*, for the respondent.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

[1] DESCHAMPS J. — For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency*

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, Tysoe et Smith), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, qui a infirmé une décision du juge en chef Brenner, 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, qui a rejeté la demande de la Couronne sollicitant le paiement de la TPS. Pourvoi accueilli, la juge Abella est dissidente.

Mary I. A. Buttery, *Owen J. James* et *Matthew J. G. Curtis*, pour l'appelante.

Gordon Bourgard, *David Jacyk* et *Michael J. Lema*, pour l'intimé.

Version française du jugement de la juge en chef McLachlin et des juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell rendu par

[1] LA JUGE DESCHAMPS — C'est la première fois que la Cour est appelée à interpréter directement les dispositions de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). À cet égard, deux questions sont soulevées. La première requiert la conciliation d'une disposition de la *LACC* et d'une disposition de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), qui, selon des juridictions inférieures, sont en conflit l'une avec l'autre. La deuxième concerne la portée du pouvoir discrétionnaire du tribunal qui surveille une réorganisation. Les dispositions législatives pertinentes sont reproduites en annexe. Pour ce qui est de la première question, après avoir examiné l'évolution des priorités de la Couronne en matière d'insolvabilité et le libellé des diverses lois qui établissent ces priorités, j'arrive à la conclusion que c'est la *LACC*, et non la *LTA*, qui énonce la règle applicable. Pour ce qui est de la seconde question, je conclus qu'il faut interpréter les larges pouvoirs discrétionnaires conférés au juge en tenant compte de la nature réparatrice de la *LACC* et de la législation sur l'insolvabilité en général. Par conséquent, le tribunal avait le pouvoir

Act, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

[2] Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

[3] Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

discrétionnaire de lever partiellement la suspension des procédures pour permettre au débiteur de faire cession de ses biens en vertu de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »). Je suis d'avis d'accueillir le pourvoi.

1. Faits et décisions des juridictions inférieures

[2] Le 13 décembre 2007, Ted LeRoy Trucking Ltd. (« LeRoy Trucking ») a déposé une requête sous le régime de la *LACC* devant la Cour suprême de la Colombie-Britannique et obtenu la suspension des procédures dans le but de réorganiser ses finances. L'entreprise a vendu certains éléments d'actif excédentaires, comme l'y autorisait l'ordonnance.

[3] Parmi les dettes de LeRoy Trucking figurait une somme perçue par celle-ci au titre de la taxe sur les produits et services (« TPS ») mais non versée à la Couronne. La *LTA* crée en faveur de la Couronne une fiducie réputée visant les sommes perçues au titre de la TPS. Cette fiducie réputée s'applique à tout bien ou toute recette détenue par la personne qui perçoit la TPS et à tout bien de cette personne détenu par un créancier garanti, et le produit découlant de ces biens doit être payé à la Couronne par priorité sur tout droit en garantie. Aux termes de la *LTA*, la fiducie réputée s'applique malgré tout autre texte législatif du Canada sauf la *LFI*. Cependant, la *LACC* prévoit également que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, ne s'appliquent pas sous son régime les fiducies réputées qui existent en faveur de la Couronne. Par conséquent, pour ce qui est de la TPS, la Couronne est un créancier non garanti dans le cadre de cette loi. Néanmoins, à l'époque où LeRoy Trucking a débuté ses procédures en vertu de la *LACC*, la jurisprudence dominante indiquait que la *LTA* l'emportait sur la *LACC*, la Couronne jouissant ainsi d'un droit prioritaire à l'égard des créances relatives à la TPS dans le cadre de la *LACC*, malgré le fait qu'elle aurait perdu cette priorité en vertu de la *LFI*. La *LACC* a fait l'objet de modifications substantielles en 2005, et certaines des dispositions en cause dans le présent pourvoi ont alors été renumérotées et reformulées (L.C. 2005, ch. 47). Mais ces modifications ne sont entrées en vigueur que le 18 septembre 2009. Je ne me reporterai aux dispositions modifiées que lorsqu'il sera utile de le faire.

[4] On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

[5] On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221).

[6] The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, 270 B.C.A.C. 167). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

[7] First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and

[4] Le 29 avril 2008, le juge en chef Brenner de la Cour suprême de la Colombie-Britannique, dans le contexte des procédures intentées en vertu de la *LACC*, a approuvé le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars, soit le produit de la vente d'éléments d'actif excédentaires. LeRoy Trucking a proposé de retenir un montant égal aux sommes perçues au titre de la TPS mais non versées à la Couronne et de le déposer dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Afin de maintenir le statu quo, en raison du succès incertain de la réorganisation, le juge en chef Brenner a accepté la proposition et ordonné qu'une somme de 305 202,30 $ soit détenue par le contrôleur dans son compte en fiducie.

[5] Le 3 septembre 2008, ayant conclu que la réorganisation n'était pas possible, LeRoy Trucking a demandé à la Cour suprême de la Colombie-Britannique l'autorisation de faire cession de ses biens en vertu de la *LFI*. Pour sa part, la Couronne a demandé au tribunal d'ordonner le paiement au receveur général du Canada de la somme détenue par le contrôleur au titre de la TPS. Le juge en chef Brenner a rejeté cette dernière demande. Selon lui, comme la détention des fonds dans le compte en fiducie du contrôleur visait à [TRADUCTION] « faciliter le paiement final des sommes de TPS qui étaient dues avant que l'entreprise ne débute les procédures, mais seulement si un plan viable était proposé », l'impossibilité de procéder à une telle réorganisation, suivie d'une cession de biens, signifiait que la Couronne perdrait sa priorité sous le régime de la *LFI* (2008 BCSC 1805, [2008] G.S.T.C. 221).

[6] La Cour d'appel de la Colombie-Britannique a accueilli l'appel interjeté par la Couronne (2009 BCCA 205, 270 B.C.A.C. 167). Rédigeant l'arrêt unanime de la cour, le juge Tysoe a invoqué deux raisons distinctes pour y faire droit.

[7] Premièrement, le juge d'appel Tysoe a conclu que le pouvoir conféré au tribunal par l'art. 11 de la *LACC* n'autorisait pas ce dernier à rejeter la demande de la Couronne sollicitant le paiement immédiat des sommes de TPS faisant l'objet de la fiducie réputée,

that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

après qu'il fut devenu clair que la tentative de réorganisation avait échoué et que la faillite était inévitable. Comme la restructuration n'était plus une possibilité, il ne servait plus à rien, dans le cadre de la *LACC*, de suspendre le paiement à la Couronne des sommes de TPS et le tribunal était tenu, en raison de la priorité établie par la *LTA*, d'en autoriser le versement à la Couronne. Ce faisant, le juge Tysoe a adopté le raisonnement énoncé dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), suivant lequel la fiducie réputée que crée la *LTA* à l'égard des sommes dues au titre de la TPS établissait la priorité de la Couronne sur les créanciers garantis dans le cadre de la *LACC*.

[8] Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

[8] Deuxièmement, le juge Tysoe a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur le 29 avril 2008, le tribunal avait créé une fiducie expresse en faveur de la Couronne, et que les sommes visées ne pouvaient être utilisées à quelque autre fin que ce soit. En conséquence, la Cour d'appel a ordonné que les sommes détenues par le contrôleur en fiducie pour la Couronne soient versées au receveur général.

2. Issues

2. Questions en litige

[9] This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

[9] Le pourvoi soulève trois grandes questions que j'examinerai à tour de rôle :

(1) Le paragraphe 222(3) de la *LTA* l'emporte-t-il sur le par. 18.3(1) de la *LACC* et donne-t-il priorité à la fiducie réputée qui est établie par la *LTA* en faveur de la Couronne pendant des procédures régies par la *LACC*, comme il a été décidé dans l'arrêt *Ottawa Senators*?

(2) Le tribunal a-t-il outrepassé les pouvoirs qui lui étaient conférés par la *LACC* en levant la suspension des procédures dans le but de permettre au débiteur de faire cession de ses biens?

(3) L'ordonnance du tribunal datée du 29 avril 2008 exigeant que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte en fiducie du contrôleur a-t-elle créé une fiducie expresse en faveur de la Couronne à l'égard des fonds en question?

3. Analysis

[10] The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite . . . any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

[11] In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 *Purpose and Scope of Insolvency Law*

[12] Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain

3. Analyse

[10] La première question porte sur les priorités de la Couronne dans le contexte de l'insolvabilité. Comme nous le verrons, la *LTA* crée en faveur de la Couronne une fiducie réputée à l'égard de la TPS due par un débiteur « [m]algré [. . .] tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*) » (par. 222(3)), alors que selon la disposition de la *LACC* en vigueur à l'époque, « par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme [tel] » (par. 18.3(1)). Il est difficile d'imaginer deux dispositions législatives plus contradictoires en apparence. Cependant, comme c'est souvent le cas, le conflit apparent peut être résolu au moyen des principes d'interprétation législative.

[11] Pour interpréter correctement ces dispositions, il faut examiner l'historique de la *LACC*, la fonction de cette loi parmi l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et les principes reconnus dans la jurisprudence. Nous verrons que les priorités de la Couronne en matière d'insolvabilité ont été restreintes de façon appréciable. La réponse à la deuxième question repose aussi sur le contexte de la *LACC*, mais l'objectif de cette loi et l'interprétation qu'en a donnée la jurisprudence jouent également un rôle essentiel. Après avoir examiné les deux premières questions soulevées en l'espèce, j'aborderai la conclusion du juge Tysoe selon laquelle l'ordonnance rendue par le tribunal le 29 avril 2008 a eu pour effet de créer une fiducie expresse en faveur de la Couronne.

3.1 *Objectif et portée du droit relatif à l'insolvabilité*

[12] L'insolvabilité est la situation de fait qui se présente quand un débiteur n'est pas en mesure de payer ses créanciers (voir, généralement, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), p. 16). Certaines procédures judiciaires peuvent être intentées en cas d'insolvabilité. Ainsi, le débiteur peut généralement obtenir une ordonnance judiciaire

a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

[13] Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

[14] Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either

ayant pour effet de suspendre les mesures d'exécution de ses créanciers, puis tenter de conclure avec eux une transaction à caractère exécutoire contenant des conditions de paiement plus réalistes. Ou alors, les biens du débiteur sont liquidés et ses dettes sont remboursées sur le produit de cette liquidation, selon les règles de priorité établies par la loi. Dans le premier cas, on emploie habituellement les termes de réorganisation ou de restructuration, alors que dans le second, on parle de liquidation.

[13] Le droit canadien en matière d'insolvabilité commerciale n'est pas codifié dans une seule loi exhaustive. En effet, le législateur a plutôt adopté plusieurs lois sur l'insolvabilité, la principale étant la *LFI*. Cette dernière établit un régime juridique autonome qui concerne à la fois la réorganisation et la liquidation. Bien qu'il existe depuis longtemps des mesures législatives relatives à la faillite, la *LFI* elle-même est une loi assez récente — elle a été adoptée en 1992. Ses procédures se caractérisent par une approche fondée sur des règles préétablies. Les débiteurs insolvables — personnes physiques ou personnes morales — qui doivent 1 000 $ ou plus peuvent recourir à la *LFI*. Celle-ci comporte des mécanismes permettant au débiteur de présenter à ses créanciers une proposition de rajustement des dettes. Si la proposition est rejetée, la *LFI* établit la démarche aboutissant à la faillite : les biens du débiteur sont liquidés et le produit de cette liquidation est versé aux créanciers conformément à la répartition prévue par la loi.

[14] La possibilité de recourir à la *LACC* est plus restreinte. Le débiteur doit être une compagnie dont les dettes dépassent cinq millions de dollars. Contrairement à la *LFI*, la *LACC* ne contient aucune disposition relative à la liquidation de l'actif d'un débiteur en cas d'échec de la réorganisation. Une procédure engagée sous le régime de la *LACC* peut se terminer de trois façons différentes. Le scénario idéal survient dans les cas où la suspension des recours donne au débiteur un répit lui permettant de rétablir sa solvabilité et où le processus régi par la *LACC* prend fin sans qu'une réorganisation soit nécessaire. Le deuxième scénario le plus souhaitable est le cas où la transaction ou l'arrangement proposé par le débiteur est

the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

accepté par ses créanciers et où la compagnie réorganisée poursuit ses activités au terme de la procédure engagée en vertu de la *LACC*. Enfin, dans le dernier scénario, la transaction ou l'arrangement échoue et la compagnie ou ses créanciers cherchent habituellement à obtenir la liquidation des biens en vertu des dispositions applicables de la *LFI* ou la mise sous séquestre du débiteur. Comme nous le verrons, la principale différence entre les régimes de réorganisation prévus par la *LFI* et la *LACC* est que le second établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire, ce qui rend le mécanisme mieux adapté aux réorganisations complexes.

[15] As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

[15] Comme je vais le préciser davantage plus loin, la *LACC* — la première loi canadienne régissant la réorganisation — a pour objectif de permettre au débiteur de continuer d'exercer ses activités et, dans les cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif. Les propositions faites aux créanciers en vertu de la *LFI* répondent au même objectif, mais au moyen d'un mécanisme fondé sur des règles et offrant moins de souplesse. Quand la réorganisation s'avère impossible, les dispositions de la *LFI* peuvent être appliquées pour répartir de manière ordonnée les biens du débiteur entre les créanciers, en fonction des règles de priorité qui y sont établies.

[16] Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors*

[16] Avant l'adoption de la *LACC* en 1933 (S.C. 1932-33, ch. 36), la liquidation de la compagnie débitrice constituait la pratique la plus courante en vertu de la législation existante en matière d'insolvabilité commerciale (J. Sarra, *Creditor Rights and the Public Interest : Restructuring Insolvent Corporations* (2003), p. 12). Les ravages de la Grande Dépression sur les entreprises canadiennes et l'absence d'un mécanisme efficace susceptible de permettre aux débiteurs et aux créanciers d'arriver à des compromis afin d'éviter la liquidation commandaient une solution législative. La *LACC* a innové en permettant au débiteur insolvable de tenter une réorganisation sous surveillance judiciaire, hors du cadre de la législation existante en matière d'insolvabilité qui, une fois entrée en jeu,

Arrangement Act, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

[17] Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

[18] Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

[19] The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make

aboutissait presque invariablement à la liquidation (*Reference re Companies' Creditors Arrangement Act*, [1934] R.C.S. 659, p. 660-661; Sarra, *Creditor Rights*, p. 12-13).

[17] Le législateur comprenait, lorsqu'il a adopté la *LACC*, que la liquidation d'une compagnie insolvable causait préjudice à la plupart des personnes touchées — notamment les créanciers et les employés — et que la meilleure solution consistait dans un arrangement permettant à la compagnie de survivre (Sarra, *Creditor Rights*, p. 13-15).

[18] Les premières analyses et décisions judiciaires à cet égard ont également entériné les objectifs réparateurs de la *LACC*. On y reconnaissait que la valeur de la compagnie demeurait plus grande lorsque celle-ci pouvait poursuivre ses activités, tout en soulignant les pertes intangibles découlant d'une liquidation, par exemple la disparition de la clientèle (S. E. Edwards, « Reorganizations Under the Companies' Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587, p. 592). La réorganisation sert l'intérêt public en permettant la survie de compagnies qui fournissent des biens ou des services essentiels à la santé de l'économie ou en préservant un grand nombre d'emplois (*ibid.*, p. 593). Les effets de l'insolvabilité pouvaient même toucher d'autres intéressés que les seuls créanciers et employés. Ces arguments se font entendre encore aujourd'hui sous une forme un peu différente, lorsqu'on justifie la réorganisation par la nécessité de remettre sur pied des compagnies qui constituent des volets essentiels d'un réseau complexe de rapports économiques interdépendants, dans le but d'éviter les effets négatifs de la liquidation.

[19] La *LACC* est tombée en désuétude au cours des décennies qui ont suivi, vraisemblablement parce que des modifications apportées en 1953 ont restreint son application aux compagnies émettant des obligations (S.C. 1952-53, ch. 3). Pendant la récession du début des années 1980, obligés de s'adapter au nombre grandissant d'entreprises en difficulté, les avocats travaillant dans le domaine de l'insolvabilité ainsi que les tribunaux ont redécouvert cette loi et s'en sont servis pour relever les nouveaux défis de l'économie. Les participants aux

TAB 9

Workers' Compensation Board *Appellant (Respondent)*

v.

Husky Oil Operations Ltd. *Respondent (Applicant)*

and

Her Majesty The Queen in right of Canada, as represented by the Minister of National Revenue, Her Majesty The Queen in right of the Province of Saskatchewan, as represented by the Minister of Human Resources, Labour and Employment, Her Majesty The Queen in right of the province of Saskatchewan, as represented by the Minister of Finance, Bank of Montreal, Eric Zimmerman, Garth Price, Trevor Brown, Arthur Gingras, Kelly Houston, Darcy Kuzio, Hans Bohle, Charles Pshebenicki, Terry Sapergia, SBW—Wright Construction Inc., Campbell West (1991) Ltd., Fuller Austin Insulation Inc., United Industrial Equipment Rentals Ltd., Atco Enterprises Ltd. and Deloitte & Touche Inc., as Trustee in Bankruptcy of the Estate of Metal Fabricating & Construction Ltd. *Respondents*

and

The Attorney General for Saskatchewan *Respondent (Intervener in the Court of Appeal)*

and

The Attorney General for Ontario, the Attorney General for New Brunswick, the Attorney General of British Columbia, the Attorney General for Alberta, the Workers' Compensation Board of Ontario,

Workers' Compensation Board *Appelante (Intimée)*

c.

Husky Oil Operations Ltd. *Intimée (Requérante)*

et

Sa Majesté la Reine du chef du Canada, représentée par le ministre du Revenu national, Sa Majesté la Reine du chef de la province de la Saskatchewan, représentée par le ministre des Ressources humaines, du Travail et de l'Emploi, Sa Majesté la Reine du chef de la province de la Saskatchewan, représentée par le ministre des Finances, Banque de Montréal, Eric Zimmerman, Garth Price, Trevor Brown, Arthur Gingras, Kelly Houston, Darcy Kuzio, Hans Bohle, Charles Pshebenicki, Terry Sapergia, SBW—Wright Construction Inc., Campbell West (1991) Ltd., Fuller Austin Insulation Inc., United Industrial Equipment Rentals Ltd., Atco Enterprises Ltd. et Deloitte & Touche Inc., syndic de faillite de l'actif de Metal Fabricating & Construction Ltd. *Intimés*

et

Le procureur général de la Saskatchewan *Intimé (Intervenant en Cour d'appel)*

et

Le procureur général de l'Ontario, le procureur général du Nouveau-Brunswick, le procureur général de la Colombie-Britannique, le procureur général de l'Alberta,

of distribution of assets in the estate is thereby unaffected. In such a case, there is no constitutional reason why full effect should not be given to provincial law within its legitimate sphere of operation. I would therefore only read down s. 133 to the extent that in application it enters into conflict with the scheme of distribution in the *Bankruptcy Act*. Where s. 133(1) alone is engaged in a given case, the Board's claim against the principal continues to be fully applicable.

mation sur l'actif de la faillite, et elle ne recouvre qu'auprès du commettant. Le plan de répartition des biens de l'actif demeure ainsi intact. Dans un tel cas, il n'y a, du point de vue constitutionnel, aucun motif de ne pas donner plein effet à la loi provinciale à l'intérieur de son champ légitime d'application. Je ne donnerais donc une interprétation atténuée à l'art. 133 que dans la mesure où son application entre en conflit avec le plan de répartition de la *Loi sur la faillite*. Là où seul le par. 133(1) trouve application, la réclamation de la Commission contre le commettant continue d'être pleinement exécutoire.

(c) *The Appropriate Remedy: Is Section 133 Inapplicable or Inoperative?*

c) *Le redressement approprié: l'article 133 est-il inapplicable ou inopérant?*

81 I have already concluded that the impugned legislation must be declared inapplicable rather than inoperable in bankruptcy. I should perhaps explain that this is preferable for the simple reason that bankruptcy is an exclusive federal domain within which provincial legislation does not apply, as distinguished from areas of joint or overlapping jurisdiction where federal legislation will prevail, rendering provincial legislation inoperable to the extent of any conflict. However, as bankruptcy is carved out from the domain of property and civil rights of which it is conceptually a part, valid provincial legislation of general application continues to apply in bankruptcy until Parliament legislates pursuant to its exclusive jurisdiction in relation to bankruptcy and insolvency. At that point, provincial legislation which conflicts with federal law must yield to the extent of the conflict (*Tennant v. Union Bank of Canada*, [1894] A.C. 31 (P.C.); *Crown Grain Co. v. Day*, [1908] A.C. 504 (P.C.)) and it becomes inapplicable to that extent. Consistent with the presumption of constitutionality — that the enacting body is presumed to have intended to enact provisions which do not transgress the limits of its constitutional powers — the provincial law should be read down to the extent of the conflict. In other words, it should be interpreted so as not to apply to the matter that is outside the jurisdiction of the enacting body.

J'ai déjà conclu que la loi attaquée doit être déclarée inapplicable plutôt qu'inopérante en matière de faillite. Je devrais peut-être expliquer que cela est préférable pour le simple motif que la faillite est un domaine de compétence fédérale exclusive à l'intérieur duquel les lois provinciales ne s'appliquent pas, ce qui est différent des domaines où il y a compétence concurrente ou chevauchement de compétence, auquel cas la loi fédérale l'emporte et rend la loi provinciale inopérante dans la mesure du conflit. Cependant, puisque le domaine de la faillite est dégagé de celui de la propriété et des droits civils dont il relève au niveau conceptuel, une loi provinciale valide d'application générale continue de s'appliquer en matière de faillite jusqu'à ce que le législateur fédéral légifère conformément à sa compétence exclusive en matière de faillite et d'insolvabilité. À ce moment, la loi provinciale cède le pas à la loi fédérale dans la mesure où il y a conflit entre les deux (*Tennant c. Union Bank of Canada*, [1894] A.C. 31 (C.P.); *Crown Grain Co. c. Day*, [1908] A.C. 504 (C.P.)) et devient inapplicable dans cette mesure. Conformément à la présomption de constitutionnalité — l'autorité législative étant présumée avoir eu l'intention d'adopter des dispositions à l'intérieur de son champ de compétence constitutionnelle — la loi provinciale doit recevoir une interprétation atténuée dans la mesure du conflit. En d'autres termes, elle doit être interprétée de façon à ne pas s'appliquer à la matière qui ne relève pas de la compétence de l'autorité qui l'a adoptée.

This, I believe, has been the trend of this Court's approach to matters of applicability and operability. For example, in refusing to apply the paramountcy doctrine in *Deloitte Haskins*, Wilson J. explained (at p. 807):

I think rather that the applicable principle is the one stated by Laskin C.J. in *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, [1977] 2 S.C.R. 1054, at p. 1065, to the effect that "if the provincial legislation is of general application, it will be construed so as not to apply to such enterprises", *i.e.*, those within federal competence.

She concluded at p. 808:

I believe that the trend of the more recent authorities favours a restrictive approach to the concept of "conflict" and a construction of impugned provincial legislation, where this is possible, so as to avoid operational conflict with valid federal legislation. Where this is done both provisions can stand and have their own legitimate spheres of operation. In this sense I find no conflict between s. 107(1) of the *Bankruptcy Act* and s. 78(4) of *The Workers' Compensation Act.* I would accordingly answer the question as framed by stating that s. 107(1)(*h*) of the *Bankruptcy Act* applies to determine priorities on a bankruptcy and s. 78(4) of *The Workers' Compensation Act* has no application in such a situation.

Another way of explaining this approach is simply to say, with Lamer J. in *FBDB*, that "in a bankruptcy matter, it is the *Bankruptcy Act* which must be applied" (at p. 1071).

This was also the Court's approach in *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121. The case concerned the relationship between *Bank Act*, R.S.C., 1985, c. B-1, security interests and the provincial procedural requirements for seizure under the Saskatchewan *Limitation of Civil Rights Act*, R.S.S. 1978, c. L-16. Speaking for the Court, La Forest J. found the federal and provincial legislation to conflict in operation. However, he added at p. 155:

C'est là, à mon avis, la façon dont notre Cour a eu tendance à aborder les questions d'applicabilité et de caractère opérant. Par exemple, lorsqu'elle a refusé d'appliquer la règle de la prépondérance dans l'arrêt *Deloitte Haskins*, le juge Wilson explique, à la p. 807: 82

Je crois plutôt que le principe applicable est celui qu'a formulé le juge en chef Laskin dans l'arrêt *Quebec North Shore Paper Co. c. Canadien Pacifique Ltée*, [1977] 2 R.C.S. 1054, à la p. 1065, selon lequel «si la législation provinciale est de portée générale, elle devra être interprétée de façon à ne pas s'appliquer à ces entreprises», c.-à-d. celles qui relèvent de la compétence fédérale.

Elle conclut, à la p. 808:

Je crois que le courant doctrinal et jurisprudentiel le plus récent favorise une conception restrictive de la notion de «conflit» et, dans la mesure du possible, une interprétation de la loi provinciale contestée qui évite un conflit d'application avec la loi fédérale valide. Dans un tel cas, les deux dispositions peuvent subsister et avoir chacune leur sphère légitime d'application. En ce sens, je conclus qu'il n'y a aucun conflit entre le par. 107(1) de la *Loi sur la faillite* et le par. 78(4) de *The Workers' Compensation Act*. L'alinéa 107(1)*h*) de la *Loi sur la faillite* ne rend pas ce paragraphe inopérant; ce dernier ne s'applique tout bonnement pas en cas de faillite, quand on l'interprète correctement. Par conséquent, la question formulée par le Juge en chef doit recevoir une réponse négative.

Une autre façon d'expliquer ce point de vue est de dire tout simplement qu'«en cas de faillite, c'est la *Loi sur la faillite* qui doit recevoir application», pour reprendre les propos du juge Lamer dans l'arrêt *BFD* (à la p. 1071). 83

C'est également le point de vue que notre Cour a adopté dans l'arrêt *Banque de Montréal c. Hall*, [1990] 1 R.C.S. 121. Cet arrêt portait sur le rapport entre les sûretés établies par la *Loi sur les banques*, L.R.C. (1985), ch. B-1, et les conditions procédurales de saisie posées par la province de la Saskatchewan en vertu de sa *Limitation of Civil Rights Act*, R.S.S. 1978, ch. L-16. Le juge La Forest a conclu, au nom de notre Cour, qu'il existait une incompatibilité d'application entre la loi fédérale et la loi provinciale. Il ajoute cependant, à la p. 155: 84

I have dealt with this case on the basis of paramountcy to meet the arguments put forward by counsel. But the issue can, I think, be answered more directly. At the end of the day, I agree with counsel for the Attorney General of Canada that this is simply a case where Parliament, under its power to regulate banking, has enacted a complete code that at once defines and provides for the realization of a security interest. There is no room left for the operation of the provincial legislation and that legislation should, accordingly, be construed as inapplicable to the extent that it trenches on valid federal banking legislation.

In response to the third question, then, I would hold that ss. 19 to 36 of *The Limitation of Civil Rights Act*, if interpreted to include a s. 178 security, conflict with ss. 178 and 179 of the *Bank Act* so as to render ss. 19 to 36 inoperative in respect of the security taken pursuant to s. 178 by a chartered bank. To put it another way, ss. 19 to 36 of *The Limitation of Civil Rights Act* are inapplicable to security taken pursuant to ss. 178 and 179 of the *Bank Act*. [Emphasis added.]

85 I fully endorse this approach, and am of the opinion that my colleague La Forest J.'s remarks apply *mutatis mutandis* to the present appeal. Parliament has enacted a complete code in the *Bankruptcy Act*, one which necessarily calls upon provincial law for its operation. But Parliament's invitation stipulates an important limitation at the threshold of its domain, namely, that provincial law simply cannot apply when to do so would entail subverting the federal order of priorities in the *Bankruptcy Act*.

86 I therefore agree with the submissions of the Attorney General of Canada and find that s. 133 is inapplicable in bankruptcy when s. 133(1) operates together with s. 133(3) as it trenches on valid federal bankruptcy legislation.

87 In view of Iacobucci J.'s statement at para. 162 that provincial "[l]egislation that is *intra vires* is permitted to have an incidental and ancillary effect on a federal sphere", I think it appropriate in concluding to summarize my view as to the proper constitutional analysis where federal and provin-

J'ai tranché cette affaire en fonction de la prépondérance pour répondre aux arguments présentés par les avocats. Mais je crois qu'on peut répondre plus directement à la question. En définitive, je partage l'avis de l'avocat du procureur général du Canada qu'il s'agit simplement d'un cas où le Parlement, en vertu de son pouvoir de réglementer les opérations bancaires, a adopté un code complet qui définit et prescrit à la fois la procédure de réalisation d'une sûreté. Il n'y a plus de place pour l'application d'une loi provinciale et cette loi devrait donc être interprétée comme étant inapplicable dans la mesure où elle empiète sur une loi fédérale valide en matière d'opérations bancaires.

Donc, en réponse à la troisième question, je suis d'avis de conclure que les art. 19 à 36 de *The Limitation of Civil Rights Act*, interprétés de manière à inclure une sûreté visée par l'art. 178, entrent en conflit avec les art. 178 et 179 de la *Loi sur les banques* et sont inopérants à l'égard de garanties prises conformément à l'art. 178 par une banque à charte. En d'autres termes, les art. 19 à 36 de *The Limitation of Civil Rights Act* sont inapplicables à la garantie prise conformément aux art. 178 et 179 de la *Loi sur les banques*. [Je souligne.]

Je suis tout à fait d'accord avec ce point de vue et j'estime que les remarques de mon collègue le juge La Forest s'appliquent *mutatis mutandis* au présent pourvoi. Le législateur fédéral a, dans la *Loi sur la faillite*, adopté un code complet qui fait nécessairement appel à la loi provinciale pour son application. Cependant, l'invitation du législateur fédéral comporte une importante restriction préliminaire: la loi provinciale ne peut tout simplement pas s'appliquer dans les cas où cela aurait pour effet de contrevenir à l'ordre de priorité établi dans la *Loi sur la faillite* fédérale.

Je suis donc d'accord avec les arguments du procureur général du Canada et je conclus que l'art. 133 est inapplicable en matière de faillite lorsque les par. 133(1) et (3) s'appliquent ensemble, du fait qu'il empiète alors sur une loi fédérale valide en matière de faillite.

Quant à l'affirmation du juge Iacobucci, au par. 162, qu'«[u]ne loi provinciale constitutionnelle peut avoir un effet incident et accessoire sur un domaine de compétence fédérale», je crois qu'il y a lieu pour moi de conclure par un résumé de mon opinion sur l'analyse constitutionnelle qu'il concial legislation potentially conflict. One must first determine whether the laws are respectively valid federal or provincial legislation. If so, the actual operation of the laws must be examined to determine whether they are in operational conflict, that is, inconsistent or incapable of being fully complied with in a given situation. If they are in operational conflict, the federal legislation prevails and the provincial legislation is without effect to the extent of this conflict. If the operational conflict is in a field of exclusive federal jurisdiction, the provincial legislation will be inapplicable as being *ultra vires* to that extent. If the conflict is in an area of concurrent or overlapping jurisdictions, the provincial legislation will remain *intra vires* but be inoperative. To the extent that there is operational conflict, there is no room for an incidental or ancillary effect of provincial legislation. If, on the other hand, there is no operational conflict, then both laws continue to operate and both continue to have effect to the extent that operational conflict does not arise. Short of operational conflict, provincial law may validly have an effect on bankruptcy, as I have indeed acknowledged in observing that there is no bankruptcy "bottom line" without provincial law (at para. 30). In the present case, I have found clear operational conflict in that ss. 133(1) and (3) in their operation together entail a reordering or subverting of the federal order of priorities under the *Bankruptcy Act*. Such an intrusion into an exclusive federal sphere necessarily goes far beyond an incidental and ancillary effect. I believe this proposition runs through my reasons.

vient de faire en cas de possibilité de conflit entre une loi fédérale et une loi provinciale. Il faut d'abord décider s'il s'agit de lois fédérale et provinciale valides. Dans l'affirmative, il faut examiner leur application concrète pour déterminer s'il existe une incompatibilité d'application entre les deux, c'est-à-dire déterminer si les lois en cause sont incompatibles ou non susceptibles d'être respectées intégralement dans une situation donnée. En cas d'incompatibilité d'application, la loi fédérale l'emporte et la loi provinciale est sans effet dans la mesure du conflit. S'il existe une incompatibilité d'application dans un domaine de compétence fédérale exclusive, la loi provinciale sera inapplicable comme étant inconstitutionnelle dans cette mesure. Si le conflit se situe dans un domaine où il y a compétence concurrente ou chevauchement de compétence, la loi provinciale demeurera constitutionnelle, mais sera inopérante. Dans la mesure où il y a incompatibilité d'application, une loi provinciale ne peut avoir un effet incident ou accessoire. Par contre, s'il n'y a pas d'incompatibilité d'application, alors les deux lois continuent de s'appliquer et d'avoir effet dans la mesure où aucune incompatibilité d'application ne surgit. À moins d'une incompatibilité d'application, une loi provinciale peut validement avoir une incidence sur la faillite, comme je l'ai effectivement reconnu en soulignant qu'en l'absence de droit provincial il n'existe pas de «résultat final» en matière de faillite (par. 30). En l'espèce, j'ai conclu qu'il existe une incompatibilité d'application manifeste vu que l'application conjuguée des par. 133(1) et (3) a pour effet de modifier l'ordre de priorité établi par la *Loi sur la faillite* fédérale, ou d'y contrevenir. Un tel empiétement sur un domaine de compétence fédérale exclusive constitue nécessairement bien plus qu'un effet incident et accessoire. À mon avis, cette affirmation se dégage de l'ensemble de mes motifs.

D. *Residual Issues*

D. *Les questions qui restent à résoudre*

Finally, as my colleague Iacobucci J. notes, before this Court the Bank of Montreal raised factual and legal issues which had not been raised in the courts below. Specifically, the Bank argued that Husky was not liable under s. 133 for payment of Metal Fab's assessments since the Board was

88 Enfin, comme mon collègue le juge Iacobucci le fait remarquer, la Banque de Montréal a soulevé devant nous des questions de fait et de droit qui n'avaient pas été soulevées devant les tribunaux d'instance inférieure. Plus particulièrement, la Banque a soutenu que Husky n'était pas, en vertu

TAB 10

Chandos Construction Ltd. *Appellant*

v.

Deloitte Restructuring Inc. in its capacity as Trustee in Bankruptcy of Capital Steel Inc., a bankrupt *Respondent*

and

Attorney General of Canada, Canadian Association of Insolvency and Restructuring Professionals and Insolvency Institute of Canada *Interveners*

Indexed as: Chandos Construction Ltd. *v.* Deloitte Restructuring Inc.

2020 SCC 25

File No.: 38571.

2020: January 20; 2020: October 2.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Bankruptcy and insolvency — Anti-deprivation rule — Priority of claims — Clause in subcontract awarding fee to general contractor in the event of subcontractor's bankruptcy — Subcontractor filing assignment in bankruptcy prior to completing subcontract — Whether general contractor entitled to set fee off against amount owing to subcontractor — Whether anti-deprivation rule exists at common law — If so, whether clause invalid by virtue of anti-deprivation rule.

Chandos Construction Ltd. ("Chandos"), a general construction contractor, entered into a construction subcontract with Capital Steel Inc. ("Capital Steel"). Clause VII Q(d) of the subcontract provides that Capital Steel will pay Chandos 10 percent of the subcontract price as a fee for the inconvenience or for monitoring the work in the event of Capital Steel's bankruptcy. When Capital Steel filed an assignment in bankruptcy prior to completing its

Chandos Construction Ltd. *Appelante*

c.

Restructuration Deloitte Inc. en sa qualité de syndic de faillite de Capital Steel Inc., une faillie *Intimée*

et

Procureur général du Canada, Association canadienne des professionnels de l'insolvabilité et de la réorganisation et Institut d'insolvabilité du Canada *Intervenants*

Répertorié : Chandos Construction Ltd. *c.* Restructuration Deloitte Inc.

2020 CSC 25

N° du greffe : 38571.

2020 : 20 janvier; 2020 : 2 octobre.

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

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

Faillite et insolvabilité — Règle anti-privation — Priorité des créances — Clause d'un contrat de sous-traitance prévoyant l'octroi de frais à l'entrepreneur général en cas de faillite du sous-traitant — Dépôt d'une cession de biens par le sous-traitant avant l'achèvement des travaux — L'entrepreneur général a-t-il le droit de compenser les frais et de les soustraire du montant qu'il doit au sous-traitant? — La règle anti-privation existe-t-elle en common law? — Si oui, la clause est-elle invalide en raison de la règle anti-privation?

Chandos Construction Ltd. (« Chandos »), un entrepreneur général en construction, a conclu un contrat de sous-traitance en construction avec Capital Steel Inc. (« Capital Steel »). La clause VII Q(d) du contrat de sous-traitance prévoit que Capital Steel doit payer à Chandos 10 p. 100 du prix du contrat de sous-traitance à titre de frais pour les dérangements ou pour la surveillance des travaux advenant la faillite de Capital Steel. Lorsque cette dernière a procédé

Local 324, 2003 SCC 42, [2003] 2 S.C.R. 157, at para. 39; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306, at paras. 29-30).

sans ambiguïté (*Parry Sound (district), Conseil d'administration des services sociaux c. S.E.E.F.P.O., section locale 324*, 2003 CSC 42, [2003] 2 R.C.S. 157, par. 39; *Heritage Capital Corp. c. Équitable, Cie de fiducie*, 2016 CSC 19, [2016] 1 R.C.S. 306, par. 29-30).

[30] Indeed, the most relevant statutory provision in the *BIA* is not s. 65.1, s. 66.34, or s. 84.2, but rather s. 71. As this Court recognized in *Royal Bank of Canada v. North American Life Assurance Co.*, [1996] 1 S.C.R. 325, s. 71 provides that the property of a bankrupt "passes to and vests in the trustee" (para. 44). This helps maximize the "global recovery for all creditors" in accordance with the priorities set out in the *BIA* (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 33; see also *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at paras. 7-9). The anti-deprivation rule renders void contractual provisions that would prevent property from passing to the trustee and thus frustrate s. 71 and the scheme of the *BIA*. This maximizes the assets that are available for the trustee to pass to creditors.

[30] Effectivement, la disposition la plus pertinente de la *LFI* n'est pas l'art. 65.1, l'art. 66.34 ou l'art. 84.2, mais plutôt l'art. 71. Comme la Cour l'a reconnu dans l'arrêt *Banque Royale du Canada c. Nord-Américaine, cie d'assurance-vie*, [1996] 1 R.C.S. 325, cette disposition prévoit que les biens du failli « passent et sont dévolus au syndic » (par. 44). Cela contribue à maximiser le « recouvrement global pour tous les créanciers », en conformité avec les priorités énoncées dans la *LFI* (*Alberta (Procureur général) c. Moloney*, 2015 CSC 51, [2015] 3 R.C.S. 327, par. 33; voir aussi *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, par. 7-9). La règle anti-privation rend nulles les stipulations qui empêchent de faire passer des biens au syndic et qui contrecarrent ainsi l'objectif de l'art. 71 et le régime de la *LFI*. Cela permet de maximiser la valeur des actifs que le syndic peut remettre aux créanciers.

V. The Content of the Anti-Deprivation Rule

V. Le contenu de la règle anti-privation

[31] As *Bramalea* described, the anti-deprivation rule renders void contractual provisions that, upon insolvency, remove value that would otherwise have been available to an insolvent person's creditors from their reach. This test has two parts: first, the relevant clause must be triggered by an event of insolvency or bankruptcy; and second, the effect of the clause must be to remove value from the insolvent's estate. This has been rightly called an effects-based test.

[31] Comme le décrit la décision *Bramalea*, la règle anti-privation rend nulle les stipulations qui, en cas d'insolvabilité, réduisent la valeur des actifs à laquelle les créanciers de la personne insolvable aurait autrement accès. Ce test comporte deux volets : premièrement, l'application de la clause pertinente doit être déclenchée par une insolvabilité ou une faillite; et, deuxièmement, la clause doit avoir pour effet de réduire la valeur de l'actif de la personne insolvable. C'est ce qu'on appelle à juste titre un test fondé sur les effets.

[32] Chandos submits that this Court should change the anti-deprivation rule to follow *Belmont* and adopt a purpose-based test. As noted above, *Belmont* held that the English anti-deprivation rule does not invalidate provisions of "bona fide commercial transactions which do not have as their predominant purpose, or one of their main purposes,

[32] Chandos soutient que la Cour devrait modifier la règle anti-privation afin de suivre l'arrêt *Belmont* et adopter un test fondé sur l'objet. Comme je l'ai mentionné, dans l'arrêt *Belmont*, il a été conclu que la règle anti-privation anglaise n'invalide pas les stipulations des « opérations commerciales de bonne foi dont l'objectif prédominant ou l'un des

the deprivation of the property of one of the parties on bankruptcy". Chandos says we should follow this reasoning because upholding *bona fide* commercial agreements would strike the best balance of public policy considerations and contribute to commercial certainty. It also submits that the side-effects of such a rule would not be so deleterious, as unsecured creditors tend to receive little in bankruptcy; as well, courts would be able to tell who had inserted provisions that remove value from the debtor's estate for *bona fide* commercial reasons. None of these reasons holds water.

objectifs principaux n'est pas de priver certains acteurs concernés des biens d'une des parties en cas de faillite ». Selon Chandos, nous devrions suivre ce raisonnement, car c'est le maintien des ententes commerciales conclues de bonne foi qui permettrait le mieux d'établir le juste équilibre entre les considérations d'intérêt public et de contribuer à la stabilité commerciale. Elle soutient également que les effets secondaires d'une telle règle ne seraient pas si néfastes, car les créanciers non garantis ont tendance à recevoir peu dans les cas de faillite; en outre, les tribunaux seraient en mesure de déterminer qui a convenu d'une stipulation réduisant la valeur des actifs du débiteur de bonne foi pour des motifs commerciaux véritables. Aucun de ces arguments ne tient la route.

[33] The goal of public policy, in this instance, is not decided by the common law; rather, that policy has been established in the legislation. What is left to the common law is the choice of means that best gives effect to the statutory scheme adopted by Parliament. Thus, once a court ascertains that Parliament intended, by virtue of s. 71, that all of the bankrupt's property is to be collected in the trustee, it is not for the court to substitute a competing goal that would give rise to a different result. In this, I agree with Professor Worthington that "[a]ny avoidance, whether intentional or inevitable, is surely a fraud on the statute" ("Good Faith, Flawed Assets and the Emasculation of the UK Anti-Deprivation Rule" (2012), 75 *Mod. L. Rev.* 112, at p. 121).

[33] L'objectif d'intérêt public en l'espèce n'est pas établi par la common law. Il a plutôt été établi par les lois. Dans ce contexte, le rôle de la common law se limite à choisir le moyen qui permet le mieux de mettre en œuvre le régime législatif adopté par le législateur. Par conséquent, lorsqu'un tribunal conclut que, en adoptant l'art. 71, le législateur avait l'intention que l'ensemble des biens d'un failli soit dévolu au syndic, il ne lui appartient pas de substituer à cette intention un objectif concurrent qui donnerait lieu à un résultat différent. À cet égard, je suis d'accord avec la professeure Worthington, lorsqu'elle écrit que [TRADUCTION] « [t]out évitement, qu'il soit intentionnel ou inéluctable, est assurément une fraude envers la loi » (« Good Faith, Flawed Assets and the Emasculation of the UK Anti-Deprivation Rule » (2012), 75 *Mod. L. Rev.* 112, p. 121).

[34] In addition, I would disagree that adopting a purpose-based test would create commercial certainty. To the contrary, applying such a test would require courts to determine the intention of contracting parties long after the fact and it would detract from the efficient administration of corporate bankruptcies. Parties cannot know at the time of contracting whether a court, possibly years later, will find their contract had been entered into for *bona fide* commercial reasons. This will give rise to uncertainty at the time of contracting.

[34] En outre, je ne suis pas d'accord pour dire qu'adopter un test fondé sur l'objet créerait une stabilité commerciale. Au contraire, l'application d'un tel test obligerait les tribunaux à déterminer l'intention des parties contractantes bien après les faits, ce qui nuirait à l'administration efficace des faillites d'entreprise. Les parties ne peuvent pas savoir au moment de la conclusion d'un contrat si un tribunal, possiblement des années plus tard, jugera que leur contrat a été conclu de bonne foi pour des motifs commerciaux véritables. Cela entraînerait de l'incertitude au moment de la conclusion des contrats.

[35] The effects-based rule, as it stands, is clear. Courts (and commercial parties) do not need to look to anything other than the trigger for the clause and its effect. The effect of a clause can be far more readily determined in the event of bankruptcy than the intention of contracting parties. An effects-based approach also provides parties with the confidence that contractual agreements, absent a provision providing for the withdrawal of assets upon bankruptcy or insolvency, will generally be upheld. Maintaining an effects-based test is also consistent with the existing effects-based test recognized in *Gingras*, at p. 487, for the *pari passu* rule founded on s. 141 of the *BIA* (previously s. 112 of the *Bankruptcy Act*, R.S.C. 1970, c. B-3), as well as the effects-based test set out in ss. 65.1, 66.34 and 84.2 of the *BIA*. These tests should remain consistent to prevent duplicative proceedings and avoid arcane disputes over whether the *pari passu* rule or the anti-deprivation rule is engaged by a particular provision. Although it is often easy to tell that a provision would affect the amount a creditor will receive, determining whether this is because it deprives the estate of value (thus violating the anti-deprivation rule) or because it reallocates the estate among creditors (thus violating the *pari passu* rule) depends on the precise machinery of law, disputes over such intricacies can be avoided if both rules apply an effects-based test.

[35] La règle fondée sur les effets, telle qu'elle existe actuellement, est claire. Les tribunaux (et les parties commerciales) n'ont qu'à déterminer ce qui déclenche l'application de la clause et ses effets. Il est bien plus facile de déterminer l'effet d'une clause en cas de faillite que l'intention des parties contractantes. Une approche fondée sur les effets assure également aux parties que les ententes contractuelles, en l'absence d'une stipulation prévoyant le retrait d'actifs en cas de faillite ou d'insolvabilité, seront généralement maintenues. Le maintien d'un test fondé sur les effets est également compatible avec le test existant fondé sur les effets, reconnu dans l'arrêt *Gingras*, p. 487, applicable à la règle du *pari passu* fondée sur l'art. 141 de la *LFI* (anciennement l'art. 112 de la *Loi sur la faillite*, L.R.C. 1970, c. B-3), ainsi qu'avec le test fondé sur les effets établi aux art. 65.1, 66.34 et 84.2 de la *LFI*. Ces tests devraient rester cohérents afin d'éviter un dédoublement de procédures et des litiges complexes sur la question de savoir si la règle du *pari passu* ou la règle anti-privation est déclenchée par une stipulation en particulier. Bien qu'il soit souvent facile de dire qu'une stipulation aura un effet sur le montant que touchera un créancier, la question de savoir si c'est parce qu'elle réduit la valeur de l'actif (violant ainsi la règle anti-privation) ou parce qu'elle réattribue l'actif parmi les créanciers (violant ainsi la règle du *pari passu*) dépend de subtilités juridiques précises, et les litiges concernant de telles complexités peuvent être évités si les deux règles sont appliquées à la lumière d'un test fondé sur les effets.

[36] Moreover, an intention-based test would encourage parties who can plausibly pretend to have *bona fide* intentions to create a preference over other creditors by inserting such clauses. Parties will often be able to state some commercial rationale for provisions altering contractual rights in the event of a counterparty's insolvency, such as guarding against the risk of the counterparty's non-performance. An intention-based test would render the rule ineffectual, save in the most flagrant cases of deliberate circumvention of insolvency law. This would threaten to undermine the statutory scheme of the *BIA*.

[36] En outre, un test fondé sur l'intention encouragerait les parties qui peuvent plausiblement prétendre être de bonne foi à s'accorder une préférence à l'encontre des autres créanciers en insérant de telles clauses dans leurs contrats. Les parties seront souvent en mesure de fournir une justification commerciale pour expliquer l'existence des stipulations qui modifient les droits contractuels en cas d'insolvabilité de l'une d'entre elles, comme la protection contre le risque d'inexécution par un cocontractant. Un test fondé sur l'intention rendrait la règle inefficace, sauf dans les cas les plus évidents de contournement délibéré des lois en matière de faillite. Cela risquerait de nuire au régime législatif de la *LFI*.

[37] Reliance on general principles of contractual freedom to support an intention-based test is no less misplaced. As noted in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 70, the common law of contract "generally places great weight on the freedom of contracting parties to pursue their individual self-interest" but, by definition, an assignment in bankruptcy strips the insolvent party of their interest. As Rowbotham J.A. observed, a party who might become insolvent has no incentive to resist a clause that deprives their estate of value upon bankruptcy. Parties do not negotiate with a view to protecting the interests of their creditors in the event of their bankruptcy. The costs of accepting the clause are borne solely by the unsecured creditors of the insolvent company (who are without a seat at the bargaining table) while the benefits are enjoyed only by the company while it is solvent.

[37] Il serait tout aussi mal avisé de se fonder sur des principes généraux de liberté contractuelle pour appuyer un test fondé sur l'intention. Certes, comme la Cour l'a noté dans l'arrêt *Bhasin c. Hrynew*, 2014 CSC 71, [2014] 3 R.C.S. 494, par. 70, le droit des contrats en common law « accorde généralement beaucoup de poids à la liberté des parties contractantes dans la poursuite de leur intérêt personnel », or, par définition, après une cession de biens la partie insolvable n'a plus aucun intérêt. Comme la juge Rowbotham l'a mentionné, une partie susceptible de devenir insolvable n'a aucune raison de s'opposer à une clause qui réduit la valeur de son actif en cas de faillite. Les parties ne négocient pas dans le but de protéger les intérêts de leurs créanciers en cas de faillite. Les coûts de l'acceptation d'une telle clause ne sont assumés que par les créanciers non garantis de l'entreprise insolvable (lesquels n'ont pas de place à la table de négociation), tandis que les avantages ne reviennent qu'à l'entreprise pendant qu'elle est solvable.

[38] Finally, while it may be true that unsecured creditors tend to receive relatively little now, the effect of a purpose-based rule is that they would receive less.

[38] Enfin, bien qu'il puisse être vrai que les créanciers non garantis ont tendance à recevoir bien peu de nos jours, l'application d'une règle fondée sur l'objet aurait pour effet de leur en faire recevoir encore moins.

[39] Overall, Chandos has not shown us good reason to adopt a purpose-based test. In my view, adopting the purpose-based test would create "new and greater difficulties" of the sort cautioned against in *Watkins v. Olafson*, [1989] 2 S.C.R. 750, at p. 762. As recognized in *Bhasin*, at para. 40, although a change to the Canadian common law may be appropriate when it creates greater certainty and coherence, it is not when the change would foster uncertainty and incoherence.

[39] En somme, Chandos n'a fait valoir aucune raison valable justifiant l'adoption d'un test fondé sur l'objet. À mon avis, adopter un tel test aurait pour effet de créer « des difficultés nouvelles plus grandes » comme celles contre lesquelles l'arrêt *Watkins c. Olafson*, [1989] 2 R.C.S. 750, p. 762, nous met en garde. Comme l'a reconnu l'arrêt *Bhasin*, par. 40, même s'il peut être approprié de modifier la common law canadienne afin d'apporter une plus grande certitude et une meilleure cohérence, ce n'est pas le cas lorsqu'une telle modification entraînerait de l'incertitude et de l'incohérence.

[40] All that said, we should recognize that there are nuances with the anti-deprivation rule as it stands. For example, contractual provisions that eliminate property from the estate, but do not eliminate value, may not offend the anti-deprivation rule (see *Belmont*, at para. 160, per Lord Mance; *Borland's Trustee v. Steel Brothers & Co., Limited*, [1901]

[40] Cela étant dit, nous devons reconnaître que la règle anti-privation actuelle comporte des nuances. Par exemple, les stipulations contractuelles qui retirent certains biens de l'actif, sans pour autant réduire la valeur de ce dernier, peuvent ne pas violer la règle anti-privation (voir l'arrêt *Belmont*, par. 160, motifs de lord Mance; *Borland's Trustee c. Steel*

1 Ch. 279; see also *Coopérants*). Nor do provisions whose effect is triggered by an event other than insolvency or bankruptcy. Moreover, the anti-deprivation rule is not offended when commercial parties protect themselves against a contracting counterparty's insolvency by taking security, acquiring insurance, or requiring a third-party guarantee.

[41] In sum, the Court of Appeal was correct to consider whether the effect of the contractual provision was to deprive the estate of assets upon bankruptcy rather than whether the intention of the contracting parties was commercially reasonable.

VI. Application and the Effect of Set-Off

[42] This brings us to Chandos' final argument concerning the effect of set-off on the application of the anti-deprivation rule in this case. Set-off is given statutory approval in s. 97(3) of the *BIA*:

> **(3)** The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off or compensation is affected by the provisions of this Act respecting frauds or fraudulent preferences.

As this Court described in *Husky Oil*, at para. 3, s. 97(3) incorporates the provincial law of set-off (and the related civil law concept of compensation) into the federal bankruptcy regime. Set-off is a defence to the payment of a debt. The effect of set-off is to allow a creditor who happens to be also a debtor to recover ahead of their priority.

[43] The *BIA*'s affirmation of set-off and the anti-deprivation rule are not incompatible. While set-off reduces the value of assets that are transferred to the Trustee for redistribution, it is applicable only to enforceable debts or claims (see, e.g., *Holt v. Telford*, [1987] 2 S.C.R. 193, at pp. 204-6). The

Brothers & Co., Limited, [1901] 1 Ch. 279; voir aussi l'arrêt *Coopérants*). Il en va de même pour les stipulations dont l'effet est déclenché par autre chose qu'une insolvabilité ou une faillite. De plus, il n'y a pas de violation de la règle anti-privation lorsque des parties commerciales se protègent contre l'insolvabilité d'un cocontractant en obtenant une garantie ou une assurance ou en exigeant une garantie d'un tiers.

[41] En somme, la Cour d'appel s'est penchée à juste titre sur la question de savoir si l'effet de la stipulation était de réduire la valeur de l'actif en cas de faillite plutôt que sur celle de savoir si l'intention des parties contractantes était raisonnable sur le plan commercial.

VI. Application et effet de la compensation

[42] Cela nous amène à l'argument final de Chandos concernant l'effet de la compensation sur l'application de la règle anti-privation en l'espèce. La compensation est autorisée par le par. 97(3) de la *LFI* :

> **(3)** Les règles de la compensation s'appliquent à toutes les réclamations produites contre l'actif du failli, et aussi à toutes les actions intentées par le syndic pour le recouvrement des créances dues au failli, de la même manière et dans la même mesure que si le failli était demandeur ou défendeur, selon le cas, sauf en tant que toute réclamation pour compensation est atteinte par les dispositions de la présente loi concernant les fraudes ou préférences frauduleuses.

Comme la Cour l'a décrit au par. 3 de l'arrêt *Husky Oil*, le par. 97(3) incorpore les règles provinciales de la compensation (issues de la common law et du droit civil) au régime fédéral en matière de faillite. La compensation est un moyen de défense opposable au paiement d'une créance. Elle a pour effet d'autoriser un créancier qui se trouve être également un débiteur à être colloqué plus favorablement qu'il ne le serait suivant l'ordre de priorité établi par la loi.

[43] La reconnaissance de la compensation par la *LFI* et la règle anti-privation ne sont pas incompatibles. S'il est vrai que la compensation réduit la valeur des biens qui sont transférés au syndic pour redistribution, elle ne s'applique qu'aux dettes ou aux réclamations exigibles (voir, p. ex., *Holt c. Telford*,

TAB 11

Orphan Well Association and Alberta Energy Regulator *Appellants*

v.

Grant Thornton Limited and ATB Financial (formerly known as Alberta Treasury Branches) *Respondents*

and

Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Ecojustice Canada Society, Canadian Association of Petroleum Producers, Greenpeace Canada, Action Surface Rights Association, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers' Association *Interveners*

Indexed as: Orphan Well Association *v.* Grant Thornton Ltd.

2019 SCC 5

File No.: 37627.

2018: February 15; 2019: January 31.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Division of powers — Federal paramountcy — Bankruptcy and insolvency — Environmental law — Oil and gas — Oil and gas companies in Alberta required by provincial comprehensive licensing regime to assume end-of-life responsibilities with respect to oil wells, pipelines, and facilities — Provincial regulator administering licensing regime and enforcing end-of-life obligations pursuant to statutory powers — Trustee in bankruptcy of oil and gas company not taking responsibility for company's unproductive oil and gas assets and seeking to walk away from environmental liabilities

Orphan Well Association et Alberta Energy Regulator *Appelants*

c.

Grant Thornton Limited et ATB Financial (auparavant connue sous le nom d'Alberta Treasury Branches) *Intimées*

et

Procureure générale de l'Ontario, procureur général de la Colombie-Britannique, procureur général de la Saskatchewan, procureur général de l'Alberta, Ecojustice Canada Society, Association canadienne des producteurs pétroliers, Greenpeace Canada, Action Surface Rights Association, Association canadienne des professionnels de l'insolvabilité et de la réorganisation et Association des banquiers canadiens *Intervenants*

Répertorié : Orphan Well Association *c.* Grant Thornton Ltd.

2019 CSC 5

N° du greffe : 37627.

2018 : 15 février; 2019 : 31 janvier.

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

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

Droit constitutionnel — Partage des compétences — Prépondérance fédérale — Faillite et insolvabilité — Droit de l'environnement — Pétrole et gaz — Sociétés pétrolières et gazières de l'Alberta tenues par le régime provincial complet de délivrance de permis d'assumer des responsabilités de fin de vie à l'égard de puits de pétrole, de pipelines et d'installations — Organisme de réglementation provincial administrant le régime d'octroi de permis et assurant le respect des obligations de fin de vie en vertu des pouvoirs que lui confère la loi — Syndic de faillite d'une société pétrolière et gazière refusant d'assumer la

III. Analysis

A. *The Doctrine of Paramountcy*

[63] As I have explained, Alberta legislation grants the Regulator wide-ranging powers to ensure that companies that have been granted licences to operate in the Alberta oil and gas industry will safely and properly abandon oil wells, facilities and pipelines at the end of their productive lives and will reclaim their sites. GTL seeks to avoid being subject to two of those powers: the power to order Redwater to abandon the Renounced Assets and the power to refuse to allow a transfer of the licences for the Retained Assets due to unmet LMR requirements. There is no doubt that these are valid regulatory powers granted to the Regulator by valid Alberta legislation. GTL seeks to avoid their application during bankruptcy by virtue of the doctrine of federal paramountcy, which dictates that the Alberta legislation empowering the Regulator to use the powers in dispute in this appeal will be inoperative to the extent that its use of these powers during bankruptcy conflicts with the *BIA*.

[64] The issues in this appeal arise from what has been termed the "untidy intersection" of provincial environmental legislation and federal insolvency legislation (*Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111, at para. 8). Paramountcy issues frequently arise in the insolvency context. Given the procedural nature of the *BIA*, the bankruptcy regime relies heavily on the continued operation of provincial laws. However, s. 72(1) of the *BIA* confirms that, where there is a genuine conflict between provincial laws concerning property and civil rights and federal bankruptcy legislation, the *BIA* prevails (see *Moloney*, at para. 40). In other words, bankruptcy is carved out from property and civil rights but remains conceptually part of it. Valid provincial legislation of general application continues to apply in bankruptcy until Parliament legislates pursuant to its exclusive jurisdiction in relation to bankruptcy and insolvency. At that point,

III. Analyse

A. *La doctrine de la prépondérance fédérale*

[63] Comme je l'ai expliqué, la législation albertaine accorde à l'organisme de réglementation des pouvoirs étendus pour s'assurer que les sociétés qui ont obtenu des permis d'exploitation dans l'industrie pétrolière et gazière de l'Alberta abandonneront, de façon appropriée et sécuritaire, les puits de pétrole, installations et pipelines à la fin de leur vie productive, et remettront en état leurs sites. GTL cherche à éviter d'être assujetti à deux de ces pouvoirs : celui d'ordonner à Redwater d'abandonner les biens faisant l'objet de la renonciation et celui de refuser de permettre le transfert des permis relatifs aux biens conservés à cause du non-respect des exigences relatives à la CGR. Il s'agit là sans aucun doute de pouvoirs réglementaires valables accordés à l'organisme de réglementation par une loi albertaine valide. GTL cherche à éviter leur application au cours de la faillite en invoquant la doctrine de la prépondérance fédérale, selon laquelle la loi de l'Alberta habilitant l'organisme de réglementation à utiliser les pouvoirs qui sont en litige dans le cadre du présent pourvoi est inopérante dans la mesure où son exercice de ces pouvoirs pendant la faillite entre en conflit avec la *LFI*.

[64] Les questions en litige dans le présent pourvoi découlent de ce qu'on a appelé [TRADUCTION] l'« intersection désordonnée » de la législation provinciale sur l'environnement et de la législation fédérale sur l'insolvabilité (*Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111, par. 8). Les questions de prépondérance se posent souvent dans le contexte de l'insolvabilité. Étant donné la nature procédurale de la *LFI*, le régime de faillite repose en grande partie sur l'application continue des lois provinciales. Toutefois, le par. 72(1) de la *LFI* confirme qu'en cas de conflit véritable entre les lois provinciales concernant la propriété et les droits civils et la législation fédérale sur la faillite, la *LFI* l'emporte (voir *Moloney*, par. 40). En d'autres termes, la faillite est issue de la propriété et des droits civils, mais elle en fait toujours partie conceptuellement. Les lois provinciales valides d'application générale continuent de s'appliquer dans le domaine de la faillite jusqu'à ce

the provincial law becomes inoperative to the extent of the conflict (see *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 3).

[65] Over time, two distinct forms of conflict have been recognized. The first is *operational conflict*, which arises where compliance with both a valid federal law and a valid provincial law is impossible. Operational conflict arises "where one enactment says 'yes' and the other says 'no', such that 'compliance with one is defiance of the other'" (*Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 18, quoting *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191). The second is *frustration of purpose*, which occurs where the operation of a valid provincial law is incompatible with a federal legislative purpose. The effect of a provincial law may frustrate the purpose of the federal law, even though it does "not entail a direct violation of the federal law's provisions" (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 73). The party relying on frustration of purpose "must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose" (*Lemare*, at para. 26, quoting *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536, at para. 66).

[66] Under both branches of paramountcy, the burden of proof rests on the party alleging the conflict. This burden is not an easy one to satisfy, as the doctrine of paramountcy is to be applied with restraint. Conflict must be defined narrowly so that each level of government may act as freely as possible within its respective sphere of constitutional authority. "[H]armonious interpretations of federal and provincial legislation should be favoured over an interpretation that results in incompatibility . . . [i]n the absence of 'very clear' statutory language to the contrary" (*Lemare*, at paras. 21 and 27). "It is presumed that Parliament intends its laws to co-exist with provincial laws" (*Moloney*, at para. 27). As this Court found in *Lemare*, at paras. 22-23, the application of the

que le Parlement légifère en vertu de sa compétence exclusive en matière de faillite et d'insolvabilité. La loi provinciale devient alors inopérante dans la mesure du conflit (voir *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, par. 3).

[65] Au fil du temps, deux formes distinctes de conflit ont été reconnues. La première est le *conflit d'application*, qui survient lorsqu'il est impossible de se conformer en même temps à une loi fédérale valide et à une loi provinciale valide. Il y a conflit d'application lorsqu'« une loi dit "oui" et l'autre dit "non", de sorte que "l'observance de l'une entraîne l'inobservance de l'autre" » (*Saskatchewan (Procureur général) c. Lemare Lake Logging Ltd.*, 2015 CSC 53, [2015] 3 R.C.S. 419, par. 18, citant *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, p. 191). La seconde est l'*entrave à la réalisation d'un objet fédéral*, qui se produit lorsque l'application d'une loi provinciale valide est incompatible avec l'objet d'une loi fédérale. L'effet d'une loi provinciale peut contrecarrer la réalisation de l'objet de la loi fédérale, « sans toutefois entraîner une violation directe de ses dispositions » (*Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3, par. 73). La partie qui invoque l'entrave à la réalisation d'un objet fédéral « doit d'abord établir l'objet de la loi fédérale pertinente et ensuite prouver que la loi provinciale est incompatible avec cet objet » (*Lemare*, par. 26, citant *Québec (Procureur général) c. Canadian Owners and Pilots Association*, 2010 CSC 39, [2010] 2 R.C.S. 536, par. 66).

[66] Aux deux volets de la prépondérance, la charge de la preuve incombe à la partie qui allègue l'existence du conflit. Il n'est pas facile de s'en acquitter, puisque la doctrine de la prépondérance doit être appliquée avec retenue. Le conflit doit être défini de façon étroite pour que chaque ordre de gouvernement puisse agir aussi librement que possible dans sa sphère de compétence constitutionnelle respective. « [L]es tribunaux doivent donner aux lois provinciale et fédérale une interprétation harmonieuse plutôt qu'une interprétation qui donne lieu à une incompatibilité [. . .] [e]n l'absence d'un texte législatif "clair" à cet effet » (*Lemare*, par. 21 et 27). « On présume que le Parlement a l'intention de faire coexister ses lois avec les lois provinciales » (*Moloney*, par. 27).

doctrine of paramountcy should also give due weight to the principle of co-operative federalism. This principle allows for interplay and overlap between federal and provincial legislation. While co-operative federalism does not impose limits on the otherwise valid exercise of legislative power, it does mean that courts should avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with provincial legislation.

Comme le conclut notre Cour aux par. 22 et 23 de l'arrêt *Lemare*, l'application de la doctrine de la prépondérance devrait également tenir dûment compte du principe du fédéralisme coopératif. Ce principe permet l'interaction ainsi que le chevauchement entre les lois fédérales et provinciales. Bien que le fédéralisme coopératif n'impose pas de limites à l'exercice par ailleurs valide du pouvoir législatif, cela signifie que les tribunaux devraient éviter de donner à l'objet de la loi fédérale une interprétation large qui le mettrait en conflit avec la loi provinciale.

[67] The case law has established that the *BIA* as a whole is intended to further "two purposes: the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation" (*Moloney*, at para. 32, citing *Husky Oil*, at para. 7). Here, the bankrupt is a corporation that will never emerge from bankruptcy. Accordingly, only the former purpose is relevant. As I will discuss below, the chambers judge also spoke of the purposes of s. 14.06 as distinct from the broader purposes of the *BIA*. This Court has discussed the purpose of specific provisions of the *BIA* in previous cases — see, for example, *Lemare*, at para. 45.

[67] La jurisprudence a établi que la *LFI* dans son ensemble est censée favoriser l'atteinte de « deux objectifs : le partage équitable des biens du failli entre ses créanciers et la réhabilitation financière du failli » (*Moloney*, par. 32, citant *Husky Oil*, par. 7). En l'espèce, la faillie est une société qui ne s'extirpera jamais de la faillite. Donc, seul le premier objectif est pertinent. Comme je vais l'expliquer ci-dessous, le juge siégeant en cabinet a également affirmé que l'objet de l'art. 14.06 se distinguait des objets plus larges de la *LFI*. Notre Cour a analysé l'objet de certaines dispositions de la *LFI* dans des décisions antérieures (voir, par exemple, *Lemare*, par. 45).

[68] GTL has proposed two conflicts between the Alberta legislation establishing the disputed powers of the Regulator during bankruptcy and the *BIA*, either of which, it says, would have provided a sufficient basis for the order granted by the chambers judge.

[68] GTL a relevé deux conflits entre la législation albertaine établissant les pouvoirs contestés de l'organisme de réglementation pendant la faillite et la *LFI*, et l'un ou l'autre aurait constitué, selon lui, un fondement suffisant pour l'ordonnance rendue par le juge siégeant en cabinet.

[69] The first conflict proposed by GTL results from the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act*. GTL says that s. 14.06(4) releases it from all environmental liability associated with the Renounced Assets after a valid "disclaimer" is made. But as a "licensee", it can be required by the Regulator to satisfy all of Redwater's statutory obligations and liabilities, which disregards the "disclaimer" of the Renounced Assets. GTL further notes the possibility that it may be held personally liable as a "licensee". In response, the Regulator says that s. 14.06(4) is concerned primarily with protecting trustees from personal liability in relation to environmental orders, and does not affect the ongoing responsibilities of the bankrupt

[69] Le premier conflit avancé par GTL découle de l'ajout des syndics à la définition de « titulaire de permis » qui figure dans l'*OGCA* et la *Pipeline Act*. GTL affirme que le par. 14.06(4) le soustrait à tout engagement environnemental associé aux biens faisant l'objet d'une « renonciation » valide. Toutefois, comme il est « titulaire de permis », l'organisme de réglementation peut l'obliger à s'acquitter de toutes les obligations et de tous les engagements légaux de Redwater, faisant ainsi abstraction de la « renonciation » aux biens en cause. GTL souligne en outre la possibilité qu'il soit tenu personnellement responsable en tant que « titulaire de permis ». L'organisme de réglementation réplique que le par. 14.06(4) a pour objectif premier de mettre les syndics à l'abri de toute

estate. Thus, as long as a trustee is protected from personal liability, no conflict arises from its status as a "licensee" or from the fact that the bankrupt estate remains responsible under provincial law for the ongoing environmental obligations associated with "disclaimed" assets.

[70] The second conflict proposed by GTL is that, even if s. 14.06(4) is only concerned with a trustee's personal liability, the Regulator's use of its statutory powers effectively reorders the priorities in bankruptcy established by the *BIA*. Such reordering is said to be caused by the fact that the Regulator requires the expenditure of estate assets to comply with the Abandonment Orders and to discharge or secure the environmental liabilities associated with the Renounced Assets before it will approve a transfer of the licences for the Retained Assets (in keeping with the LMR requirements). These end-of-life obligations are said by GTL to be unsecured claims held by the Regulator, which cannot, under the *BIA*, be satisfied in preference over the claims of Redwater's secured creditors. In response, the Regulator says that, on the proper application of the *Abitibi* test, these environmental regulatory obligations are not provable claims in bankruptcy. Accordingly, says the Regulator, the provincial laws requiring the Redwater estate to satisfy these obligations prior to the distribution of its assets to secured creditors do not conflict with the priority scheme in the *BIA*.

[71] I will consider each alleged conflict in turn.

B. *Is There a Conflict Between the Alberta Regulatory Scheme and Section 14.06 of the BIA?*

[72] As a statutory scheme, s. 14.06 of the *BIA* raises numerous interpretive issues. As noted by Martin J.A., the only matter concerning s. 14.06 on

responsabilité personnelle à l'égard des ordonnances environnementales et que cette disposition n'a aucune incidence sur les responsabilités continues de l'actif du failli. Ainsi, tant qu'un syndic est à l'abri de toute responsabilité personnelle, son statut de « titulaire de permis » et le fait que l'actif d'un failli demeure responsable, aux termes du droit provincial, des obligations environnementales continues associées aux éléments le composant et faisant l'objet de la renonciation ne sont à l'origine d'aucun conflit.

[70] Le second conflit allégué par GTL est que, même si le par. 14.06(4) ne porte que la responsabilité personnelle d'un syndic, l'exercice par l'organisme de réglementation des pouvoirs que lui confère la loi réarrange de fait les priorités établies par la *LFI* en matière de faillite. Un tel réarrangement serait imputable au fait que l'organisme de réglementation exige la dépense d'éléments d'actif pour respecter les ordonnances d'abandon ainsi que pour libérer ou garantir les engagements environnementaux associés aux biens faisant l'objet de la renonciation avant d'approuver un transfert des permis liés aux biens conservés (conformément aux exigences relatives à la CGR). Ces obligations de fin de vie sont considérées par GTL comme étant une créance ordinaire de l'organisme de réglementation, que la *LFI* ne permet pas d'acquitter de préférence aux réclamations des créanciers garantis de Redwater. L'organisme de réglementation réplique que, si l'on applique correctement le critère d'*Abitibi*, ces obligations réglementaires environnementales ne sont pas des réclamations prouvables en matière de faillite. En conséquence, selon l'organisme de réglementation, les lois provinciales exigeant que l'actif de Redwater satisfasse à ces obligations avant le partage, entre les créanciers garantis, des éléments dont il est composé n'entre pas en conflit avec le régime de priorité de la *LFI*.

[71] J'examinerai chacun des conflits allégués, l'un après l'autre.

B. *Y a-t-il un conflit entre le régime de réglementation albertain et l'art. 14.06 de la LFI?*

[72] En tant que régime législatif, l'art. 14.06 de la *LFI* soulève de nombreuses questions d'interprétation. Comme l'a fait remarquer la juge Martin, le seul

TAB 12

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l’insolvabilité

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

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

Current to December 2, 2025

Last amended on December 12, 2024

À jour au 2 décembre 2025

Dernière modification le 12 décembre 2024

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Property included for enforcement purposes

(15) For the purpose of this section, a requirement that a bankrupt pay an amount to the estate is enforceable against the bankrupt's total income.

When obligation to pay ceases

(16) If an opposition to the automatic discharge of a bankrupt individual who is required to pay an amount to the estate is filed, the bankrupt's obligation under this section ceases on the day on which the bankrupt would have been automatically discharged had the opposition not been filed, but nothing in this subsection precludes the court from determining that the bankrupt is required to pay to the estate an amount that the court considers appropriate.

R.S., 1985, c. B-3, s. 68; 1992, c. 27, s. 34; 1997, c. 12, s. 60; 2005, c. 47, s. 58; 2007, c. 36, s. 33.

Assignment of wages

68.1 (1) An assignment of existing or future wages made by a debtor before the debtor became bankrupt is of no effect in respect of wages earned after the bankruptcy.

Assignment of book debts

(2) An assignment of existing or future amounts receivable as payment for or commission or professional fees in respect of services rendered by a debtor who is an individual before the debtor became bankrupt is of no effect in respect of such amounts earned or generated after the bankruptcy.

1992, c. 27, s. 35; 1997, c. 12, s. 61; 2005, c. 47, s. 59.

Stay of Proceedings

Stay of proceedings — notice of intention

69 (1) Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on

(i) the insolvent person's insolvency,

(ii) the default by the insolvent person of an obligation under the security agreement, or

Biens pouvant faire l'objet d'une exécution

(15) Pour l'application du présent article, la somme à verser à l'actif de la faillite peut être recouvrée par voie d'exécution contre le revenu total du failli.

Cessation des versements

(16) L'obligation du failli qui est une personne physique de faire des versements à l'actif de la faillite au titre du présent article cesse, en cas d'opposition à sa libération d'office, le jour où il aurait été libéré n'eût été l'avis d'opposition, rien n'empêchant toutefois le tribunal de reconduire l'obligation pour la somme qu'il estime indiquée.

L.R. (1985), ch. B-3, art. 68; 1992, ch. 27, art. 34; 1997, ch. 12, art. 60; 2005, ch. 47, art. 58; 2007, ch. 36, art. 33.

Cession de salaire

68.1 (1) La cession de salaires présents ou futurs faite par le débiteur avant qu'il ne devienne un failli est sans effet sur les salaires gagnés après sa faillite.

Cession de créances comptables

(2) La cession de sommes — échues ou à percevoir — à titre de paiement, de commission ou d'honoraires professionnels pour la prestation de services, faite par un débiteur qui est une personne physique avant qu'il ne fasse faillite, est sans effet sur les sommes de même provenance qui sont gagnées après sa faillite.

1992, ch. 27, art. 35; 1997, ch. 12, art. 61; 2005, ch. 47, art. 59.

Suspension des procédures

Suspension des procédures en cas d'avis d'intention

69 (1) Sous réserve des paragraphes (2) et (3) et des articles 69.4, 69.5 et 69.6, entre la date du dépôt par une personne insolvable d'un avis d'intention aux termes de l'article 50.4 et la date du dépôt, aux termes du paragraphe 62(1), d'une proposition relative à cette personne ou la date à laquelle celle-ci devient un failli :

a) les créanciers n'ont aucun recours contre la personne insolvable ou contre ses biens et ne peuvent intenter ou continuer aucune action, exécution ou autre procédure en vue du recouvrement de réclamations prouvables en matière de faillite;

b) est sans effet toute disposition d'un contrat de garantie conclu entre la personne insolvable et un créancier garanti qui prévoit, pour l'essentiel, que celle-ci, dès qu'elle devient insolvable, qu'elle manque à un engagement prévu par le contrat de garantie ou qu'elle

(iii) the filing by the insolvent person of a notice of intention under section 50.4,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as he would otherwise have, has any force or effect,

(c) Her Majesty in right of Canada may not exercise Her rights under

(i) subsection 224(1.2) of the *Income Tax Act*, or

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that

(A) refers to subsection 224(1.2) of the *Income Tax Act*, and

(B) provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts,

in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, and

(d) Her Majesty in right of a province may not exercise her rights under any provision of provincial legislation in respect of the insolvent person where the insolvent person is a debtor under the provincial legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

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

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

until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.

dépose un avis d'intention aux termes de l'article 50.4, est déchue des droits qu'elle aurait normalement de se servir des avoirs visés par le contrat de garantie ou de faire d'autres opérations à leur égard;

c) est suspendu l'exercice par Sa Majesté du chef du Canada des droits que lui confère l'une des dispositions suivantes à l'égard de la personne insolvable, lorsque celle-ci est un débiteur fiscal visé à cette disposition :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui, à la fois :

(A) renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(B) prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi et des intérêts, pénalités ou autres montants y afférents;

d) est suspendu l'exercice par Sa Majesté du chef d'une province des droits que lui confère toute disposition législative provinciale à l'égard d'une personne insolvable, lorsque celle-ci est un débiteur visé par la loi provinciale et qu'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

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

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

Limitation

(2) The stays provided by subsection (1) do not apply

(a) to prevent a secured creditor who took possession of secured assets of the insolvent person for the purpose of realization before the notice of intention under section 50.4 was filed from dealing with those assets;

(b) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person more than ten days before the notice of intention under section 50.4 was filed, from enforcing that security, unless the secured creditor consents to the stay;

(c) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security from enforcing the security if the insolvent person has, under subsection 244(2), consented to the enforcement action; or

(d) [Repealed, 2012, c. 31, s. 416]

Limitation

(3) A stay provided by paragraph (1)(c) or (d) does not apply, or terminates, in respect of Her Majesty in right of Canada and every province if

(a) the insolvent person defaults on payment of any amount that becomes due to Her Majesty after the filing of the notice of intention and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax

Exceptions

(2) Le paragraphe (1) n'a pas pour effet :

a) d'empêcher le créancier garanti de faire des opérations à l'égard des avoirs garantis de la personne insolvable dont il a pris possession — en vue de les réaliser — avant le dépôt de l'avis d'intention prévu à l'article 50.4;

b) d'empêcher le créancier garanti, sauf s'il a consenti à la suspension, qui a donné le préavis prévu au paragraphe 244(1) plus de dix jours avant le dépôt de l'avis d'intention prévu à l'article 50.4 de mettre à exécution sa garantie;

c) d'empêcher le créancier garanti qui a donné le préavis prévu au paragraphe 244(1) de mettre à exécution sa garantie si la personne insolvable a consenti à l'exécution au titre du paragraphe 244(2).

d) [Abrogé, 2012, ch. 31, art. 416]

Exception

(3) L'alinéa (1)c) ou d) ne s'applique pas, ou cesse de s'appliquer, à Sa Majesté du chef du Canada ou de la province en cause dans les cas suivants :

a) la personne insolvable manque à ses obligations de paiement d'un montant qui devient dû à Sa Majesté après le dépôt de l'avis d'intention et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

imposed on individuals under the *Income Tax Act*, or

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

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising Her rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

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

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

R.S., 1985, c. B-3, s. 69; 1992, c. 27, s. 36; 1997, c. 12, s. 62; 2000, c. 30, s. 145; 2005, c. 3, s. 12, c. 47, s. 60; 2007, c. 36, s. 34; 2009, c. 33, s. 23; 2012, c. 31, s. 416.

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

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

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

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

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si

TAB 13

Court of King's Bench of Alberta

Citation: Blade Energy Services Corp (Re), 2024 ABKB 100

Date: 20240221
Dockets: B301 037330; B301 037334
B301 037338; B301 037340
Registry: Calgary

In the Matter of the Notice of Intention to Make a Proposal of

Docket: B301 037330

Between:

FTI Consulting Canada Inc

Applicant

- and -

Blade Energy Services Corp

Respondent

In the Matter of the Notice of Intention to Make a Proposal of

Docket: B301 037334

Between:

FTI Consulting Canada Inc

Applicant

- and -

Razor Energy Corp

Respondent

In the Matter of the Notice of Intention to Make a Proposal of

Docket: B301 037338

Between:

FTI Consulting Canada Inc

Applicant

- and -

Razor Holdings GP Corp

Respondent

In the Matter of the Notice of Intention to Make a Proposal of

Docket: B301 037340

Between:

FTI Consulting Canada Inc

Applicant

- and -

Razor Royalties Limited Partnership

Respondent

Reasons for Judgment
of
Honourable Justice M. J. Lema

I. Introduction

[1] Is the arrears-triggered disconnection (or lockout) of a gas producer by a gas-plant operator a continuing remedy and accordingly one stayed under the producer's notice-of-intention proceedings under the *Bankruptcy and Insolvency Act*?

[2] The producer seeks an order declaring that the stay applies and directing reconnection to the gas-gathering system and processing of its production on certain payment terms.

[3] The operator characterizes the lockout as a completed step and thus, not offside the *BIA* stay. Alternatively, if the stay applies and reconnection follows, the operator seeks going-forward terms including immediate payment, a critical-supplier's charge, and payment of some of the existing arrears.

[4] I find that the lockout was a continuing remedy, that it was stayed when the *BIA* notice of intention was filed, that reconnection is required, and that, with the stay not applying to any post-NOI arrears that may accrue, the parties' existing agreements will govern future services and payments for them i.e., without the Court setting such terms.

II. Background

[5] Razor and Conifer are oil and gas producers. Conifer is also the operator of a gas plant in the South Swan Hills area in which both are producing natural gas.

[6] Per Conifer, Razor owes approximately $8 million to it, relating in part to processing-charge and capital-cost shortfalls. Razor disputes that figure.

[7] After long-running attempts to negotiate the clearance of those arrears, Conifer notified Razor that, relying on a right in their operating-procedure agreement, it intended to disconnect Razor from the gas-gathering system if it did not clear its arrears or agree to a satisfactory payment arrangement.

[8] Neither happened, eventually leading to Conifer disconnecting Razor from the system, Razor shortly afterwards filing a notice of intention to file a proposal under the *Bankruptcy and Insolvency Act*, and the current debate over the scope of the resulting stay and its impact (if any) on the lockout.

III. Issues

[9] The first issue is whether the lockout constitutes a continuing debt-collection remedy. If so, it is stayed by the *BIA* stay. The second is the appropriate remedy in such case. Assuming it includes reconnection, the third is on what term(s) should future services be provided by Conifer.

IV. Analysis

A. Stay provision

[10] Here is the applicable *BIA* provision (para 69(1)(a)):

> Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6 [none of which apply here, at least not currently], on the filing of a notice of intention under section 50.4 by an insolvent person,
>
> (a) no creditor has **any remedy** against the insolvent person or the insolvent person's property, or shall commence or continue **any** action, execution or **other proceedings**, for the recovery of a claim provable in bankruptcy[.] [emphasis added]

[11] Conifer did not argue, and it could not plausibly have argued, that Razor is not an insolvent person, that a notice of intention has not been filed, or that its claim for contractual amounts owing by Razor through to the lockout is not a claim provable in bankruptcy i.e. would not fall within the scope of s 121 *BIA* if a bankruptcy had occurred on the NOI filing date.

[12] Leaving the questions of whether the lockout constitutes a remedy or other proceeding (or both) and, if so, whether the stay captures the lockout when it occurred before the NOI was filed.

[13] I start by examining the scope of the key terms here.

B. Broad scope of "remedy" and "other proceedings"

[14] The scope of "remedy" and "other proceedings" is broad, including both judicial and extrajudicial debt-collection steps. Per ***Vachon v Canada Employment and Immigration Commission***, [1985] 2 SCR 417:

> Appellant in my view properly relied upon the English version of s. 49(1) of the *Bankruptcy Act*, where the word *recours* is rendered by the word "remedy", **giving to it and to the words "*autres procédures*" ("other proceedings") a very broad meaning which covers any kind of attempt at recovery, judicial or extrajudicial.** *Black's Law Dictionary* (5th ed. 1979), defines "remedy":
>
> > The **means by which a right is enforced** or the violation of a right is prevented, redressed, or compensated.
>
> and below:
>
> > Remedy means **any remedial right** to which an aggrieved party is entitled with or without resort to a tribunal.
>
> *Jowitt's Dictionary of English Law* (2nd ed. 1977), vol. 2, gives an almost identical definition:
>
> > **the means by which the violation of a right is prevented, redressed, or compensated**. Remedies are of four kinds: (1) by act of the party injured . . .; (2) by operation of law . . .; (3) **by agreement between the parties** ...; (4) by judicial remedy, *e.g.* action or suit. **The last are called judicial remedies, as opposed to the first three classes which are extrajudicial.**
>
> The courts have also interpreted the stay of proceedings imposed by s. 49(1) of the *Bankruptcy Act* **very broadly**.
>
> [discussion of cases involving distress for unpaid municipal taxes, incomplete seizures, and bids to cut off utilities].
>
> This Court of course does not have to decide whether the conclusions of these judgments are correct, but in my opinion **the courts were right to give, expressly or by implication, a broad meaning to the stay of proceedings imposed by s. 49(1) of the *Bankruptcy Act*. This broad meaning is confirmed by the fact that the legislator took the trouble to exclude actions against either the creditor or his property.**

> As Houlden and Morawetz wrote in *Bankruptcy Law of Canada*, vol. 1, p. F-70.1, under s. 49 of the *Bankruptcy Act*:
>
> > **An ordinary unsecured creditor with a claim provable in bankruptcy can only obtain payment of that claim subject to and in accordance with the terms of the Bankruptcy Act. The procedure laid down by that Act completely excludes any other remedy or procedure.**
>
> The *Bankruptcy Act* governs bankruptcy in all its aspects. It is therefore understandable that **the legislator wished to suspend all proceedings, administrative or judicial, so that all the objectives of the Act could be attained.**
>
> Accordingly, I consider that s. 49(1) of the *Bankruptcy Act* is sufficiently broad to include recovery by retention from subsequent [unemployment-insurance] benefits, such as the recovery at issue here. [paras 21-31] [emphasis added]

[15] Recall as well that para 69(1)(a) refers to "**any** remedy" and "**any** … other proceedings", without any limitation to legal remedies or proceedings.

[16] Further examples of extrajudicial steps found to constitute "remedies" or "proceedings" include:

- **setting off** current payments (for coal deliveries) against pre-existing arrears: ***Quintette Coal Ltd v Nippon Steel Corp***, 1990 CanLII 430 (BCCA), found to fall within the scope of a s 11 *CCAA* stay of "proceedings" (see paragraph beginning "Quintette continued to make coal deliveries …" and paragraphs from that beginning with "It is evident from the above that …" .. up to and including that beginning with "As Thackray, J. has not been shown to have erred …"]
- "**sweeping [the debtor's] operating account** and **[capping]** the amount available to [the debtor] [under a **revolving credit facility**]: ***Heritage Flooring BIA Proposal (Re)***, 2004 NBQB 168 (para 82);
- **distraining** for unpaid rent: ***Ford Credit Canada Ltd v Crosbie Realty Ltd***, 1992 CanLII 7132 (NLCA) (paras 21-26) and ***Durham Sports Barn Inc (bankruptcy proposal)***, 2020 ONSC 5938 (42-49);
- **registering a caveat** as a prelude to enforcing a condominium levy: ***Condominium Plan No 78R15349 v Fayad***, 2001 SKQB 104 (paras 23 and 24); and
- seeking an **injunction to enforce continued business operations** in leased premises: ***Golden Griddle Corp v Fort Erie Truck & Travel Plaza Inc***, 2005 CanLII 81263 (ONSC) (paras 11-15).

[17] The focus of such steps is collection or attempted collection of existing indebtedness i.e. "remedies" or "other proceedings" for the "recovery of claims provable in bankruptcy."

[18] By contrast, **terminating an agreement** was found to fall outside the scope of s. 69: ***Canadian Petcetera Limited Partnership v 2876 R Holdings Ltd***, 2010 BCCA 469 (paras 20, 28

and 29). For the same (outside scope of s 69) treatment of **contract termination**, see also ***Hutchingame Growth Capital Corporation v Independent Electricity System Operator***, 2020 ONCA 430 (paras 32-26) (leave denied: 2021 CanLII 2823 (SCC)). Examples of the same treatment in a landlord-tenant context include ***Peel Housing Corp v Siewnarine***, 2008 CanLII 31815 (ONSC DC) (paras 12-26) and ***BCIMC Realty Corporation v Fernandes***, 2021 CanLII 140640 (ON LTB) (determinations 1-7).

[19] The distinction with termination is the focus on ending the commercial relationship, not on recovery of outstanding arrears.

[20] I note that Conifer does not argue that the agreement in question has terminated, whether because of Razor's defaults or otherwise.

[21] Other "outside scope" examples noted in ***Canadian Petcetera*** are seeking *Criminal Code* **compensation orders**, pursuing a **contempt order**, or **enforcing post-bankruptcy indebtedness** (paras 30 and 31), all found not to involve claims provable in the insolvency proceeding. (I discuss the latter aspect later, with "post-bankruptcy" translated to "post-NOI".)

C. Purpose of stay

[22] ***Golden Griddle*** (cited above) accurately describes the purpose of staying such remedies and proceedings in a proposal setting:

> While I agree that the word "remedy" in section 69(1)(a) should be given a broad interpretation, it must be a purposive one that is in accord with the objectives of the BIA generally, and in particular, the specific purposes of the stay provisions against secured and unsecured creditors, **giving**, in the words of E.B. Leonard and K.G. Marantz in their article, "Debt restructuring under the *Bankruptcy and Insolvency Act*, June 1, 1995 – Stays of Proceedings, under the *Bankruptcy and Insolvency Act"* (for the 1995 Insolvency Institute of Canada lectures), **"a reorganizing debtor an opportunity to have some 'breathing room' during which to negotiate with its creditors and hopefully put together a prospective financial restructuring which would meet their requirements."**
>
> A purposive definition of the word "remedy" in section 69(1)(a) would suggest that, **remedies which in any way hinder or could impair that process are caught within the section and are stayed**. The issue 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. Therefore, if the injunctive relief sought detrimentally affects or could impair the ability of the insolvent person to put forth a proposal, it should be stayed**, whereas, if the nature of the injunction sought would have no effect whatsoever on that ability, it should not be stayed.
>
> The nature of the injunctive relief sought here is to restrain the defendants from operating a restaurant other than a Golden Griddle and a convenience store other than a Nicholby's, and to restrain the defendants from terminating the lease arrangements. It is, in a sense, a **mandatory injunction that is sought to continue to have the defendants operate the outlets as a Golden Griddle restaurant and as a Nicholby's**. To operate as a Golden Griddle restaurant

requires compliance by the defendants with the franchise agreement provisions such as meeting certain standards and operating procedures, selling only approved products and services, purchasing food products and supplies from designated suppliers and maintaining adequate inventory and adequately trained personnel.

To enforce such provisions during the proposal period, in my view, would be a remedy which would interfere with the "breathing space" that section 69(1)(a) was meant to create, and, could have implications for and could impair the debtor's ability to restructure and put forth a proposal.

I, therefore find that the **nature of the injunctive relief sought here is such that because of its potential impact on the restructuring process it is caught by the wording of section 69(1)(a) and is, therefore, stayed**. [paras 11-15] [emphasis added]

D. Nature of lockout per Conifer

[23] Conifer itself recognizes the remedial nature of its lockout step. Per the February 15, 2024 Affidavit of its deponent (Heather Wilkins – Conifer's VP Finance):

> On or around December 23, 2023, **after multiple attempts to get Razor to address its arrears**, Conifer exercised its rights under section 602(b)(ii) of the [Construction, Ownership and Operation Agreement], and **stopped receiving and processing Razor's gas by physically closing and locking valves** at 16 separate points within the South Swan Hills Gas Gathering System **on the basis of close to $8 million in unpaid arrears**. [para 8]
>
> Conifer has not received any payments and **no further enforcement steps** were taken following the disconnecting of services. [para 9]
>
> **Due to Razor's unwillingness to address its obligations**, on or about November 2, 2023, conifer notified Razor that Conifer would **revoke Razor's privileges and disconnect services** at the Judy Creek Gas Plant in seven days … **if Razor failed to remedy its arrears and bring its account into good standing.** … [para 28]
>
> … Conifer reiterated that **it would disconnect Razor's Services within seven days if Razor did not implement a monthly payment plan to bring its account into good standing**. [para 31]
>
> On December 20, 2023, Conifer wrote … to Razor that [a certain] proposal was not acceptable, and that **Conifer would follow through with Service Disconnection if Conifer did not receive at least $2.5 million to pay towards Razor's arrears** by December 22, 2023. … [para 34]
>
> On December 29, 2023 …, Conifer completed the Fuel Disconnection. At that time, **service to Razor's South Swan Hills Unit assets was completely disconnected from the fuel supply at the Judy Creek Gas Plant** with the exception of one generator running for building heat and pipeline tracers to preserve infrastructure integrity. [para 42]

> I confirm that **Conifer has taken no further steps to enforce payment of Razor's arrears since the Fuel Disconnection** on December 29, 2023. [emphasis added]

[24] Conifer did not argue that its exercise of the described disconnection step, one its contractual rights under the agreement in question with Razor (and other parties), was not a "remedy" or "other proceeding" within the meaning of para 69(1)(a).

[25] Nor could it plausibly have done so, given the above-described breadth of the provision and the clearly acknowledged use of the lockout right to recover, or try to recover, Razor's arrears. Per ***Vachon***, this was undoubtedly "[a] kind of attempt at recovery, judicial or extrajudicial" of amounts qualifying as a "provable claim in bankruptcy."

[26] By invoking the lockout provision of its agreement with Razor (and others), Conifer was attempting to extract payment from Razor of the approximately $8 million in arrears claimed by Conifer (not all of which are acknowledged by Razor) or some subset satisfactory to Conifer and accompanied by a satisfactory payment arrangement for the balance.

[27] As was acknowledged by Conifer's counsel in the bolded passages below:

> … Conifer is preserving the *status quo*, which as of the date of Disconnection means **no further Services will be provided without the substantial past accounts being paid or satisfactory arrangements being reached.**
>
> The key question in determining this [legitimacy-of-disconnection] issue is whether or not Conifer **already exercised its rights** prior to Razor filing its NOI. If it has, the issue is moot; **Conifer cannot breach the stay for an action taken prior to the existence of the Stay**, which was only triggered by the filing of the NOI.
>
> Conifer agrees that the Stay was created pursuant to section 69(1)(a) of the *BIA*; however, Razor's submissions fail to acknowledge two key points: (1) **the remedy, in this case the Disconnection and cessation of the Services, was exercised on notice and prior to January 30, 2024 when Razor filed the NOI**; and (2) the Disconnection was implemented to prevent further costs from being incurred in the face of Razor's continued payment arrears. …
>
> Conifer reasonably exercised its rights by ceasing to provide Services at a loss through implementing the Disconnection when Razor failed to provide a viable plan to address its arrears. **The Disconnection was not a continuing action as characterized by Razor but rather a one-time permanent step** taken in December 2023 resulting from the disconnection at 16 separate points within the South Swan Hills Gas Gathering System. [Conifer brief, paras 12-15] [emphasis added]

[28] As seen here, Conifer is not arguing that its lockout step was not a remedy or other proceeding per para 69(1)(a), instead that the remedy was taken *and completed* before the NOI was filed and, having no ongoing effect, is thus beyond the reach of the NOI-triggered stay. (It also anchors the lockout in the anticipated avoidance of further losses, which I discuss later.)

[29] It is common ground that the lockout occurred, or at least began, before the NOI was filed.