Court File No. 31-2610052
Estate No. 31-2610052

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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 **YUAN HUA (MIKE) WANG**

APPLICATION UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

Court File No. CV-18-608313-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **FORME DEVELOPMENT GROUP INC**. AND OTHER COMPANIES LISTED ON SCHEDULE "A" HERETO

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

BOOK OF AUTHORITIES OF FERINA CONSTRUCTION LIMITED

(Motions returnable March 31, 2020)

March 17, 2020

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SCHEDULE "A"
THE APPLICANTS

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1296 Kennedy Development Inc.
1326 Wilson Development Inc.
5507 River Development Inc.
4439 John Development Inc.
2358825 Ontario Ltd.
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In the Matter of the notice of Intention to Make a Proposal of Andover Mining Corp.

In the Matter of the Application by Enirgi Group Corporation under ss. 50.4(11) and 47.1(1)(b) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-5

Enirgi Group Corporation Creditor and Andover Mining Corp. Insolvent Person

Steeves J.

Heard: September 24, 2013
Judgment: October 4, 2013
Docket: Vancouver B131136

Counsel: D.R. Brown, M. Nied for Creditor
M.R. Davies for Insolvent Person

Subject: Insolvency; Contracts; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.a Extension of time
Headnote
Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time
Creditor held three promissory notes against debtor — Debtor filed intention to file proposal — Debtor brought application for extension of time for filing proposal for period of 45 days — Creditor brought application for declaration that debtor's attempt to file proposal be immediately terminated, debtor be deemed bankrupt and trustee be appointed — Parties disputed which application should prevail — Application by debtor allowed; application by creditor dismissed with leave to reapply — Debtor had significant assets — It was likely that debtor would be able to present viable proposal — Debtor acted in good faith and with due diligence in attempting to construct proposal — There was no material prejudice to creditor if extension was granted — If debtor presented proposal, creditor would have opportunity to decide its position — Debtor was entitled to have its application considered on merits — If debtor's application was not meritorious it was logical to proceed with creditor's application.
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s. 50.4(11)(b) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11)(c) [en. 1992, c. 27, s. 19] — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

APPLICATION by debtor for extension of time for filing proposal; APPLICATION by creditor for declaration that debtor's attempt to file proposal be immediately terminated, debtor be deemed bankrupt and trustee be appointed.

***Steeves J.*:**

Introduction

1 Enirgi Group Corporation ("Enirgi") holds three promissory notes (by means of assignment) with a total value of $6.5 million against Andover Mining Corp. ("Andover"). One of the notes, in the amount of $2.5 million, was due on October 1, 2012 and it has not been paid. In August 2013 Andover filed an intention to file a proposal under s. 50.4(1) of the *Bankruptcy and Insolvency Act* R.S.C. 1985 c. B-3 ("*BIA*"). That proposal expires on October 4, 2013.

2 This is a decision about two applications related to those notes.

3 Andover seeks an order pursuant to s. 50.4(9) of the *BIA* for an extension of time for the filing of a proposal for a period of 45 days. According to Andover it has acted, and is acting, in good faith and with due diligence. Further, it would likely be able to make a viable proposal if the extension was granted and no creditor would be materially prejudiced if the extension was granted. Andover also submits that it has significantly more assets than debts and Enirgi has persistently been disruptive of the affairs of Andover as part of a campaign to target the assets of Andover.

4 The second application is by Enirgi pursuant to s. 50.4(11) of the *BIA*. It seeks declarations that Andover's attempt to file a proposal is immediately terminated, a previous stay of proceedings is lifted, Andover is deemed bankrupt and a trustee in bankruptcy is appointed. The primary basis for Enirgi's application is the submission that Andover will not be able to make a proposal before the expiration of the period in question that will be accepted by Enirgi. Enirgi disputes that Andover has significantly more assets than debts. It also submits that it has a veto over any proposal by Andover because it is the largest creditor, it has lost faith in Andover's ability to manage its assets and it is concerned that Andover is restructuring its affairs to dissipate its assets. In the alternative, if there is to be an extension of Andover's proposal, Enirgi submits that a receiver should be appointed pursuant to 47.1 of the *BIA* to ensure transparency and fairness.

5 Each party submits that its application should supersede the application of the other party. There are also disputes between the parties about a number of factual issues set out in affidavit evidence.

Background

6 Andover is an advanced mineral exploration company incorporated under the laws of British Columbia in 2003. Its shares have been listed for trading on the TSX Venture Exchange since 2006. As of September 6, 2013 approximately 12,000,000 shares of Andover were issued and outstanding with more than 398 shareholders. Andover had a market capitalization of about $9 million, as of September 14, 2013; its payroll is $2,441 per month. According to publicly available audited financial statements, as of March 31, 2013, Andover had $42.5 million of assets and $9.1 million of liabilities.

7 Andover has two main assets. It owns 83.5% of Chief Consolidated Mining Company ("Chief") that owns extensive amounts of land and mining equipment in Utah, U.S.A. Andover also owns 100% of the shares of Andover Alaska Inc. ("Alaska"), a company with large land holdings and mineral claims in Alaska, U.S.A. Affidavit evidence from Andover is that it has the prospect of significant and imminent cash flow from more than one project. This is discussed below.

8 Enirgi is a natural resources development company incorporated under the laws of Canada.

9 In 2011 and 2012 Andover issued non-interest bearing, unsecured promissory notes to Sentient Global Resources Fund IV ("Sentient"). The first note was dated September 23, 2011 with a principal of $2.5 million and a maturity date of October 1, 2012. The second note was dated April 30, 2012 with a principal of $2.5 million and a maturity date of May 1, 2014. The third note was dated August 31, 2012, the principal was $1.5 million and the maturity date was September 1, 2014.

10 In September 2012 there were discussions between Andover, Enirgi and Chief in regards to a potential joint venture, with the possibility that Enirgi would take majority ownership of Andover. A memorandum of understanding was executed and Enirgi commenced a process of due diligence. According to Enirgi, the due diligence revealed a complex joint venture agreement between Chief and another company. Ultimately, in March 2013, the parties were not able to agree on terms that were commercially acceptable to Enirgi. On March 27, 2013 Sentient assigned the above three promissory notes to Enirgi including all of the rights and obligations of Sentient under the terms of the notes. These notes are the subject of the current applications. According to Enirgi, it made a reasonable business decision to cease discussions with Enirgi, it became the assignee of the three promissory notes and it then sought repayment of the first promissory note.

11 Andover had not paid the first promissory note at this time, March 2013 (and it had not been paid up to the date of the hearing of these applications). According to Andover, the reason it was not paid on the due date was because there was an expectation that Sentient and then Enirgi would become a partner of Andover in the joint venture (or something more significant) and discussions on this were taking place as late as January 2013. The expectation of all parties, according to Andover, was that any agreement would have included cancellation of the first promissory note. Andover says Enirgi knew this and agreed to it.

12 By letter dated April 5, 2013 Enirgi advised Andover of the assignment of the notes from Sentient to it and that the full amount of the first note (with a maturity date of October 1, 2012) remained outstanding. The letter also expressly put Andover on notice that demand for repayment could occur at any time. According to Andover, Enirgi's demand was made at a meeting in Toronto in May 2013. Andover describes the demand from Enirgi as a "shock" because Andover believed Enirgi acquired the notes from Sentient as part of a process to become a partner with Andover. Because of the short demand period, three days, Andover had no ability to meet the demand. This was the beginning of Enirgi becoming "very aggressive", according to Andover.

13 In a letter dated May 28, 2013 Andover advised Enirgi that it was making its best efforts to secure funding to repay the first promissory note. On May 30, 2013 Enirgi again demanded repayment of the first promissory note. In a letter of that date Enirgi advised Andover that failure to pay would be considered default and the second and third notes would become immediately due and payable. Enirgi takes the position that, by application of the wording of the other two notes, they are now due and owing. As above, the total for all three notes is $6.5 million and the due date for the second and third notes are May 1, 2014 and September 1, 2014, respectively. Whether Enirgi is correct in its interpretation of the notes and, therefore, all three notes are now due and owing is not an issue to be decided at this time.

14 At the end of May 2013 Andover received $1.7 million as a result of a private placement. Enirgi objects to the fact that Andover did not make prior public disclosure of Enirgi's demand letter prior to closing the private placement. Andover did not use the funds from the private placement to repay the first note. There is a dispute between the parties as to how the $1.7 million was used.

15 In a letter dated May 31, 2013 Andover advised Enirgi that it was expecting to receive funds from Chief greater than the amount of the first promissory note. The letter also offered a written undertaking to pay the first promissory note no later than September 3, 2013. On June 3, 2013 Enirgi demanded repayment of the first note, for the third time.

16 Enirgi commenced this action on June 4, 2013 seeking to recover the total amount of the three promissory notes. At the end of July 2013 Andover filed affidavit evidence that it was engaged at the time in negotiations with third parties to raise funding to pay the $2.5 million of the first promissory note. This payment was expected to occur on or before August 22, 2013. On August 8, 2013 the parties agreed to a Consent Order in the following terms:

> . . .
>
> BY CONSENT the Defendant [Andover] is required to pay the Plaintiff [Enirgi] the amount of CAD $2,604,000 on August 22, 2013 and if that amount is not paid by the Defendant to the Plaintiff as of August 22, 2013 this order shall for all purposes be of the same effect as a judgment of This Honourable Court for the payment of CAD $2,604,000 by the Defendant to the Plaintiff;
>
> . . .

17 Andover says it agreed to the Consent Order because it expected to receive the funds to pay the Order. However, Enirgi obstructed the negotiations that were ongoing for the loan. Enirgi says that Andover's actions were misleading. These and other disputes between the parties are discussed below.

18 According to Enirgi, Andover avoided having to meet its obligations pursuant to the first promissory note and the August Consent Order and this resulted in Enirgi losing confidence in Andover. Disclosure of information from the trustee was sought by Enirgi but, according to their submission, only very limited information was provided with regards to Andover's prospects and intentions. For example, Enirgi characterizes a September 6, 2013 letter from Andover as unresponsive and inconsistent with previous statements made by Andover. Enirgi also takes issue with a cash flow statement prepared by the trustee and it is submitted by Enirgi that subsequent requests for disclosure were also not complied with. Enirgi responds, in part, by saying that, as a result of a sophisticated tracking system, Andover has information available to it at a level of detail that is not normally available.

19 As well, on September 4, 2013, Enirgi sent Andover a proof of claim and requested that Andover approve the claim. The claim was for payment of all three promissory notes as well as court order interest with respect to the first promissory note. In a letter dated September 12, 2013 the trustee acknowledged Enirgi's proof of claim but denied that the second and third promissory notes were due and payable. Further, according to the trustee, the proof of claim should be amended accordingly or it would be denied.

20 On August 22, 2013 Andover filed a notice of intention to make a proposal under s. 50.4(1) of the *BIA* and a trustee was appointed. It would have been open to Enirgi to enforce the judgment described in the August 8, 2013 Consent Order the following day, August 23, 2013. The notice listed all of the creditors of Andover and the total is $7,476,961.43. Enirgi is listed as the largest single creditor of Andover with a claim of $6.5 million.

21 During the hearing of these applications on September 24, 2013 counsel for Andover presented an affidavit filed the same day. Attached to the affidavits were two short emails and a letter from the president of Ophir Minerals LLC ("Ophir") in Payson Utah, U.S.A. The letter states:

> The following is a letter stating the intentions of Ophir Minerals LLC and Andover Ventures.. In an attempt to help secure the future of Andover Ventures, Al McKee, CEO of Ophir Minerals LLC, is in the process of securing a three dollar million loan ($3,000,000) privately. This loan will be provided to Gordon Blankstein, Operating Manager for Andover Ventures. This loan will be considered prepayment of royalties due to Andover Ventures through mining operations of Ophir Mineral LLC.; The repayment of the loan will be deducted from the royalties to be paid. The purpose of the loan is to assist in the future financial security between the two companies to ensure future business operations.

[Reproduced as written].

22 Andover relies on this letter as a basis for meeting its obligation to pay the first promissory note in the amount of $2.5 million. Enirgi points to the use of "in the process" in the letter and submits that the letter is of little weight.

23 At the conclusion of argument I was advised by counsel that Andover's proposal expired that day, September 24, 2013. I extended the proposal to October 4, 2013.

Analysis

Review of the evidence

24 There are some significant differences between the parties about the facts in this case. Some of these are portrayed by one party as evidence of bad faith on the part of the other party. These are primarily set out in original and reply affidavits from Gordon Blankstein, the CEO of Andover, and Robert Scargill, the North American Managing Director of Enirgi. There are the usual difficulties preferring one version of events over another on the basis of affidavit evidence. A full trial would be necessary to fully and conclusively decide these issues and this matter was set down for two hours, presumably because of the need to hear at least the application by Andover on the day its proposal expired.

25 It is not in dispute that Enirgi holds three promissory notes (by means of assignment) with a total value of $6.5 million against Andover. One of the notes, in the amount of $2.5 million was due on October 1, 2012 and it has not been paid for the reasons discussed below. Enirgi's right to have the other two notes paid out is in dispute since they are due in 2014; that dispute is not part of the subject applications. All three notes are unsecured, non-interest bearing instruments.

26 In April or May 2013 Enirgi demanded payment of the first note ($2.5 million). Enirgi made a second demand in May 2013 and a third in June 2013.

27 In June 2013 Enirgi commenced this action and in August 2013 Andover filed a notice of intention to file a proposal pursuant to s. 50.4(1) of the *BIA*. A trustee was appointed. A Consent Order of this court, dated August 8, 2013, stated that Andover was to pay an amount of $2,604,000 to Enirgi on August 22, 2013.

28 Andover has not paid the $2.5 million due on the first promissory note (or the amount of $2,604,000) for the reasons discussed below.

29 I set out some of the factual differences between the parties as reflected in the affidavit evidence and my conclusions on that evidence as follows:

> (a) Mr. Blankstein, on behalf of Andover, deposes that in May 2013 Enirgi issued an Insider Report advising the public of its demand on the first promissory note. According to Mr. Blankstein there "was no apparent legal basis to do so" and the directors of Andover "considered this a move to deflate Andover's share value and curtail its ability to raise funds."
>
> In reply Mr. Scargill, with Enirgi, deposes that it "did not issue an insider report or otherwise advise the public that it had made demand on the first note at or about the time it made such demand on May 23, 2013." Further, "the first public announcement of the fact of the demand was made by Andover on June 5, 2013 only after Enirgi had commenced legal proceedings."
>
> The result is that I am asked to prefer one person's affidavit evidence over another: either Enirgi issued an insider's report with the information of its demand, as deposed by Mr. Blankstein, or it did not, as

deposed to by Mr. Scargill. However, since there is no evidence of an insider report with the statement in question I am unable to agree with Andover that such a report exists.

(b) There were negotiations between Andover and Enirgi (and Chief) in October 2012 about a potential joint venture. A memorandum of understanding was signed but, following due diligence by Enirgi, there was no agreement on the joint venture.

According to Mr. Blankstein the prospect of these negotiations being successful (as well as previous negotiations to a similar end with Sentient) was the main reason that the first note was not paid. It was anticipated, by Andover at least, that any joint venture agreement would include purchase of stock in Andover and cancellation of the first note. There were "verbal assurances" from Sentient and Enirgi that there was no intention to make demand on the note and it was intended to convert the note as part of a venture agreement. Further, according to Andover, the demand on the first note was the beginning of a very aggressive campaign by Enirgi to ultimately get access to the assets of Andover, assets which were and are worth significantly more than the first note or all three notes.

In his affidavit evidence Mr. Scargill agrees that there were negotiations as described by Mr. Blankstein. However, they ended when he (Mr. Scargill) asked Mr. Blankstein to consider all or majority ownership by Enirgi in Andover. This was the "only possible involvement" by Enirgi in Andover, according to Mr. Scargill. He asked Mr. Blankstein to consider "what sort of transaction" that he and Andover might be interested in "but no transaction was ever proposed by Mr. Blankstein outside of a sale by him and his family of their equity ownership stake." Since there was "no realistic likelihood" of a transaction, Enirgi decided to cease its efforts and turn its attention on being repaid for the first note.

It is clear that negotiations between Andover and Enirgi did not work out. It is also clear that Andover was surprised that the three promissory notes were assigned from Sentient to Enirgi. The evidence does not suggest that either party was more responsible than the other for the lack of an agreement (assuming there is some legal significance to that issue).

Mr. Scargill does not deny or mention the point raised by Mr. Blankstein that Enirgi agreed not to demand payment of the first note. Therefore, I conclude that there was at least acquiescence between the parties at the time of their negotiations that cancellation of the first promissory note would be part of any agreement. This conclusion also explains why payment on a note worth $2.5 million and due in October 2012 was not demanded by Sentient and then Enirgi until after the negotiations failed.

In any event, the negotiations did fail and any commitment not to demand payment on the note ended. There is no evidence of any collateral agreement that amended the terms of payment and, therefore, the terms of the notes applied. That was obviously a shock to Andover's cash flow but it was permitted under the terms of the note, including the short period to make payment.

(c) As above, I am not determining the issue of whether the second and third promissory notes are now due and payable because the first note was not paid.

A related matter is that Enirgi says that one of the deficiencies by Andover in disclosure of information relates to the Proof of Claim sent by Enirgi to Andover in September 2013. It required the trustee of Andover to confirm that the second and third notes were due and payable. The trustee declined to do so as long as the proof of claim included all three notes.

Since the issue of whether the second and third notes are now due is very much in dispute, I can find nothing objectionable in the trustee's response.

(d) In May 2013 Andover obtained about $1.7 million from a private placement. According Mr. Scargill, none of this money was used to pay the first promissory note. Instead, it was used to repay a shareholder loan and to settle a wrongful dismissal lawsuit. Enirgi is concerned that all of the money from the private placement has been used for purposes other than payment of the first note.

Mr. Blankstein agrees that Andover received $1.7 million from a private placement. However, he deposes that Mr. Scargill "neglects to include" all of the facts although Mr. Scargill "knew all about" the placement "from its inception" and Enirgi "was invited to participate in it." Specifically, Mr. Scargill was "fully aware" of the payment of the shareholder loan (in the amount of $375,000). He was told about it at the time and he "never indicated any objection" to it then. Further, the funds from the placement were committed in April 2012 to "pay certain items" and for the operating expenses of Andover "for the next several months, well before the sudden demand for repayment by Energi [sic] on May 23, 2013." Despite knowing that Andover was to receive the money from the private placement at the time of its demand, Enirgi raised no complaints or allegations until Mr. Scargill's affidavit, filed September 17, 2013.

Mr. Blankstein also deposes that the former employee involved in the lawsuit was an employee of Chief and it made the settlement. The settlement was for $275,000 but it is to be paid in instalments and only $50,000 has thus far been paid. Chief is responsible for paying the balance.

Overall there was a private placement of about $1.7 million dollars that was received by Andover before its proposal was filed. It was used to pay for a shareholder loan and for operating expenses and some of these at least were committed to as early as April 2012. Further, the wrongful dismissal payment was a matter involving Chief, rather than Andover, and only $50,000 has been paid by Chief. I conclude that Mr. Scargill did not have all of the pertinent information before him when he gave his affidavit evidence.

(e) According to the affidavit of Mr. Scargill, Andover's agreement to the August 2013 Consent Order:

> ... was calculated to encourage Enirgi to consent to the Judgment and mislead Enirgi into believing that Andover would be in a position to pay the Judgment as required and that available funds would not be used in the interim, for the Preferential Payments [the private placement, discussed above] or other improper purposes.

On the other hand, Mr. Blankstein deposes that Andover agreed to the Consent Order because it thought at the time that it was to receive $3 million as a result of mortgaging assets of its Utah operations, through Chief. However, the mortgage did not complete. Efforts to obtain an unsecured loan were then unsuccessful. Mr. Blankstein has also deposed that in the summer of 2013, counsel for Enirgi contacted counsel for Andover, "[d]espite there being no apparent legal basis for doing so", and "insisted that Chief entering into a mortgage transaction would violate the agreements between Energi [sic] and Andover and was prohibited." This left Mr. Blankstein "scrambling to raise an unsecured loan in a very short time frame."

In argument, Enirgi described Mr. Blankstein's evidence on this issue as misleading. The basis of this is that the correspondence between counsel was without prejudice, it occurred on or about June 21, 2013 and, therefore, "the suggestion that Andover only learned after August 8, 2013 [the date of the Consent Order] that Enirgi refused to consent is clearly misleading."

From this I take it that Enirgi did contact Chief to say any mortgage by Chief would violate agreements between Andover and Enirgi. This took place before the date of the Consent Order. On its face it supports the contention by Andover that Enirgi has obstructed its efforts to obtain funding although there is no evidence or argument before me to decide whether Enirgi was correct in taking the view it did with Chief.

(f) Enirgi asserts, through Mr. Scargill, that Andover is attempting to restructure its assets and this is evidenced from its "continued failure to engage Enirgi" by refusing to provide information regarding its plans or opportunities, despite Enirgi's repeated requests for information. Mr. Blankstein replies by deposing that Andover is not attempting to restructure; [i]t is simply attempting to gain some time and distance so as to be able to pay Enirgi."

All that can be said on this point is that there is no evidence that Andover is restructuring its assets. Mr. Scargill is concerned that is happening or it is going to happen but the evidence here does not support that conclusion.

(g) In argument Enirgi submits that Andover has been "unresponsive" to requests for information about the proposal process being followed by Andover. For example, Mr. Scargill deposes that Andover, in correspondence in August 2013, did not adequately address the concerns of Enirgi. Similarly, according to Enirgi, Andover has provided a deficient cash flow statement and has generally provided inadequate information. Enirgi also submits that Andover has given only "vague assertions" and inconsistent information about its assets and its potential plans.

For its part, Mr. Scargill deposes that Andover asked Enirgi by letter of September 6, 2013 (through counsel) to present "whatever proposal or suggestion" Enirgi might have and Andover would be "more than happy to consider same." No reply was received.

Mr. Blankstein also deposes that Andover provided information to Enirgi about all of Chief's information, files and data with the agreement by Enirgi that it would be returned. It was not returned. In reply Mr. Scargill deposes that "by oversight" the information was not returned and it was returned on or about September 18, 2013.

The evidence is that both parties have been tactical in their requests for information and their responses to those requests. There has been some unresponsiveness and some vagueness as the parties have positioned themselves for their competing applications. I can find no legal or other issue that is relevant to those applications.

(h) In its 2013 financial statements Andover stated that it had filed a notice "to seek creditor protection" and it was done "to ensure the fair and equitable settlement of the Company's liabilities in light of the legal challenges launched" by Enirgi. According to Enirgi the reference to "legal challenges" is incorrect and this statement by Andover demonstrates that the notice of proposal was a "purely defensive" act on the part of Andover.

I take it as beyond dispute that Andover has been operating in a defensive manner since the demand on the first note was made in May 2013. Further, I accept that its notice of intention to file a proposal is also defensive. As for what are "legal challenges" that is a phrase that is capable of many meanings.

(i) Andover alleges that Enirgi has obstructed its efforts to obtain financing to pay the first promissory note of $2.5 million. Mr. Blankstein deposes that, to this end, Enirgi has done the following (in part, this is a summary of some of the above issues): made an abrupt demand for payment (after it and Sentient had given verbal assurances that there would be no demand); made demands on the second and third promissory notes that are payable in 2014; interfered in attempts by Andover to enter into a joint venture with Ophir without any legal basis to do so; and disrupted a mortgage transaction between Andover and Chief in the summer of 2013.

Mr. Scargill, in reply, deposes that neither he nor anyone ("after due inquiry") has been in contact with Ophir.

> The allegation by Andover about Ophir is a vague one and I accept Mr. Scargill's evidence on it. I have discussed the issues of Enirgi's abrupt demand on the first promissory note and the allegation that Enirgi disrupted a mortgage arrangement between Andover and Chief above. Enirgi interprets the language of the three promissory notes to mean that all are due on default of the first one. That is a legal issue that is not before me.
>
> (j) Enirgi attempts to minimize the assets of Andover and maximize its debts. There may well be more detailed evidence that supports a different valuation of the assets than presented by Andover. However, on the evidence in this application, I accept that Andover is cash poor and asset rich.

30 Despite vigorous argument to the contrary by both parties I am unable to find bad faith on the part of either party. There is the apparent communication by Enirgi to Chief about a possible mortgage arrangement for Andover which reflects the aggressive approach that Enirgi has taken to Andover. That represents the aggressiveness of Enirgi rather than any bad faith.

31 Clearly there has been a falling out between the parties and it is also clear that Andover is vulnerable because of its lack of cash and Enirgi is being aggressive in seeking repayment of, at least, the first note.

The applications

32 Andover now seeks an extension of its proposal pursuant to s. 50.4(9) of the *BIA* and Enirgi seeks termination of Andover's proposal pursuant to s. 50.4(11) of the *BIA*.

33 I set out the two provisions of the *BIA* at issue as follows;

> **Extension of time for filing proposal**
>
> 50.4(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that
>
> (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
>
> (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (c) no creditor would be materially prejudiced if the extension being applied for were granted.
>
> . . .
>
> **Court may terminate period for making proposal**
>
> 50.4(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that
>
> (a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
>
> (b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

> (c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
>
> (d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,
>
> and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

34 Each party says that its application should prevail over the other's application. I will review the case law presented by the parties on this issue as well as some interpretive issues under s. 50.4(9) and s. 50.4(11).

The approaches in Cumberland and in Baldwin

35 In a decision relied on by Enirgi, Mr. Justice Farley of the Ontario Court of Justice denied the appeal of a registrar's decision that had dismissed an application for an extension of time by debtors under s. 50.4(9): *Baldwin Valley Investors Inc., Re*, [1994] O.J. No. 271 (Ont. Gen. Div. [Commercial List])). The court noted that the test under 50.4(9)(b) was whether the debtors "would likely be able to make a viable proposal if the extension being applied for was granted." "Likely" did not mean a certainty and, using the Oxford Dictionary, it was defined as "such as might well happen, or turn out to be the thing specified, probable ... to be reasonably expected." Applied to the facts, the conclusion was that it was not likely the debtors would be able to make such a proposal since they had only submitted a cash flow statement. At para. 4, Mr. Justice Farley concluded "I do not see the conjecture of the debtor companies' rough submission as being 'likely'". Further, the court noted at para. 6 that the debtors did not even attempt to meet the condition of material prejudice under s. 50.4(9)(c) and the debtor was changing inventory into cash.

36 The court also noted that the registrar (who made the decision being appealed) focused on the fact that the creditor had lost all confidence in the debtor. The creditor held a substantial part of the creditor's debt. Mr. Justice Farley pointed out, at para. 3, that that was not the test under s. 50.4(9)(b):

> This becomes clear when one examines s. 50.4(11)(b) and (c); it appears that Parliament wished to distinguish between a situation of a viable proposal (s. 50.4(9)(b) and 11(b)) versus a situation in which it is likely that the creditors will not vote for this proposal, no matter how viable that proposal (s. 50.4(11)(c) but with no corresponding clause in s. 50.4(9)).

37 Enirgi relies on this statement for its submission that its application for termination under s. 50.4(11) should prevail over the application of Andover under 50.4(9).

38 However, that statement was made as a comment on the previous registrar's reliance on the fact that the creditor (who held significant security) would not vote for any proposal. Mr. Justice Farley in *Baldwin* pointed out that was not the test under 50.4(9). He reasoned that this was clear because Parliament had distinguished between a situation of a viable proposal under s. 50.4(9)(b) and s. 50.4(11)(b) from a situation where it is likely that the creditors will not vote for a proposal no matter how viable, under s. 50.4(11)(c). In s. 50.4(9) there was no clause corresponding to 50.4(11)(c). The result is that this part of *Baldwin* does not support Enirgi's submission that an application under s. 50.4(11) supersedes one under s. 50.4(9).

39 The result in *Baldwin* was that the debtor's application under s. 50.4(9) was denied. There does not appear to have been an application for termination under 50.4(11), unlike the subject case. At para. 8, the court did contrast the provisions by saying that, if the debtor had been successful in its application to extend, it would have been a "Pyrrhic victory" because the creditor bank would have been able "to come right back in a motion based on s. 50.4(11)(c)."

40 This is broad language but I acknowledge that it is capable of meaning that 50.4(11) is to supersede s. 50.4(9). However, such an interpretation would seem to be inconsistent with the other reference in *Baldwin* that the two provisions apply to different situations (discussed above). I also note that *Baldwin* only decided the merits of the s. 50.4(9) application, there was no application under s. 50.4(11) and there was no decision in favour of the creditor on the basis of that provision. The above statement was, therefore, *obiter*.

41 Another decision relied on by Enirgi is *Cumberland Trading Inc., Re*, [1994] O.J. No. 132 (Ont. Gen. Div. [Commercial List])) where a creditor sought to terminate a debtor's proposal after the notice of intention was filed. There does not appear to have been an application by the debtor to extend the proposal under s. 50.4(9), only an application under s. 50.4(11). Mr. Justice Farley found there was no indication what the proposal of the debtor was to be; "... there was not even a germ of a plan revealed" only a "bald assertion" and "[t]his is akin to trying to box with a ghost" (paragraph 8). The application for termination under s. 50.4(11) was allowed.

42 The court noted, at para. 5, that the *BIA* was "debtor friendly legislation" because it provided for the possibility of reorganization by a debtor but it (and the *Companies Creditors Arrangement Act*, R.S.C. 1985 c. C-36) "do not allow debtors absolute immunity and impunity from their creditors". Concern was expressed about debtors too frequently waiting until the last moment, or beyond the last moment, before thinking about reorganization. The automatic stay available to a debtor by filing a notice of intention to file a proposal was noted. However:

> ... [the] *BIA* does not guarantee the insolvent person a stay without review for any set period of time. To keep the playing field level and dry so that it remains in play, a creditor or creditors can apply to the court to cut short the otherwise automatic (or extended) stay; in this case [the creditor] is utilizing s. 50.4(11) to do so.

43 Enirgi relies on this statement in its submission that its termination application should proceed over the extension application of Andover. This is broad language but I acknowledge Enirgi's submission that this statement provides support for its position that s. 50.4(11) permits it to "cut short" a stay or extension under s. 50.4(9).

44 The court also described s. 50.4(11)(c) as permitting termination of a proposal if the debtor cannot make one before the expiration of the "period in question, that will be accepted by the creditors ..." Mr. Justice Farley concluded that s. 50.4(11) deals specifically with the situation "where there has been no proposal tabled." It provides that there is "no absolute requirement" that the creditors have to wait to see what the proposal is "before they can indicate they will vote it down" (paragraph 9). Enirgi relies on this statement.

45 In my view, this statement goes no further than saying what is self-evident: under s. 50.4(11)(c) any proposal must be accepted by the creditors. However, as explained in *Baldwin*, that is not a requirement under s. 50.4(9). *Cumberland Trading Inc.* also says that the making of the proposal may be still to come but a creditor can exercise its rights under s. 50.4(11)(c). I do not agree with Enirgi that this statement in *Cumberland Trading Inc.* supports its submission.

46 From the above I conclude that there is some support for the submission of Enirgi that I should consider (and allow) its application under s. 50.4(11) over that of Andover under s. 50.4(9). There is the *obiter* in *Baldwin* that a successful application under s. 50.4(9) would be a Pyrrhic victory because a creditor could come right back with an application under s. 50.4(11). And there is the statement in *Cumberland Trading Inc.* that an application under s. 50.4(11) can cut short an application under s. 50.4(9).

The approach in Cantrail

47 A quite different view is set out in a more recent British Columbia case, *Cantrail Coach Lines Ltd., Re*, 2005 BCSC 351 (B.C. Master) [*Cantrail*] a decision relied on by Andover. Master Groves, as he then was, was presented with a submission by the creditor in that case that it intended to vote against any proposal from the

debtor because it had lost faith in the debtor. The creditor was one of 91 creditors and its share of the total debt was not explained. This is essentially the position of Enirgi.

48 In response to the creditor's submission that it could vote under s. 50.4(11) against any proposal of the debtor under s. 50.4(9) the court said:

> 14. If that was simply the test to be applied then one wonders why Parliament would have gone to the trouble, and creativity perhaps, of setting out proposals as an option in the *Bankruptcy and Insolvency Act*. Secured creditors or major creditors not uncommonly, in light of general security agreements and other type [sic] of security available, are in a position to claim to be over 50 percent of the indebtedness. Thus they will be the determining creditor or, I should say, are likely to be the determining creditor or, I should say, are likely to be the determining creditor in any vote on any proposal.
>
> 15. If a creditor with over 50 percent of the indebtedness could take the position that it would vote no, prior to seeing any proposal, and thus terminate all efforts under the proposal provisions, one wonders why Parliament would not simply set up the legislation that way. One wonders what the point would be of the proposal sections in the *Bankruptcy and Insolvency Act* if that were the case.
>
> 16. If the test to be applied was simply one of majority rules then in my view Parliament would not have set the test as it did in s. 50.4(9). They would simply set a test that if 50 percent of the creditors object at any point the proposal would be over. That is not the test that has been set.

49 Since there was no evidence of bad faith on the part of the debtor in *Cantrail* and no determination of what the actual proposal would be, Master Groves allowed the application under s. 50.4(9) to extend the proposal and dismissed the application of the creditor under s. 50.4(11) to terminate the proposal (paragraphs 15-17). This is the result sought by Andover but opposed by Enirgi.

50 Master Groves also adopted the view at para. 11 of *N.T.W. Management Group Ltd., Re*, [1993] O.J. No. 621 (Ont. Bktcy.)) that the intent of the *BIA* is that s. 50.4(9) and s. 50.4(11) should be judged on a rehabilitation basis rather than on a liquidation basis. And, in *Cantrail*, at para. 4, the court concluded that an objective standard must be applied to determine what a reasonable person or creditor would do, as was done in *Baldwin*.

51 Enirgi distinguishes *Cantrail* on two grounds. First, it is submitted that at para. 9 *Cantrail* contains the inaccurate statement that "s. 50.4(11) is the mirror of 50.4(9)". As well, there was no discussion of *Cumberland* in *Cantrail* .

52 I accept that, while there are a number of similarities between the two sections, there is one significant difference: under s. 50.4(11)(c) a creditor has a veto over any proposal. S. 50.4(9) does not contain such a veto and it is not a mirror to the extent of being exactly the same as s. 50.4(11). In my view this comment on a very small part of *Cantrail* does not affect the broader meaning of that judgement. And it is true that *Cumberland* was not discussed in *Cantrail* although the submission of the creditor in *Cantrail*, as recorded in the oral judgement, is in language very similar to that used in *Cumberland* .

53 Another decision relied on by Andover as being similar to *Cantrail* is *Plancher Heritage Ltée / Heritage Flooring Ltd., Re*, [2004] N.B.J. No. 286 (N.B. Q.B.) where a debtor filed an application under s. 50.4(9) for an extension and the creditor filed an application for termination under s. 50.4(11). The court allowed the application for an extension. The *Cumberland* and *Baldwin* decisions were noted but in *Plancher Heritage Ltée / Heritage Flooring Ltd.* the evidence was that the creditor would be paid out and, in any event, the creditor was not in a position to veto any proposal. *Cantrail* was also followed in *Entegrity Wind Systems Inc., Re*, 2009 PESC 25 (P.E.I. S.C.) although the facts in *Entegrity Wind Systems Inc.* did not include an application by the creditor under s. 50.4(11). The objective standard discussed in *Cantrail* was also adopted in *Convergix Inc., Re*, 2006 NBQB 288 (N.B. Q.B.).

Cumberland or Cantrail?

54 The result of the above is that there are different approaches to situations where there are competing applications under sections 50.4(9) and 50.4(11).

55 The comments from *Cumberland* discussed above suggest that an application by a creditor under s. 50.4(11) can "cut short" an application under 50.4(9) and there is no absolute requirement that a creditor has to wait to see a proposal before voting it down. And in *Baldwin* there is a comment, in *obiter*, that any successful application under s. 50.4(9) would be a Pyrrhic victory because the creditor could "come right back" with an application under s. 50.4(11).

56 On the other hand, in *Cantrail* the court decided that there should be an extension for a viable proposal, not yet formulated, under s. 50.4(9) even though the creditor has lost faith in the debtor and has said it will vote against any proposal.

57 As a matter of interpretation of the *BIA* I consider that s. 50.4(9) and 50.4(11) set out distinct rights and obligations. In the first case a debtor is entitled to an extension of time to make a proposal; in the second case a creditor can apply for the termination of the time for making a proposal. As I understand the submission of Enirgi the fact that it is the primary creditor (by some considerable margin), that it has lost confidence in Andover and that it will not accept any proposal from Andover supports consideration of its application for termination under s. 50.4(11).

58 The problem with this submission is that it does not reflect the factors under 50.4(9) for granting an extension of time for a proposal. A creditor under this provision does not have the rights that Enirgi seeks over the debts of Andover. Those rights are in s. 50.4(11)(c) but that is a different inquiry. Indeed, one effect of the submission of Enirgi is to conflate s. 50.4(9) and s. 50.4(11). I recognize the comments from *Cumberland* and *Baldwin* that may support a contrary view. However, recognition must be given to the differences between the provisions in dispute and that contrary view does not do so. In my view the analysis and conclusions in *Cantrail* is to be preferred.

59 I add that there are some situations where an application for an extension is overtaken by an application for termination. In *Cumberland* there was not even a germ of a proposal from the debtor for the analysis under s. 50.4(9). In that circumstance the court then proceeded to the other application before it from the creditor under s. 50.4(11).

60 Other cases relied on by Enirgi are of a similar kind. In *Baldwin* the proposal was conjecture and rough (and the debtor had not even considered the issue of any material prejudice to the creditor from the proposal). Similarly, in *St. Isidore Meats Inc. / Viandes St. Isidore Inc. v. Paquette Fine Foods Inc.*, [1997] O.J. No. 1863 (Ont. Bktcy.)) and *1252206 Alberta Ltd. v. Bank of Montreal*, [2009] A.J. No. 648 (Alta. Q.B.) the courts proceeded to a determination of the s. 50.4(11) application after finding there was no viable proposal. In *Triangle Drugs Inc., Re*, [1993] O.J. No. 40 (Ont. Bktcy.)) the creditors had a veto and they had actually seen the proposal. The court imported principles from the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, concluded that it was fruitless to proceed with a plan that is doomed to failure and allowed the creditor's application under s. 50.4(11). In *Com/Mit Hitech Services Inc., Re*, [1997] O.J. No. 3360 (Ont. Bktcy.)) there was no good faith or due diligence on the part of the debtor and the court proceeded to consider and allow the creditor's application under s. 50.4(11).

61 In my view, these cases represent recognition of the procedural and business realities of the various situations rather than a legal conclusion that an application for termination will supersede an application for an extension.

62 It follows that I find that Andover is entitled to have its application under 50.4(9) considered on its merits. If it is not meritorious then it is logical and consistent with the authorities to proceed with the application by Enirgi under 50.4(11).

The application by Andover under s. 50.4(9)

63 With regards to the merits of Andover's application under s. 50.4(9) all of the following issues must be decided in its favour. Has it acted in good faith and with due diligence? Is it likely it would be able to make a viable proposal if an extension is granted? And, if an extension is granted, would a creditor be materially prejudiced?

64 With regards to good faith and due diligence *N.T.W.* says that it is the conduct of Andover following the notice of intention in August 2013, rather than its conduct before then, that is to be considered. I have found above that the evidence does not support a finding of bad faith against either party.

65 With regards to due diligence, since August 2013 Andover has obtained the September 24, 2013 letter from Ophir that says the latter "is in the process" of finalizing a loan of $3,000,000 to Andover. This is not a firm commitment of funds and nor does it need to be under s. 50.4(9); it does reflect some diligence on Andover's part. Mr. Blankstein also deposes that he has been having discussions with another party but he cannot reveal the name of that party because he is concerned that Enirgi will obstruct those discussions, as they did with Chief in June 2013. This latter information is not particularly helpful. Nonetheless I conclude that Andover has acted with sufficient due diligence.

66 Turning to s. 50.4(9)(b), a viable proposal is one that would be reasonable on its face to a reasonable creditor; "this ignores the possible idiosyncrasies of any specific creditor": *Cumberland* at para. 4. It follows that Enirgi's views about any proposal are not necessarily determinative. The proposal need not be a certainty and "likely" means "such as might well happen."(*Baldwin*, paras. 3-4). And Enirgi's statement that it has lost faith in Andover is not determinative under s. 50.4(9): *Baldwin* at para. 3; *Cantrail* at paras. 13-18).

67 I turn to a review of the assets of Andover in order to consider whether they provide some support for the viability of any proposal from Andover. The evidence for this review is from the affidavit of Mr. Blankstein.

68 Alaska (wholly owned by Andover) is expecting, as a result of preliminary discussions, a N143101 Resource Calculation for a property to show approximately 1,200,000,000 pounds of copper with a gross value of about $3,600,000,000. An immediate net value of $60,000,000 and $120,000,000 is estimated, depending on the world price of copper. The State of Alaska is confident enough in the property that it has financed a road to it. In a separate property, Alaska has an estimated mineralization of 4,000,000 tons of 4.5 % copper and Andover has spent approximately $10,000,000 in developing this project. Alaska is solvent and up to date in its financial obligations.

69 With respect to Chief (83% owned by Andover), it is also solvent and generally up to date on its obligations. Andover purchased 65% of the shares of Chief in 2008 for $8,700,000 with an environmental claim against it in the amount of $60,000,000. That claim has been negotiated down to a smaller number and the current amount due is $450,000, with half due in November 2013 and the other half due in November 2014. This has increased the value of Chief significantly, according to Andover.

70 Financial statements in March 2013 showed Chief had $33,000,000 in equity, based on land and equipment (not mineral deposits). It owns more than 16,000 acres of land in Utah and leases an additional 2,000 acres. Plant and equipment have been independently appraised at $19,200,000. Andover estimates a cash flow in the next year of $7,000,000 to $11,000,000 to Chief.

71 Andover and Chief are also presently involved in a joint venture with Ophir regarding deposits of silica, limestone and aggregate on property owned by Chief. Production will commence in November 2013 and sold to customers of Ophir. Ophir is spending $3,000,000 on exploration and development and production equipment has been ordered. Andover expects to receive from these two mines and a third (a joint venture with Rio Tinto) $7,200,000 to $10,900,000 in annual production net revenues commencing at the end of 2014.

72 Chief has another property called Burgin Complex. At one time Enirgi was apparently interested in this specific property. A Technical Report, dated December 2, 2011, shows an expected cash flow of $483,000,000 in today's metal prices.

73 By way of a summary, publicly available financial statements in March 2013 report that Andover had $42.5 million in assets and $9.1 of liabilities.

74 Enirgi generally minimizes the asset value of Andover but it does not dispute the specific numbers above. In my view these are impressive numbers and they reflect a strong asset base for Andover. I accept that they do not demonstrate the cash at hand to pay the first promissory note and at this time Andover remains asset rich and cash poor. But it is not "trying to box with a ghost" (as in *Cumberland*) to conclude that the assets of Andover support the view that it is likely that it can present a viable proposal. As above, there is also the prospect of a $3,000,000 cash loan from Ophir and that is some evidence of an imminent injection of cash into Andover. It has not materialized as yet but it is further evidence of the likelihood of a viable proposal. A certainty is not required and I conclude that a proposal is likely in the sense it might well happen.

75 Enirgi points out that it holds the largest portion of unsecured debt of Andover (more than 80%) and it submits that this gives them a veto over any proposal. That may take place but thus far there is no proposal and Enirgi will have to make a business decision about its response in the event one is presented. Again, as an issue under s. 50.4(9), a proposal does not have to be acceptable to Enirgi. As well, I also note comments from the Court of Appeal, in the context of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, that questioned the legal basis of a creditor forestalling an application for a stay and whether the court's jurisdiction could be "neutralized" in that way: *Forest & Marine Financial Corp., Re*, 2009 BCCA 319 (B.C. C.A.) at para. 26, cited in *Pacific Shores Resort & Spa Ltd., Re*, 2011 BCSC 1775 (B.C. S.C. [In Chambers]), at paras. 40-41.

76 The third requirement under s. 50.4(9) is that no creditor should be materially prejudiced if an extension is granted. As emphasized in *Cantrail* at para. 21 the test is not prejudice but material prejudice. It is also an objective test: *Cumberland* at para. 11. In the subject case there is no evidence that the security in the first promissory note would be less if an extension was granted. Enirgi asserts that Andover is restructuring its assets but there is no evidence of that and, in the event it occurs, remedies are available on short notice. Unlike in *Cumberland*, the debtor here is not converting inventory into cash. It is true that the note (or notes) is non-interest bearing but Enirgi knew that when it became an assignee in March 2013 and the note had not been unpaid since October 2012. I conclude that there is some prejudice to Enirgi but not material prejudice.

77 Finally, I note in *Cantrail* and *N.T.W.* that the objective of the *BIA* is rehabilitation rather than liquidation. Andover has a nominal payroll but liquidation of Andover and its assets would obviously affect a number of other companies and be a complicated and protracted affair. It may come to that but on the basis of the evidence available at this time I conclude that an extension of Andover's proposal should be granted.

78 Since Andover has met the requirements of s. 50.4(9) I find that its application under that provision must be allowed. It should be given the opportunity to make a proposal and an extension of time of 45 days is granted to do so.

Summary and conclusion

79 In cases such as this where there are competing applications under s. 50.4(9) and s. 50.4(11) the debtor is entitled to present a proposal under the former provision if it is likely a viable proposal can be presented and the other requirements of s. 50.4(9) are met. In that event the debtor should have the opportunity to present a proposal. A creditor has the ability under s. 50.4(11) to decide whether a proposal is acceptable but does not have that right under s. 50.4(9).

80 In this case Andover has significant assets and it is likely that it will be able to present a viable proposal. As well, there is no evidence of the part of Andover of bad faith, it has acted generally in good faith, it has acted with due diligence in attempting to construct a proposal and there is no material prejudice to Enirgi if an extension is granted. In the event that Andover presents a proposal Enirgi will have then have the opportunity to decide what its position will be on it. This will be a business decision rather than a matter under s. 50.4(11).

81 The application by Andover under s. 50.4(9) is allowed. It is entitled to an Order extending the time for filing a proposal under Part III of the *BIA* for a period of 45 days to give it an opportunity to present a proposal.

82 The application of Enirgi under s. 50.4(11) is dismissed with leave to reapply.

83 I considered the alternate application of Enirgi to appoint a receiver under section 47.1 of the *BIA*. I note that there is a trustee appointed as part of the notice of intention. He apparently disagreed with Enirgi about what should be in a proof of claim document but for defensible reasons. There is otherwise no evidence that something more than a trustee is warranted at this time.

84 I remain seized of this matter and any subsequent applications related to the insolvency of Andover. I am available on short notice if there is a need to move expeditiously. Costs will be in the cause.

Application by debtor allowed; application by creditor dismissed with leave to reapply.

End of Document

Tab 2

1994 CarswellOnt 255
Ontario Court of Justice (General Division [Commercial List]), In Bankruptcy

Cumberland Trading Inc., Re

1994 CarswellOnt 255, [1994] O.J. No. 132, 23 C.B.R. (3d) 225, 45 A.C.W.S. (3d) 199

Re proposal of CUMBERLAND TRADING INC.

Farley J.

Judgment: January 24, 1994
Docket: Doc. 31-282225

Counsel: *Kevin J. Zych*, for secured creditor, Skyview International Finance Corporation.
Jeff Carhart, for debtor, Cumberland Trading Inc.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.1 General principles
Headnote
Bankruptcy --- Proposal — General
Proposals — Notice of intention — Secured creditor moving for declaration that stay of proceedings no longer operated to prevent it from enforcing its security — Secured creditor not quantifying material prejudice to it resulting from continued operation of stay — Motion dismissed.
A secured creditor demanded payment in full of its operating financing loan to the debtor and gave notice of intention to enforce its security under the *Bankruptcy and Insolvency Act* (the "Act"). Two days before the expiration of the time to repay, the debtor filed a notice of intention to make a proposal. A stay of proceedings under s. 69 of the Act resulted. The secured creditor indicated that it would not approve any proposal the debtor might make; it held 95 per cent of the debtor's admitted secured creditors' claims and 67 per cent of all creditors' claims. It argued that the continued operation of the stay would be materially prejudicial to its rights.
The secured creditor brought a motion for a declaration that the stay provisions of ss. 69 and 69.1 of the Act no longer operated to prevent it from enforcing its security. It also moved for a declaration that the 30-day period to file a proposal provided in s. 50.4(8) was terminated and for an order removing the debtor's choice for trustee under the notice of intention to file a proposal and substituting another.
Held:
The motion for a declaration regarding the stay was dismissed; the motion for a declaration that the 30-day period was terminated and for an order substituting another trustee was allowed.
The secured creditor was not entitled to the benefit of s. 69.4(*a*). Its claim that it would be materially prejudiced by the continued operation of the stay was not supported by sufficient evidence. The secured creditor argued that the only way the debtor now had to finance its operations was by turning the secured creditor's accounts receivable and inventory into cash, thereby eroding the secured creditor's security. However, the secured creditor did not

quantify the prejudice to it from these actions, nor did it quantify the expected deterioration of its security if the stay was not lifted.

Table of Authorities

Cases considered:

Inducon Development Corp., Re (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.) — *referred to*

N.T.W. Management Group Ltd., Re (1993), 19 C.B.R. (3d) 162 (Ont. Bktcy.) — *not followed*

Triangle Drugs Inc., Re (1993), 16 C.B.R. (3d) 1, 12 O.R. (3d) 219 (Bktcy.) — *referred to*

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 —

s. 50.4(1)

s. 50.4(8)

s. 50.4(11)

s. 69

s. 69.1

s. 69.4

s. 244

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Motions by secured creditor for declaration that stay provisions of *Bankruptcy and Insolvency Act* no longer operated to prevent it from enforcing its security, for declaration that 30-day period to file proposal had terminated and for order allowing substitution of trustee.

***Farley J.*:**

1 Skyview International Finance Corporation ("Skyview") brought this motion for a declaration that the stay provisions (ss. 69 and 69.1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended ("BIA") no longer operate in respect of Skyview taking steps to enforce its security (including accounts receivable and inventory) given by Cumberland Trading Inc. ("Cumberland") which it has been financing for the last 9 years. In addition Skyview moved for a declaration that the 30 day period to file a proposal mentioned in s. 50.4(8) BIA was terminated. Thirdly, Skyview was asking for an order removing Doane Raymond Limited ("Doane") which was Cumberland's choice as trustee and substituting A. Farber Associates ("Farber") as trustee under the Notice of Intention to File a Proposal of Cumberland. In the alternative to the relief awarded in the last two aspects, Skyview wished to have an order appointing Farber as interim receiver.

2 On January 5, 1994 Skyview demanded payment in full of its operating financing loan to Cumberland and gave a s. 244 BIA notice of its intention to enforce its security in ten days. The affidavit filed on behalf of Skyview indicated that Cumberland was not cooperating with it in providing appropriate financial information for the last half year. This was disputed in the affidavit filed by Cumberland. Suffice it to say that there has been a falling out between the two. Skyview asserted that it was owed $966,478 and that there was an exposure to it under a guarantee given on Cumberland's behalf to a potential of approximately $200,000 U.S. Skyview's deadline for repayment was January 16th. On January 14th Cumberland filed with the Official Receiver a Notice of Intention to make a Proposal (s. 50.4(1) BIA) and pursuant to s. 69 BIA there would be a stay of proceedings upon this filing.

3 Skyview's president swore that:

> 21. In light of the unpleasant and frustrating experience Skyview has had to endure over the preceding 3 to 4 months with Cumberland, including specifically the persistent refusal by Cumberland to account for its sales from the Retail Business, the misrepresentation of Cumberland's pre-sold orders referred to above and particularly its secretive purported "termination" of its direction to accord to pay sums to Skyview in reduction of Cumberland's indebtedness, Skyview's faith and confidence in the management of Cumberland has been irreparably damaged such that Skyview would not be prepared to vote in terms of any proposal which Cumberland may make.

and further that

> 24. The continued operation of a stay of proceedings preventing Skyview from enforcing its security will be materially prejudicial to the rights of Skyview. The assets of Skyview consist primarily of inventory and receivables (both from the Distribution Business and the Retail Business). With each day that passes Cumberland is converting its inventory (financed by Skyview) into cash (primarily in the Retail Business) and receivables (primarily in the Distribution Business) and it is Skyview's fear that those sums will be used by Cumberland to pay its other creditors and to fund the professional costs which it inevitably must incur in formulating and implementing a proposal. This fear is especially heightened insofar as the receivables generated from the Retail Business are concerned as they are under the direct and immediate control of Cumberland and are not collected by Accord.

4 Cumberland's Notice of Intention to File a Proposal acknowledges that Skyview is owed $750,000. On that basis Skyview has 95% in value of Cumberland's admitted secured creditors' claims and 67% of all creditors' claims of whatever nature. No matter what, Skyview's claim is so large that Skyview cannot be swamped in any class in which it could be put. Clearly Skyview would have a veto on any vote as to a proposal, at least so far as the secured class, assuming the secureds are treated as a separate class. This leaves the interesting aspect that under the BIA regime one could have a proposal turned down by the secured creditor class but approved by the unsecured creditor class and effective vis-à-vis this latter class, but with the secured class being able to enforce their security. One may question the practicality a proposal affecting only unsecured creditors becoming effective in similar circumstances to this situation.

5 Cumberland's essential position is that it must have some time under BIA to see about reorganizing itself. While I am mindful that both BIA and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") should be classified as debtor friendly legislation since they both provide for the possibility of reorganization (as contrasted with the absence of creditor friendly legislation which would allow, say, creditors to move for an increase in interest rates if inflation became rampant), these acts do not allow debtors absolute immunity and impunity from their creditors. I would also observe that all too frequently debtors wait until virtually the last moment, the last moment or, in some cases, beyond the last moment before even beginning to think about reorganization (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if "success" may have been available with earlier spadework. It is true that under BIA an insolvent person can get an automatic stay by merely filing a Notice of Intention to File a Proposal — as opposed to the necessity under CCAA of convincing the court of the appropriateness of granting a stay (and the nature of the stay). However BIA does not guarantee the insolvent person a stay without review for any set period of time. To keep the playing field level and dry so that it remains in play, a creditor or creditors can apply to the court to cut short the otherwise automatic (or extended) stay; in this case Skyview is utilizing s. 50.4(11) to do so.

6 Cumberland relies upon *Re N.T.W. Management Group Ltd.* (1993), 19 C.B.R. (3d) 162 (Ont. Bktcy.), a decision of Chadwick J. Skyview asserts that *N.T.W.* is distinguishable or incorrectly decided and secondly that the philosophy of my decision in *Re Triangle Drugs Inc.* (1993), 16 C.B.R. (3d) 1 (Ont. Bktcy.) should prevail.

In *Triangle Drugs* I allowed the veto holding group of unsecured creditors to in effect vote at an advance poll in a situation where there appeared to be a gap in the legislation. The key section of BIA is s. 50.4(11) which provides:

> The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that
>
> (*a*) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
>
> (*b*) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,
>
> (*c*) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
>
> (*d*) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,
>
> and where the court declares the period in question terminated, paragraphs (8)(*a*) to (*c*) thereupon apply as if that period had expired.

It does not seem to me that there is any gap in this sector of the legislation.

7 As the headnote in *N.T.W.* stated, Chadwick J. viewed a situation similar to this one as requiring that the debtor must have an opportunity to put forth its proposal when he stated at p. 163:

> The bank had stated that it would not accept any proposal. However, since the companies had not yet had the opportunity to put forth their proposal, it was impossible to make a final determination under s. 50.4(11)(*c*). The companies should have the opportunity to formulate and make their proposal.

However I note that in this instance Cumberland has filed its Notice of Intention to File a Proposal the day before Skyview's s. 244 notice would have allowed it to take control of the security. Cumberland's president swore that:

> 2. The efforts which Cumberland is currently undertaking represent a bona fide effort, made in good faith, to restructure its finances in order to preserve the business of the company for the benefit of all of the creditors of the company, including Skyview. It is my belief that the proposal process will represent a significantly better treatment of all such creditors then would be available through either an enforcement by Skyview of its security against the assets of Cumberland, a bankruptcy of Cumberland or other processes available in the circumstances.

and further that:

> I intend to submit a proposal, pursuant to the provisions of the Bankruptcy and Insolvency Act, which represents the most advantageous treatment available, in my view, to all of the creditors of Cumberland and which allows for the continued viability of the business of Cumberland. This proposal is being prepared, and will be presented, in complete good faith. In the course of reviewing and preparing this proposal material with Mr. Godbold, I have determined that the legitimate claim of Skyview does not, in fact, represent in excess of 66-2/3 of all of the claims against Cumberland. At this time, Doane Raymond Limited is already in the position of Trustee under the proposal, in accordance with the provisions of the Bankruptcy and Insolvency Act. In addition, as noted above, I am prepared to consent to the appointment of Doane Raymond Limited as interim receiver of Cumberland. In the circumstances, I respectfully submit that the stay in favour of Cumberland pursuant to the Bankruptcy and Insolvency Act should not be lifted.

No explanation was given as to the lower share indicated for Skyview but in any event there was no assertion that Skyview lost its veto.

8 However we do not have any indication of what this proposal proposes to be — notwithstanding that 10 days have now passed since Cumberland filed its Notice of Intention to File a Proposal and five days since Skyview served Cumberland with this motion. In a practical sense one would expect, given Skyview's veto power and its announced position, that Cumberland would have to present "something" to get Skyview to change its mind — e.g. an injection of fresh equity or a take out of Skyview's loan position. However there was not even a germ of a plan revealed — but merely a bald assertion that the proposal being worked on would be a better result for everyone including Skyview. This is akin to trying to box with a ghost. While I agree with the logic of Chadwick J. when he said at p. 168 of *N.T.W.* that:

> C.I.B.C. the major secured creditor has indicated they will not accept any proposal put forth, other than complete discharge of the C.I.B.C. indebtedness. Other substantial creditors have taken the same position. There is no doubt that the insolvent companies have a substantial obstacle to overcome. *As the insolvent companies have not had the opportunity to put forth this proposal, it is impossible to make the final determination*. In *Triangle Drugs Inc.* Farley J. had the proposal. Well over one-half of the secured [sic; in reality unsecured] creditors indicated they would not vote for the proposal. As such, he then terminated the proposal. We have not reached that stage in this case. The insolvent companies should have the opportunity of putting forth the proposal.
>
> [emphasis added]

9 However this analysis does not seem to address the test involved. With respect I do not see this logical aspect as coming into play in s. 50.4(11)(*c*) which reads:

> The court may, on application by ... a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) ... if the court is satisfied that
>
> . . . . .
>
> (*c*) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
>
> . . . . .
>
> and where the court declares the period in question terminated, paragraphs (8)(*a*) to (*c*) thereupon apply as if that period had expired.

It seems to me that clause (*c*) above deals specifically with the situation where there has been no proposal tabled. It provides that there is no absolute requirement that the creditors have to wait to see what the proposal is before they can indicate they will vote it down. I do not see anything in BIA which would affect a creditor (or group of creditors) with a veto position from reaching the conclusion that nothing the insolvent debtor does will persuade the creditor to vote in favour of whatever proposal may be forthcoming. I think that this view is strengthened when one considers that the court need only be satisfied that "the insolvent person will not *likely* be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors ..." (emphasis added). This implies that there need not be a certainty of turndown. The act of making the proposal is one that is still yet to come. I am of the view that Skyview's position as indicated above is satisfactory proof that Cumberland will not likely be able to make a proposal that will be accepted by the creditors of Cumberland.

10 Skyview of course also has the option of proceeding under s. 69.4 BIA which provides:

> A creditor who is affected by the operation of sections 69 to 69.3 may apply to the court for a declaration that those sections no longer operate in respect of that creditor, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

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

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

11 Is Skyview entitled to the benefit of s. 69.4(*a*) BIA? I am of the view that the material prejudice referred to therein is an objective prejudice as opposed to a subjective one — i.e., it refers to the degree of the prejudice suffered vis-à-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor *qua* person, organization or entity. If it were otherwise then a "big creditor" may be so financially strong that it could never have the benefit of this clause. In this situation Skyview's prejudice appears to be that the only continuing financing available to Cumberland is that generated by turning Chamberland's accounts receivable and inventory (pledged to Skyview) into cash to pay operating expenses during the period leading up to a vote on a potential proposal, which process will erode the security of Skyview, without any replenishment. However Skyview does not go the additional step and make any quantitative (or possibly qualitative) analysis as to the extent of such prejudice so that the court has an idea of the magnitude of materiality. In other words, Skyview presently estimates that it would be fortunate to realize $450,000 on Cumberland's accounts receivables and inventory, but it does not go on to give any foundation for a conclusion that in the course of the next month $x of this security would be eaten up or alternatively that the erosion would likely be in the neighbourhood of $y per day of future operations. The comparison would be between the "foundation" of a maximum of $450,000 and what would happen as to deterioration therefrom if the stay is not lifted. I note there was no suggestion by Cumberland that there would be no erosion of Skyview's position by, say, getting a cash injection or by improving margins by increasing revenues or decreasing expenses. Skyview's request for its first relief request is dismissed since in my view Skyview did not engage in the correct comparison of material prejudice.

12 I note that Cumberland does not oppose Skyview's request for an interim receiver. But for my conclusion that Skyview succeeds in its second relief request (to have the 30 day period in which to file a proposal terminated) and the ancillary third relief request of substitution of Farber for Doane as trustee, I would have granted the fourth relief request of appointing Farber as interim receiver. I would also award Skyview costs of $600 payable out of the estate of Cumberland from the proceeds first realized.

Order accordingly.

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Tab 3

2015 ONSC 5139
Ontario Superior Court of Justice

NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.

2015 CarswellOnt 12962, 2015 ONSC 5139, 257 A.C.W.S. (3d) 520, 30 C.B.R. (6th) 315

NS United Kaiun Kaisha, Ltd., Moving Party (Respondent in the Proposal) and Cogent Fibre Inc., Responding Party (Applicant in the Proposal)

Penny J.

Heard: August 12, 2015
Judgment: August 17, 2015
Docket: 31-2016058

Counsel: Doug Smith, Roger Jaipargas for NS United Kaiun Kaisha, Ltd.
Ken Kraft, Sara-Ann Van Allen for Cogent Fibre Inc.
Sam Babe for Proposal Trustee

Subject: Civil Practice and Procedure; Evidence; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
II Assignments in bankruptcy
II.4 Procedure on assignment

Headnote

Bankruptcy and insolvency --- Assignments in bankruptcy — Procedure on assignment

Debtor was woodchipping business and had five year shipping contract with creditor — Creditor was successful in arbitration, and next day debtor made notice in bankruptcy — Debtor had assets of approximately $261,000 and no operations, revenues or cash flow — Creditor was only significant non-contingent current creditor, although arbitration proceedings were in progress with another business — Debtor brought motion for extension of 30-day stay, creditor brought motion to terminate stay — Debtor's motion dismissed, creditor's motion granted — Debtor not acting in good faith, not using due diligence, and was not likely to make viable proposal — Unlikely that stay would allow for acceptable proposal to be put forth — Evidence of debtor was vague and there was no evidence of what it would be able to offer creditors in proposal — Debtor had not put forth outline of any plan or proposal despite no business being conducted — There was no attempt being made to rehabilitate business — Creditor had veto over proposal and refused to negotiate with debtor.

Table of Authorities

Cases considered by *Penny J.*:

Cantrail Coach Lines Ltd., Re (2005), 2005 BCSC 351, 2005 CarswellBC 581, 10 C.B.R. (5th) 164 (B.C. Master) — considered

Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]) — considered

Enirgi Group Corp. v. Andover Mining Corp. (2013), 2013 BCSC 1833, 2013 CarswellBC 3026, 6 C.B.R. (6th) 32 (B.C. S.C.) — considered

Janodee Investments Ltd. v. Pellegrini (2001), 2001 CarswellOnt 1232, 25 C.B.R. (4th) 47 (Ont. S.C.J.) — considered

Statutes considered by *Penny J.*:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 50.4(9) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11) [en. 1992, c. 27, s. 19] — considered

MOTION by debtor for extension of 30 day bankruptcy stay, MOTION by creditor to terminate order.

***Penny J.*:**

1 In a brief handwritten endorsement of August 12, 2015, I dismissed the motion of the debtor, Cogent Fibre Inc., for an extension of the 30- day stay under s. 50.4(9) of the *Bankruptcy and Insolvency Act* and allowed the motion of the judgment creditor, NS United Kaiun Kaisha, Ltd. for an order terminating the 30-day stay under s. 50.4(11) of the BIA, with reasons to follow. These are those reasons.

2 Cogent is in the woodchip business. It had a five-year shipping contract with NS United. There was a dispute which became the subject of an arbitration commenced in February 2012. An arbitral award was made against Cogent for Cdn$15.3 million in January 2015. In July 2015, the District Court for the Southern District of New York confirmed the award. The day after the release of the confirming judgment, Cogent filed its NOI.

3 In an affidavit sworn in collateral bankruptcy proceedings in New York, Mr. Montrop, a director of Cogent, deposed that Cogent's management decided to wind down Cogent's business well before the release of the arbitral award or confirming judgment. It did so, he said, on the basis not only of pending maritime arbitrations but other factors including a "hostile market."

4 Mr. Montrop's evidence is, however, that Cogent was prompted to file its NOI on the basis of its "belief" that NS United "will expeditiously seek to record the judgment and proceed with collection actions."

5 The evidence is that Cogent currently has assets of approximately $261,000 and has no operations, revenues or cash flow. The professional fees of these proceedings are being paid by its parent corporation.

6 Cogent currently has one material, non-contingent creditor — NS United. There are no secured creditors. Another maritime shipping company, NYK, also instituted arbitration proceedings against Cogent. NYK alleges it is owed about $10.9 million. There has been no hearing and there is, obviously, no decision or award. Those proceedings are currently stayed. The NYK claim is entirely contingent. There is no evidence that NYK it at all interested in whatever it is that Cogent has discussed. I was advised that NYK takes no position on the motions before me. It is conceded by Cogent that NS United has a veto over any proposal.

The Cogent Motion to Extend

7 Section 50.4(9) sets out a three-part, conjunctive test for the grant of an extension of the 30-day stay. The court may grant an extension, not to exceed 45 days, if satisfied on the evidence tendered in the application that:

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

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

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

8 There is no doubt that the intent of the BIA proposal sections is to give the insolvent person an opportunity to put forward a plan. The purpose of the legislation is rehabilitation, not liquidation. Insolvent companies should have the chance to put forward their proposal.

9 I am not satisfied, however, on the evidence provided by Cogent that it has acted and is acting in good faith and with due diligence. I am also not satisfied on the evidence provided by Cogent that it would likely be able to make a viable proposal if the extension being applied for were granted.

10 I say this principally of the basis of the vague, somewhat vacuous, affidavit evidence of Mr. Montrop filed in support of the Cogent motion and in response to the NS United motion.

11 His evidence amounts to this:

(a) Cogent has engaged in settlement discussions with NYK with a view to making a proposal to NYK;

(b) Cogent has offered to meet with NS United;

(c) Cogent is working towards a proposal; and

(d) Cogent requires additional time to continue discussions with NYK and NS United.

12 There is not a hint of what Cogent has to offer NYK and not a hint of what kind of proposal Cogent has in mind. Counsel for Cogent argues that because the settlement discussions are without prejudice, it cannot disclose them. I do not find that argument persuasive. Nothing prevents Cogent from describing its plan or what it hopes to achieve in a proposal.

13 Although Cogent has offered to meet with NS United, NS United has no interest in meeting with Cogent and has not done so.

14 Cogent says it is working towards a proposal but, in the face of this motion, has not provided even a hint of what that proposal might look like. At its highest, it involves talking to the two shipping companies and hoping to make a deal. Counsel made submissions about possible tax losses which may have value but there was not a mote of evidence to this effect.

15 In this case, the 30-day stay expires at midnight on August 14, 2015. Cogent has taken the position, on these motions, that if its request for an extension is denied, it will file a proposal of some kind on Monday, August 17, 2015. That, it suggests, would automatically extend the stay for another 21 days.

16 I find it difficult to understand how Cogent could plan to file a proposal on Monday, August 17 but was unable to provide at least the outline of this proposal on Wednesday, August 12. There was no explanation given for this apparent contradiction.

17 In effect, Cogent says it needs more time to continue discussions with its two major creditors when at least one of those creditors (a creditor with veto power) has not engaged in any discussions with Cogent and has no intention of doing so. Cogent's position is, I find, entirely tautological.

18 In his factum and in oral submissions, counsel for Cogent emphasized the rehabilitative nature of the proposal sections. He relied heavily on recent Ontario and B.C. authority to the effect that a veto-empowered creditor's statement that it will never agree to a proposal is not dispositive of whether to terminate or refuse to extend a stay. I quite agree with this position and the supporting law. Creditors often, for strategic reasons, say they will never agree.

19 Nevertheless, it seems to me there must be a certain forthrightness on the part of the debtor about what is sought to be achieved. There must also be an air of reality about the likelihood of any proposal being viable.

20 The 30-day stay (or any extension thereof) is meant to give the debtor time to deal with multiple parties, many moving pieces and potentially complex business and financial arrangements. Here, there is no active business.

There are no complex financial arrangements. There are no assets. There are only two material creditors, at least one of which, NS United, has a veto over any proposal. There are, in effect, almost no moving pieces. In the face of a motion to terminate the stay, one would have thought the debtor would be motivated to come up with the best evidence it could of what its proposal might be and, specifically, why an extension is necessary to further the development of that proposal. Yet the debtor has chosen to put forward no concrete evidence but to rely on vague, conclusory assertions.

21 It is this failure to give even a hint of what a proposal might look like, or to provide any content for the bald and conclusory statement that more time is needed to further negotiations (particularly where it is unclear that there are any negotiations), which leads me to the conclusion that Cogent has not met its onus of proving, on a balance of probabilities, that it has acted in good faith and with due diligence and that it is likely to be able to make a viable proposal if only it is given more time.

22 I am also driven to the conclusion that Cogent's emphasis on so-called "rehabilitation" is empty rhetoric in this case. The evidence filed by Cogent in the New York bankruptcy court makes it clear that there is no ongoing effort to "rehabilitate" this company. Management had already decided to wind down its operations before the NS United arbitration award was granted. The summary balance sheets filed by the proposal trustee indicate that Cogent is already well under way with its "wind-down." It went from $3.27 million in assets in 2013 to $5.024 million in 2014 to $261,476 in 2015.

23 Counsel for the debtor submitted in oral argument that perhaps the company could be restarted. There is no evidence whatsoever to support such a contention - indeed, all of the evidence is very much to the contrary.

24 For these reasons the debtor's motion to extend the stay under s. 50.4(9) is dismissed.

The NS United Motion to Terminate

25 Section 50.4(11) of the BIA provides that where a debtor files a notice of intention to make a proposal, a creditor can apply to the court to terminate the initial 30-day stay on one or more of four disjunctive grounds:

> (i) the insolvent person has not acted, or is not acting, in good faith and with due diligence;
>
> (ii) the insolvent person will not likely be able to make a viable proposal before the expiration of the 30-day period;
>
> (iii) the insolvent person will not likely to be able to make a proposal, before the expiration of the 30-day period that will be accepted by the creditors; or
>
> (iv) the creditors as a whole would be materially prejudiced if the application to terminate was rejected by the court.

26 NS United took the position that Cogent had not discharged its onus of proving it was acting in good faith and with due diligence on the motion to extend but did not positively assert this ground on the motion to terminate. NS United relies on the second and third grounds of s. 50.4(11).

27 It is clear from the very existence of s. 50.4(11), as well as judicial authority, that while an insolvent debtor is entitled to an automatic stay simply by filing a notice of intention to make a proposal, the BIA does not guarantee an insolvent person a stay without review. There is no absolute immunity from creditors. Section 50.4(11) of the BIA empowers the court to terminate the 30-day stay where the statutory conditions for doing so are met.

28 With respect to the probability of filing a viable proposal at all, I again refer to the paucity of evidence about what a proposal might look like. The debtor has utterly failed to provide even a hint of its plan for a proposal. The facts before the court, from Cogent management's own sworn statement, are that Cogent was already being

"wound down" before the arbitral award prompted its filing of a NOI. The evidence before the court, therefore, is that management's plan is not to "rehabilitate" this company.

29 As mentioned earlier, Cogent's stated intention to file a proposal of some sort on the last day, in order to buy another 21 days, seems to me not only disingenuous but to highlight the lack of any concrete proposal. There is simply no evidence to suggest there is any plan in the offing at all, much less one that would probably appear reasonable to a reasonable creditor.

30 Cogent's gambit boils down to this: its proposal depends on negotiating a compromise with its only material, non-contingent creditor. That creditor, however, will not, and is under no obligation to, negotiate any compromise with Cogent.

31 On the second ground, likely to be acceptable to creditors, I agree with Cogent that the mere fact that NS United has a veto power over any proposal is not dispositive on a motion to terminate under s. 50.4(11). It is, however, one factor to be taken into account.

32 What adds credibility to NS United's position that it will, under no circumstances, agree to any proposal is the complete paucity of evidence that any plan is even possible, much less viable and likely to be accepted by creditors.

33 Counsel for Cogent sought to distinguish between the "harsher" line taken by the Ontario courts in cases such as *Cumberland Trading Inc., Re* [1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List])] and the more "liberal" approach taken in B.C. and other provinces in cases like *Cantrail Coach Lines Ltd., Re* [2005 CarswellBC 581 (B.C. Master)] and *Enirgi Group Corp. v. Andover Mining Corp.* [2013 CarswellBC 3026 (B.C. S.C.)] Counsel argued that the more liberal approach is more in keeping with the rehabilitative purpose of the proposal sections of the BIA and current views of how these provisions should be applied.

34 I am not convinced these cases are in conflict. The exercise of the discretion under ss. 50.4(9) and (11) of the BIA is highly fact dependent. *Cumberland*, for example, was a case where a proposal had already been filed; the issue was whether to terminate the 21-day stay. The facts of *Cantrail* and *Enirgi* can also be readily distinguished from the present case. In *Cantrail*, the debtor presented evidence of a pending proposal under which the objecting creditor might be paid out in full. In *Enirgi*, likewise, there was evidence that the debtor had significant assets - in other words, the debtor had something to work with.

35 Here, the debtor has essentially nothing to work with, which might explain why it has been so reluctant to come forward with anything concrete. Cogent has no active business, no revenue, no cash flow and effectively no assets. The inference to be drawn from the complete absence of any hint of a concrete proposal is, in these circumstances, that there is no basis for a viable plan and certainly no basis for a conclusion, on a balance of probabilities, that there is likely to be any proposal that would be acceptable to the veto-empowered creditor NS United.

36 Lax J. said in *Janodee Investments Ltd. v. Pellegrini* [2001 CarswellOnt 1232 (Ont. S.C.J.)] (April 12, 2001), "the proposal sections of the BIA are intended to give a debtor some breathing room. They are not intended to create an obstacle course for creditors."

37 Cogent admits that its only hope for a proposal is to negotiate a compromise with NS United; yet NS United has no interest, and no obligation to engage, in that negotiation.

38 Even applying what counsel for Cogent describes as the more "liberal" or debtor-friendly approach, on the evidence, NS United has discharged its burden under s. 50.4(11). NS United has, I find, proven on a balance of probabilities that it is not likely that Cogent will be able to make a viable proposal and, even if that were likely, the proposal will not likely be accepted by the requisite level of creditor support.

39 For these reasons, NS United's motion to terminate the 30-day stay is granted.

40 No order as to costs.

Motion by creditor granted, motion by debtor dismissed.

End of Document

Tab 4

2016 ONCA 662
Ontario Court of Appeal

U.S. Steel Canada Inc., Re

2016 CarswellOnt 14104, 2016 ONCA 662, 270 A.C.W.S. (3d) 471, 39 C.B.R. (6th) 173, 402 D.L.R. (4th) 450, 61 B.L.R. (5th) 1

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

In the Matter of a Proposed Plan of Compromise or Arrangement with Respect to U.S. Steel Canada Inc.

George R. Strathy C.J.O., P. Lauwers, M.L. Benotto JJ.A.

Heard: March 17, 2016
Judgment: September 9, 2016
Docket: CA C61331

Counsel: Gordon Capern, Kristian Borg-Olivier, Denise Cooney for Appellant, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union
Andrew Hatnay, Barbara Walancik for SSPO and non-union retirees and active employees of U.S. Steel Canada Inc.
Tamryn Jacobson for Her Majesty the Queen in Right of Ontario and Superintendent of Financial Services (Ontario)
Michael E. Barrack, Jeff Galway, John Mather for Respondent, United States Steel Corporation
Sharon Kour for U.S. Steel Canada Inc.

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Jurisdiction — Court

Company was in Companies' Creditors Arrangement Act (CCAA) protection — Former employees of company claimed its American parent company ran company into insolvency to further its own interests — Former employees sought to have CCAA judge apply American legal doctrine of "equitable subordination" to subordinate parent company's claims to former employee's claims — CCAA judge held that he had no jurisdiction to apply doctrine of equitable subordination — Union appealed — Appeal dismissed — Nowhere in words of CCAA was there authority, express or implied, to apply doctrine of equitable subordination, nor did it fall within scheme of statute, which focused on implementation of plan of arrangement or compromise — Words "may make any order it considers appropriate in circumstances" in s. 11 of CCAA must be read as "may in furtherance of purposes of act make any order it considers appropriate in circumstances" — There was no support for concept that phrase "any order" in s. 11 provided at-large equitable jurisdiction to reorder priorities or to grant remedies as between creditors — Section 6(8) of CCAA effectively subordinates "equity claims", as defined, to claims of all other creditors — "Equitable subordination" is form of equitable relief to subordinate claim of creditor who has engaged in inequitable conduct, such claim was not "equity claim" as defined — There was no "gap" in legislative scheme to be filled by equitable subordination through exercise of discretion, common law, court's inherent jurisdiction or by equitable principles.

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APPEAL by union of judgment finding that court had no jurisdiction to apply American doctrine of equitable subordination.

***George R. Strathy C.J.O.*:**

1 U.S. Steel Canada Inc. ("USSC") is in *CCAA* [1] protection. Its former employees claim that its American parent, United States Steel Corporation ("USS"), ran the company into insolvency to further its own interests. An issue arose in the court below as to whether the *CCAA* judge could apply an American legal doctrine called "equitable subordination" to subordinate USS's claims to the appellant's claims.

2 The *CCAA* judge held he had no jurisdiction to do so. For reasons different than the ones he gave, I agree, and would dismiss the appeal.

FACTUAL BACKGROUND

3 USS is one of the largest steel producers in North America. In 2007, it acquired Stelco, which was in *CCAA* protection at the time, and changed its name to USSC.

4 Seven years later, on September 16, 2014, USSC was again granted *CCAA* protection by order of the Superior Court of Justice (Commercial List).

5 The *CCAA* judge made a Claims Process Order on November 13, 2014, establishing a procedure for filing, reviewing and resolving creditors' claims against USSC.

6 The order set out a separate procedure for resolving claims of approximately $2.2 billion by USS against USSC. Most of the claims arose from USS's acquisition and reorganization of Stelco and from advances of working capital. Those claims were to be determined by the court, rather than by the Monitor.

7 USS filed its proofs of claims. The Monitor recommended they be approved and USS moved for court approval of the claims.

8 Notices of Objection were filed by four parties: (a) the Province of Ontario and the Superintendent of Financial Services in his capacity as administrator of the Pension Benefits Guarantee Fund; (b) the United Steelworkers, Locals 8782 and 1005; (c) Representative Counsel to the Non-USW Active Salaried Employees and Non-USW Salaried Retirees; and (d) Robert Milbourne, a former president of Stelco, and his wife, Sharon Milbourne, both of whom are beneficiaries of a pension agreement with USSC.

9 These objections overlapped to some extent. The *CCAA* judge had to develop a procedure to address the objections. He had to decide whether they should be dealt with within the *CCAA* process, outside it, or not at all.

10 The Province made two allegations. The first was that loans by USS to USSC should be characterized as shareholders' equity, because of the circumstances in which they were made. They should therefore be subordinated to all other claims pursuant to s. 6(8) of the *CCAA*[2] (the "Debt/Equity Objection"). Second, the Province argued that the security for the loans should be invalidated pursuant to provincial and federal fraudulent assignment and fraudulent preference legislation (the "Security Objection"). USS disputed both allegations, but was content to have the issues determined under the Claims Process Order.

11 The Union made objections similar to the Province's, but it added a third based on oppression and breach of fiduciary duty arising out of USS's conduct in relation to the Canadian plants, pensioners, pension plan members and beneficiaries (the "Conduct Objections").

12 The *CCAA* judge described the Conduct Objections as allegations that USS caused USSC to underperform, thereby requiring it to incur significant debt and to be unable to meet its pension obligations. The Union sought, among other things, an order subordinating the USS claims in whole or in part to its claims.

13 The Milbournes' objections were based on USS's alleged conduct and relied primarily on the doctrine of equitable subordination. They asked that the USS claims be dismissed entirely or subordinated to the claims of the other unsecured creditors.

14 The *CCAA* judge scheduled a motion to establish a litigation plan for USS's motion for approval of its claims against USSC. The parties agreed that the Security Objection and the Debt/Equity Objection could be determined pursuant to the Claims Process Order and within the *CCAA* proceedings.[3]

15 The primary disagreement concerned the procedure and timing for the determination of the other objections. The Union argued that the Conduct Objections should be resolved as part of the Claims Process Order and that an evidentiary record was required to do so. USS and USSC took the position that the Conduct Objections should be litigated outside the *CCAA* claims process.

16 The *CCAA* judge found that some of the claims of the Union and the Milbournes could be approached as third party claims against USS for oppression for the purpose of s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, and for breach of fiduciary duty. He found that neither the Claims Process Order nor the *CCAA* contemplated that such claims would be addressed by or would be relevant to a plan of arrangement or compromise under the *CCAA*. The third party claims fell outside the claims process unless specifically incorporated into the restructuring plan as approved by the parties or otherwise ordered.

17 The *CCAA*, he said at para. 65, "is directed towards the creation, approval and implementation of a plan of arrangement or compromise proposed between a debtor company and its secured and unsecured creditors". It did not contemplate incorporation of inter-creditor claims into any plan of arrangement or compromise or into the voting process in respect of any proposed plan.

18 He concluded, at para. 84, that under s. 11 the court had authority to order the remaining claims of the Union and the Milbournes, except the claim for equitable subordination, to 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*." He held that those claims could be determined within the *CCAA* proceedings, rather than in a separate action in the Superior Court, but not under the Claims Process Order. He noted that the court retained jurisdiction to order that the claims be continued outside the *CCAA* if it was determined that pursuing them within the process would no longer further the remedial process of the *CCAA*.

19 He held, however, that he had no jurisdiction under the *CCAA* to apply the doctrine of equitable subordination. Before turning to his reasons, I will explain the doctrine of equitable subordination.

EQUITABLE SUBORDINATION

20 Equitable subordination was developed as an equitable remedy in American insolvency law to subordinate a creditor's claim based on its inequitable conduct. The principles were articulated in *Mobile Steel Co., Re*, 563 F.2d 692 (U.S. C.A. 5th Cir. 1977), which set out a three-part test:

> a. the claimant must have engaged in some type of inequitable conduct;
>
> b. the misconduct must have resulted in injury to creditors of the bankrupt or conferred an unfair advantage on the claimant; and
>
> c. equitable subordination of the claim must not be inconsistent with the provisions of the bankruptcy statute.

21 Paragraph 105(a) of the U.S. *Bankruptcy Code* authorizes bankruptcy courts to use equitable principles to alter the provisions of Title 11 or to prevent an abuse of process. One year after *Mobile Steel*, the *Code* was amended to give legislative effect to equitable subordination: *Bankruptcy Reform Act*, 11 U.S.C. §510(c)(1).

22 The Supreme Court of Canada considered the doctrine on two occasions. In both, the court found it unnecessary to determine whether equitable subordination should be applied, because the underlying facts did not meet the test: *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558 (S.C.C.), at p. 609; and *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 77. This court also found it unnecessary to decide the issue in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 14 O.R. (3d) 1 (Ont. C.A.).

23 The availability of the doctrine has been considered in various Canadian superior courts at the trial level, in various contexts and with inconclusive results: see *General Chemical Canada Ltd., Re*, [2006] O.J. No. 3087 (Ont. S.C.J. [Commercial List]), (in the context of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3); *Christian Brothers of Ireland in Canada, Re* (2004), 69 O.R. (3d) 507 (Ont. S.C.J. [Commercial List]), (in the context of the *Winding-up and Restructuring Act*, R.S.C. 1985, C. W-11, as amended).

24 In *AEVO Co. v. D & A Macleod Co.* (1991), 4 O.R. (3d) 368 (Ont. Bktcy.), Chadwick J. rejected the application of equitable subordination in Canadian law, observing, at p. 372, that to introduce the doctrine would create chaos and would lead to challenges to security agreements based on the conduct of the secured creditor. In *I. Waxman & Sons Ltd., Re* (2008), 89 O.R. (3d) 427 (Ont. S.C.J. [Commercial List]), Pepall J. queried, at para. 33, whether statutory priorities should be upset by a doctrine "divorced from its legal home". This observation was followed, however, with the comment that "a vibrant legal system must be responsive to new developments in the law and the need for reform. Jurisprudence from other jurisdictions often provides the impetus or basis for much needed legal developments."

25 On the other hand, the Newfoundland and Labrador Supreme Court (Trial Division) applied the doctrine in a bankruptcy case in *Lloyd's Non-Marine Underwriters v. J.J. Lacey Insurance Ltd.*, 2009 NLTD 148, 291 Nfld. & P.E.I.R. 149 (N.L. T.D.).

26 The Supreme Court of Canada's silence on the issue of equitable subordination in *CDIC* and *Indalex* cannot be taken, as the *CCAA* judge appears to have thought, as an outright rejection of the doctrine. In my view, the Supreme Court simply left the issue for another day.

27 It is unnecessary to decide that issue in order to resolve this appeal. The only issue is whether the *CCAA* judge was right in deciding that he had no jurisdiction to grant equitable subordination under the *CCAA*, assuming the remedy is available in Canadian law.

SUBMISSIONS AND ANALYSIS

A. PROCEDURAL OBJECTION

28 The appellant's first submission is procedural. It claims that it was unnecessary for the *CCAA* judge to determine whether he had jurisdiction to grant equitable subordination. The Union essentially says it was blindsided. It says it made no submissions on the doctrine of equitable subordination and the *CCAA* judge did not indicate that he was going to address the issue in the context of the scheduling motion. It was inappropriate and unnecessary for the court to shut the door on a novel and controversial remedy without a full factual record.

29 The respondent acknowledges that equitable subordination was not a central issue in the oral submissions before the *CCAA* judge, but points out that it was raised in some of the factums and memoranda filed before and after the hearing. The *CCAA* judge was required to determine what conduct-based inter-creditor claims would be litigated, either under the Claims Process Order or under the *CCAA*. He was entitled to determine whether he had jurisdiction to grant equitable subordination within the *CCAA*.

30 I do not accept the appellant's submission. The issue of equitable subordination was plainly before the *CCAA* judge in submissions made before and after the hearing. The Milbournes' factum made extensive submissions on equitable subordination and argued that it, along with fiduciary duty and oppression, were "live issues which should be the subject matter of a robust evidentiary record and subject to a fair and thorough due process in this court". The Union's factum suggested that some of USS's unsecured claim could be subordinated to the claims of other creditors "on account of a breach of fiduciary duty, a finding of oppression, *or otherwise*." USSC's factum argued that the Union's claim for equitable subordination should be rejected and that suitable remedies were available outside the Claims Process. In supplementary written submissions, the Union argued, in response to USSC's submissions, that the determination of the issue of equitable subordination should await an evidentiary record.

31 Moreover, the issue before the *CCAA* judge was not simply scheduling. The motion sought directions on the extent and nature of production and discovery with respect to the various objections. The Union argued that the objections had to be resolved before there could be approval of a plan of restructuring, a sale process or a distribution to creditors. The allegations that USS's claims should be re-characterized, invalidated, disallowed or subordinated had to be resolved and the *CCAA* judge had to determine a process for their resolution. Some might be dealt with under the Claims Process Order and some might be dealt with outside that Order but nevertheless in the *CCAA* proceedings. Some might not be dealt with under the *CCAA* at all.

32 The *CCAA* judge was plainly aware that a determination of the inter-creditor claims could have implications for the approval of any subsequent reorganization, sale of the business or credit bid. It was appropriate for him to consider whether the court had jurisdiction to address those claims and, if so, how and when.

33 An evidentiary record was unnecessary. The *CCAA* judge was not deciding whether equitable subordination applied on the facts of this case. The issue was whether he had jurisdiction to grant equitable subordination under the *CCAA*.

34 I turn now to the question whether the *CCAA* judge correctly held that he had no jurisdiction under the *CCAA* to order equitable subordination of USS's claims.

B. JURISDICTION TO ORDER EQUITABLE SUBORDINATION

35 I will begin by summarizing the *CCAA* judge's reasons on this issue. I will then set out the submissions of the parties, identify the standard of review, describe the methodology I will use and apply that methodology to the legislation.

(1) The CCAA judge's reasons

36 The *CCAA* judge noted that although the *CCAA* gives authority to re-characterize debt as equity and to invalidate a preference or assignment, there is no express provision conferring jurisdiction to grant equitable subordination. He was of the view that any jurisdiction to do so would have to be found in s. 11, which provides that "the court ... may, subject to the restrictions set out in this Act ... make any order that it considers appropriate in the circumstances."

37 He observed that there is no Canadian case law supporting that authority and, when given the occasion to confirm the existence of equitable subordination on two occasions, the Supreme Court of Canada had declined to do so: *Canada Deposit Insurance Corp.*; and *Indalex*. He suggested that one might infer from this that the Supreme Court had rejected the principle of equitable subordination.

38 He found, however, that to the extent the issue remained open, the *CCAA* evidenced an intention to exclude equitable subordination. When Parliament amended the legislation in 2009, it gave authority under s. 6(8) to subordinate debt as being in substance equity, but it did not enact any provision to subordinate a claim based on the conduct of the creditor. Nor had it drafted s. 36.1, which permitted the court to invalidate preferences and assignments, broadly enough to permit the court to make an order for equitable subordination. These provisions, he said, were "restrictions set out in this Act", limiting the court's broad discretion under s. 11. Parliament's failure to include equitable subordination in the remedies introduced in 2009 must be taken as indicative of an intention to exclude the operation of the doctrine under the *CCAA*. This, he said, was a policy decision the court must respect.

(2) The submissions of the parties

39 The appellant submits the *CCAA* judge had jurisdiction to grant equitable subordination pursuant to s. 11 of the *CCAA* in the absence of express "restrictions" on that jurisdiction. He erred in implying restrictions based on Parliament's failure to amend the legislation.

40 The respondent submits that Canadian courts have all the tools they need to assess, review and, where necessary, subordinate or invalidate creditors' claims in a manner consistent with the underlying legislation, without the need for equitable subordination. Some of these tools are the result of the 2009 amendments to the *BIA* and the *CCAA*. Parliament might have expanded those amendments to incorporate equitable subordination or some other conduct-based remedy, but declined to do so. The court should not invoke a controversial doctrine that Parliament declined to adopt when it had the opportunity to do so.

(3) The standard of review

41 The parties agree that the applicable standard of review is correctness: *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.), at para. 8; and *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), at para. 40.

(4) Framework for analysis

42 In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter Century Services], at paras. 65ff., the Supreme Court of Canada gave guidance on the approach to the scope of statutory remedies under the *CCAA*, and, if need be, under related sources of judicial authority. The court adopted the analysis proposed by Justice Georgina R. Jackson of the Court of Appeal for Saskatchewan and Professor Janis Sarra in an article entitled, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation,

Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., *Annual Review of Insolvency Law, 2007* (Toronto: Thomson Carswell, 2007), at p. 41. Blair J.A. also approved of this approach in *Metcalfe & Mansfield*, at paras. 48-49.

43 Jackson and Sarra note that the *CCAA* is skeletal legislation and advocate a transparent and consistent methodology as judges define the scope of their jurisdiction under the statute. They propose that the courts should take a hierarchical view of the powers at their disposal, adopting a broad, liberal and purposive interpretation of the statute and applying the principles of statutory interpretation before turning to other tools such as the common law or the exercise of inherent jurisdiction.

44 At para. 66 of *Century Services*, the Supreme Court held that in most cases, the search for jurisdiction under the *CCAA* should be an exercise in statutory interpretation. The starting point is the "big picture" principles of statutory interpretation.

45 Driedger's modern principle is the crucial tool for construing skeletal legislation such as the *CCAA*. A court must go beyond an examination of the wording of the statute and consider the scheme of the Act, its object or the intention of the legislature and the context of the words in issue:

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

See: Jackson and Sarra, at p. 47; Elmer A. Driedger, *The Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983) at p. 87, cited in *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.), at para. 26. See also *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at paras. 23, 40.

46 With this in mind, I will apply the framework in *Century Services* to the search for jurisdiction. I turn first to a consideration of the purpose and scheme of the *CCAA*, before considering the language of the statute.

(5) Application of the framework

(i) The purpose of the CCAA

47 There is no dispute about the purpose of the *CCAA*. It describes itself as "An Act to facilitate compromises and arrangements between companies and their creditors". Its purpose is to avoid the devastating social and economic effects of commercial bankruptcies. It permits the debtor to continue to carry on business and allows the court to preserve 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.

48 The *CCAA* has proven to be a flexible and successful tool to enable businesses to avoid bankruptcy. As Professor Sarra notes, "[i]t has been the statute of choice for debtor corporations in every major Canadian restructuring in the past quarter century, including national airlines, major steel and forestry companies, telecommunications companies, major retail chains, real estate and development groups, and the national blood delivery system": Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2d ed. (Toronto: Carswell, 2013), at p. 1.

49 The *CCAA* achieves its goals through a summary procedure for the compromise or arrangement of creditors' claims against the company. It was described in *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.), at para. 36, as:

> a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders.

50 The process has been effective because it is summary, it is practical, it is supervised by an independent expert monitor and it is managed in real time by an experienced commercial judge.

51 *Century Services* is a good example of how the purpose of the *CCAA* informs the exercise of the court's authority. At issue in that case were the reconciliation of another federal statute with the *CCAA* and the scope of a *CCAA* judge's discretion. At para. 70, the orders of the *CCAA* judge were considered squarely within the context of the purpose of the Act:

> The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.
>
> [emphasis added]

52 The Supreme Court concluded, at para. 75, that the order advanced the underlying purpose of the *CCAA*.

(ii) The scheme of the CCAA

53 The *CCAA* has been described as "skeletal" or "under-inclusive" legislation, (Jackson and Sarra at p. 48) which grants broad powers to the courts in general terms.

54 The Act has five parts. Part I, entitled "Compromises and Arrangements" permits the court to sanction a compromise or arrangement between a company and its secured or unsecured creditors, or both.

55 The powers of the court are found in Part II, entitled "Jurisdiction of Courts". The statute gives the court jurisdiction to receive applications, order stays, approve debtor-in-possession financing and appoint a monitor, among other things. Proceedings are commenced by an application to the Superior Court. The court generally grants an initial stay, appoints a monitor with authority to repudiate leases and other agreements and authorizes debtor in possession financing. A process is established for the identification and review of creditors' claims by the monitor and to deal with disputed claims, with the ultimate purpose of establishing classes of creditors who will vote, by class, on the compromise or arrangement.

56 One possible outcome is the preparation of a plan of arrangement. Creditors vote by class on the plan at a meeting called for that purpose. A majority by number of creditors in each class, together with two-thirds of the creditors in that class by dollar value, must approve the plan. If a class of creditors approves the plan, it is binding on all creditors within the class, subject to the court's approval of the plan. If all classes of creditors approve the plan, the court must then approve the plan as a final step.

57 Part III, entitled "General", deals with such issues as the determination of the amount of creditors' claims, classes of creditors, the duties of monitors, the disclaimer of agreements between the company and third parties and preferences and transfers at undervalue.

58 Section 19 identifies "claims" that may be dealt with in a compromise or arrangement. Those are claims provable in bankruptcy that relate to debts or liabilities, present or future, to which the *debtor company* is subject or may become subject before the compromise or arrangement is sanctioned. [4]

59 The significance of this definition is that the focus of the plan of arrangement is claims against the *debtor company* that are provable in bankruptcy. The *CCAA* judge identified this significance at para. 59 of his reasons, where he noted that s. 19(1) of the *CCAA* provides, effectively, "that a plan of compromise or arrangement may only deal with claims that relate to debts or liabilities to which a debtor company is subject at the time of commencement of proceedings under the *CCAA*". At para. 61, he noted that neither the Claims Process Order nor the *CCAA* contemplated that inter-creditor claims would be addressed by or be relevant to a plan of arrangement.

60 Section 20 sets out the method for determining the amount of the claim of any secured or unsecured creditors. In most cases, it will be the amount "determined by the court on summary application by the company or by the creditor".

61 Section 22 provides for the establishment of classes of creditors for the purpose of voting on a compromise or arrangement, based on, among other things, the nature of their claims, the nature of the security in respect of their claims and the remedies available to them in relation to their claims. Creditors may be included in the same class "if their interests or rights are sufficiently similar to give them a commonality of interest".

62 Part IV deals with Cross-Border Insolvencies. Its stated purposes are to give mechanisms to provide for the fair and efficient administration of such insolvencies, to promote cooperation with courts of other jurisdictions, to promote "the rescue of financially troubled businesses to protect investment and preserve employment" and to protect the interests of creditors, of other interested persons and of the debtor company. Part V deals with Administration.

63 The *CCAA* was amended in 2009. The amendments were the product of extensive discussion of the *BIA* and the *CCAA* in the Standing Senate Committee on Banking, Trade and Commerce. The Committee recommended amendments to the legislation, including an expanded power to review, invalidate or subordinate creditors' claims under the *CCAA*.

64 These recommendations were reflected in the 2009 amendments in two respects. First, s. 6(8) provides that a compromise or arrangement will not be approved unless it provides that all other claims are to be paid in full before an equity claim is paid.

65 This provision, coupled with the definition of "equity interest" [5] and "equity claim" [6] in s. 2(1), permits the court to determine whether a creditor's claim is in substance a share, warrant or option. This is the underpinning of the Debt/Equity Objection, an objection based on a disagreement as to the proper characterization of the disputed claims.

66 Section 22.1, also added in 2009, provides that all creditors with equity claims are to be in the same class unless the court otherwise orders, and may not, as members of that class, vote at any meeting unless the court otherwise orders.

67 Second, the 2009 amendments harmonized the rules of reviewable transactions under the *BIA* and the *CCAA*. Creditors in a *CCAA* proceeding are now entitled to invoke the provisions of the *BIA* to invalidate security granted by a debtor corporation to a creditor where a fraudulent preference or transfer at undervalue is established. Section 36.1 of the *CCAA* provides that ss. 38 and 95 to 101 of the *BIA* apply, with any required modifications, in respect of a compromise or arrangement, unless the compromise or arrangement provides otherwise.

68 USS says that the 2009 amendments reflected Parliament's decision concerning the extent of the court's jurisdiction over "reviewable transactions" in *CCAA* proceedings and the extent to which a creditor's claim can be subordinated to other claims as a result of its conduct. It says Parliament might have included jurisdiction to rearrange priorities between creditors, for example through equitable subordination, but it declined to do so.

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. Priorities are, however, part of the background against which the plan of compromise or arrangement is negotiated.

70 There is nothing in the record before us to indicate that the issue of equitable subordination was given serious consideration at the time of the 2009 amendments or that those amendments were intended to import other remedies.

(iii) Interpreting the particular provisions before the court

71 I now turn to the words of the statute itself, considered in context and having regard to the scheme of the *CCAA*, the object of the act and the intentions of Parliament.

72 As Blair J.A. put it when deciding whether the *CCAA* granted the court the power to sanction the disputed order in *Metcalfe & Mansfield*, at para. 58, "[w]here in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases?" The question before us is "where (if at all) in the words of the statute is the court (implicitly or explicitly) clothed with authority to make an order for equitable subordination of the USS claims?"

(a) Section 11: "The engine that drives the statutory scheme"

73 The parties focussed their arguments on whether the powers granted by s. 11 include the power to grant the remedy of equitable subordination. In order to inform the scope of s. 11, they urge us to consider the treatment of "equity" claims in s. 6(8) of the *CCAA* and the remedies available under s. 36.1.

74 In *Stelco*, at para. 36, Blair J.A. described s. 11 as "the engine that drives this broad and flexible statutory scheme". Section 11 states, in full:

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

75 Prior to amendment in 2005 (S.C. 2005, c. 47, s. 128), the underlined portion above had read "subject to this Act". In *Century Services*, the Supreme Court, at paras. 67-68, interpreted this amendment as being an endorsement of the broad reading of *CCAA* jurisdiction that had been developed in the jurisprudence.

76 The jurisdiction under s. 11 has two express limitations. First, the court must find that the order is "appropriate in the circumstances". Second, even if the court considers the order appropriate in the circumstances, it must consider whether there are "restrictions set out in" the *CCAA* that preclude it.

77 As I have noted, the *CCAA* judge held that s. 11 did not confer jurisdiction to apply the doctrine of equitable subordination. The statute could have provided the authority to subordinate claims on this basis, as it did with equity claims, but it did not. He also held that the definition of "equity claim" and the option to bring proceedings under s. 36.1 were "restrictions" within the meaning of s. 11.

78 In my view, the interpretative process should start with the scope of s. 11 before the restrictions are considered in the analysis. The broad powers exercised by *CCAA* judges evolved in the jurisprudence before the concept of "restrictions" was legislated.

79 Moreover, it is inconsistent with the anatomy and history of the *CCAA* to maintain that if Parliament had intended that a *CCAA* judge would have the authority to make a certain type of order, it would have said so. The Supreme Court has made it clear that "[t]he general language of the *CCAA* should not be read as being restricted by the availability of more specific orders": *Century Services*, at para. 70.

80 What is apparent from the many creative orders that have been made, before and since the 2009 amendments, is that such orders are made squarely in furtherance of the legislature's objectives. In *Century Services*, at para. 59, the Supreme Court observed that "[j]udicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes", to avoid the devastating social and economic effects of bankruptcy while an attempt is made to organize the affairs of the debtor under court supervision.

81 The words "may ... make any order it considers appropriate in the circumstances" in s. 11 must, in my view, be read as "may ... *in furtherance of the purposes of this act*, make any order it considers appropriate in the circumstances."

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.

83 I turn to the second limit on the court's jurisdiction under s. 11, the "restrictions set out in this Act". The first question is whether such restrictions must be express or can be implied.

84 It bears noting that there are numerous express restrictions on the court's jurisdiction contained within the *CCAA* itself. Some are contained in Part II (Jurisdiction of Courts) and some are actually preceded by the heading "Restriction". In *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 426, 81 B.C.L.R. (5th) 102 (B.C. C.A.), at para. 34, the British Columbia Court of Appeal observed that "where other provisions of the statute are intended to restrict the powers under ss. 11 and 11.02 of the statute, they do so in unequivocal terms."

85 The *CCAA* judge found that there were "restrictions set out" in the *CCAA* that prevented the court from applying equitable subordination, namely the definition of "equity claim" in s. 2(1) and the provisions of s. 36.1. Essentially, he found that Parliament could have introduced equitable subordination into the *CCAA* when it amended the legislation in 2009, but declined to do so. "The court must respect that policy decision", he said at para. 53. The respondent supports this interpretation.

86 I agree with the appellant that "equity claim" is not a restriction at all, but a definition. Together with s. 6(8), it codifies what was essentially the law before the 2009 amendments. The purpose of this involvement in the priority of claims is to remove shareholders from the process of arriving at a compromise or arrangement, absent permission of the court. It has nothing to do with any wrongdoing by the person with the equity interest. The only "restriction", if any, would be the lack of flexibility to reverse this statutory subordination, as Pepall J. pointed out in *Nelson Financial Group Ltd., Re*, 2010 ONSC 6229, 75 B.L.R. (4th) 302 (Ont. S.C.J. [Commercial List]), at para. 34. However, this has to do only with subordination flowing from the characterization of a claim and not equitable subordination.

87 I also agree that the plain meaning of the words "subject to the restrictions *set out* in this Act" refers to express restrictions, of which there are a number.

(b) Subsection 6(8): Subordination of "equity claims"

88 In the court below, and in the appellant's submissions in this court, there was a blurring of the distinction between the separate concepts of "equity claim" and the doctrine of "equitable subordination". The *CCAA* judge's reasons referred at times to the "subordination claims" of the Union and the Milbournes as including the equitable subordination claims and the claims for oppression and breach of fiduciary duty.

89 As explained earlier, s. 6(8) of the *CCAA* effectively subordinates "equity claims", as defined, to the claims of all other creditors. No compromise or arrangement can be approved unless it provides for other claims to be paid, in full, before equity claims are paid.

90 With the exception of environmental claims, ss. 6(8) and 22.1 are the only provisions of the *CCAA* to deal expressly with priorities between creditors. [7] There is a clear rationale for these provisions. In E. Patrick Shea, *BIA, CCAA & WEPPA: A Guide to the New Bankruptcy & Insolvency Regime* (Markham: LexisNexis Group, 2009), at p. 89, the author explains that "[t]he intention of these amendments is to remove the shareholder/creditor from the reorganization process, unless the court orders that they have a seat at the table."

91 "Equitable subordination", on the other hand, refers to the doctrine at issue here: a form of equitable relief to subordinate the claim of a creditor who has engaged in inequitable conduct. Such a claim is not an "equity claim", as defined. If it were, it would be subordinated without the need for intervention by the court.

92 Pepall J. dealt with these different principles and distinguished them clearly in *I. Waxman & Sons Ltd.*, a Commercial List decision that predated the 2009 amendments. There, a trustee in bankruptcy brought a motion for advice and directions as to whether a judgment creditor's claim should be allowed. Other creditors argued that his claim was rooted in equity and was not a debt claim. In the alternative, they argued that even if it was a debt claim, it should be subordinated to their claims pursuant to the doctrine of equitable subordination.

93 Pepall J. addressed the argument that the judgment creditor's claim was an equity claim under the heading "Characterization" (paras. 18-26), because the issue was whether his claim was properly characterized as one of equity or debt, with the attendant priority consequences. Next she considered whether, even though she had found that the claim was a debt claim, it should be subordinated pursuant to the doctrine of equitable subordination (paras. 27-35). She noted, at para. 27, that "[a]s its name suggests, the basis for development of the doctrine is the equitable jurisdiction of the court". She held that even if it applied in Canada, which was not established, there was no evidence on which to apply it in that case.

94 By contrast, the *CCAA* judge in this case disposed of these issues under one heading, "The Authority of the Court to Adjudicate Claims for Debt Re-Characterization and for Equitable Subordination", at paras. 38-53. He found, at para. 51, that the absence of any provision in the *CCAA* that would permit the application of equitable subordination was indicative of an intention to exclude the operation of the doctrine.

95 The *CCAA* judge appears to have treated equitable subordination as akin to equity claims as defined in s. 2(1), the subordination of equity claims in s. 6(8) and the remedies under s. 36.1. He found that because equitable subordination is not mentioned in the context of these remedies, Parliament must have intended to exclude it.

96 The distinction between these terms undermines the argument that equitable subordination does not exist because it was not included as part of the definition of (or together with the subordination of) equity claims. Equity claims are subordinated in order to keep shareholders away from the table while the claims of other creditors are being sorted out. Even prior to being explicitly subordinated by statute in 2009, they generally ranked lower than general creditors: *Sino-Forest Corp., Re*, 2012 ONCA 816, 114 O.R. (3d) 304 (Ont. C.A.), at para. 30. The purpose of the 2009 amendments appears to have been to confirm and clarify the law: see The Report of the Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of*

the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act (Ottawa, November 2003), at p. 158-59.

(c) Section 36.1: Preferences and Assignments

97 Section 36.1, which was part of the 2009 amendments, incorporates by reference provisions of the *BIA* permitting the court to invalidate prior fraudulent preferences or fraudulent assignments.

> 36.1 (1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

98 The respondent argues that the inclusion of these express provisions implies that no other form of equitable remedy was contemplated. Its argument is that, had Parliament wished to invalidate or subordinate claims of creditors who had engaged in inequitable conduct in relation to other creditors, it could have expressly included that remedy.

99 I would not read anything into s. 36.1, one way or the other. Nor would I regard it as a "restriction" set out in the Act within the meaning of s. 11.

(6) Summary

100 The appellant requested "a declaration that the *CCAA* contains no restrictions within the meaning of s. 11 on the court's ability to apply the doctrine of equitable subordination." In my view, this is the wrong inquiry and this is why I reach the same result as the *CCAA* judge, but for different reasons.

101 I would not grant the relief sought because, applying the principles of statutory interpretation, nowhere in the words of the *CCAA* is there authority, express or implied, to apply the doctrine of equitable subordination. Nor does it fall within the scheme of the statute, which focuses on the implementation of a plan of arrangement or compromise. The *CCAA* does not legislate a scheme of priorities or distribution, because these are to be worked out in each plan of compromise or arrangement. The subordination of "equity claims" is directed towards a specific group, shareholders, or those with similar claims. It also has a specific function, consistent with the purpose of the *CCAA*: to facilitate the arrangement or compromise without shareholders' involvement.

102 The success of the *CCAA* in fulfilling its statutory purpose has been in large measure due to the ability of judges to fashion creative solutions, for which there is no express authority, through the exercise of their jurisdiction under s. 11. As Blair J.A. noted in *Metcalfe and Mansfield*, however, the court's powers are not limitless. They are shaped by the purpose and scheme of the *CCAA*. The appellant has not identified how equitable subordination would further the remedial purpose of the *CCAA*.

103 At this stage of the analysis, I am mindful of the Supreme Court's observation in *Century Services* that in most cases the court's jurisdiction in *CCAA* matters will be found through statutory interpretation. I am also mindful of its observation in *Indalex*, at para. 82, that courts should not use an equitable remedy to do what they wish Parliament had done through legislation. In my view, there is no "gap" in the legislative scheme to be filled by equitable subordination through the exercise of discretion, the common law, the court's inherent jurisdiction or by equitable principles.

104 There is no provision in the *CCAA* equivalent to s. 183 of the *BIA* or §105(a) of the U.S. *Bankruptcy Code*. Section 183 invests the bankruptcy court with "such jurisdiction at law and in equity" as will enable it to exercise its bankruptcy jurisdiction. This is significant, because if equitable subordination is to become a part of Canadian law, it would appear that the *BIA* gives the bankruptcy court explicit jurisdiction as a court of equity to ground such a remedy and a legislative purpose that is more relevant to the potential reordering of priorities.

CONCLUSION

105 For these reasons, I would dismiss the appeal. I would order that counsel may make written submissions as to costs, not to exceed five pages in length, excluding costs outlines. I would assume counsel can agree on a timetable for delivery of all costs submissions within 30 days of the release of these reasons.

***P. Lauwers J.A.*:**

I agree

***M.L. Benotto J.A.*:**

I agree

Appeal dismissed.

Footnotes

1 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

2 6(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

3 In a subsequent ruling, *U.S. Steel Canada Inc., Re*, 2016 ONSC 569 (Ont. S.C.J.), the *CCAA* judge dismissed the Debt/Equity objection, finding that approximately $2 billion of USSC's unsecured claims and $73 million in secured claims were properly characterized as debt rather than equity. He also dismissed the objection that approximately $118 million in secured claims should be invalidated due to lack of consideration or as a fraudulent preference.

4 *CCAA*, s. 2(1): "*claim* means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*." Section 121 of the *BIA* states that claims provable in bankruptcy are those to which the bankrupt is subject: "121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act."

5 "*Equity interest* means (a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and (b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt."

6 "*Equity claim* means a claim that is in respect of an equity interest, including a claim for, among others, (a) a dividend or similar payment, (b) a return of capital, (c) a redemption or retraction obligation, (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)."

7 Subsection 11.8(8) gives the federal and provincial Crowns priorities for environmental claims against the debtor.

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Tab 5

Most Negative Treatment: Check subsequent history and related treatments.

2015 SCC 51, 2015 CSC 51
Supreme Court of Canada

Alberta (Attorney General) v. Moloney

2015 CarswellAlta 2091, 2015 CarswellAlta 2092, 2015 SCC 51, 2015 CSC 51, [2015] 12 W.W.R. 1, [2015] 3 S.C.R. 327, [2015] A.W.L.D. 4293, [2015] A.W.L.D. 4294, [2015] A.W.L.D. 4341, 22 Alta. L.R. (6th) 287, 259 A.C.W.S. (3d) 20, 29 C.B.R. (6th) 173, 391 D.L.R. (4th) 189, 476 N.R. 318, 606 A.R. 123, 652 W.A.C. 123, 85 M.V.R. (6th) 37, J.E. 2015-1777

Attorney General of Alberta, Appellant and Joseph William Moloney, Respondent and Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General for Saskatchewan and Superintendent of Bankruptcy, Interveners

McLachlin C.J.C., Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté JJ.

Heard: January 15, 2015
Judgment: November 13, 2015
Docket: 35820

Proceedings: affirming *Moloney v. Alberta (Administrator, Motor Vehicle Accident Claims Act)* (2014), 64 M.V.R. (6th) 82, 569 A.R. 177, 370 D.L.R. (4th) 267, 9 C.B.R. (6th) 278, 91 Alta. L.R. (5th) 221, [2014] 4 W.W.R. 272, 2014 CarswellAlta 225, 2014 ABCA 68, Frans Slatter J.A., Jack Watson J.A., Ronald Berger J.A. (Alta. C.A.); affirming *Moloney v. Alberta (Administrator, Motor Vehicle Accident Claims Act)* (2012), 550 A.R. 257, 39 M.V.R. (6th) 21, 2012 ABQB 644, 2012 CarswellAlta 1757, [2012] A.J. No. 1094, 73 Alta. L.R. (5th) 44, A.B. Moen J. (Alta. Q.B.)

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Subject: Constitutional; Insolvency; Public
Related Abridgment Classifications
Bankruptcy and insolvency
I Bankruptcy and insolvency jurisdiction
I.1 Constitutional jurisdiction of Federal government and provinces
I.1.c Paramountcy of Federal legislation
Bankruptcy and insolvency
XV Discharge of bankrupt
XV.10 Effect of discharge
XV.10.c Miscellaneous
Motor vehicles
II Constitutional issues
II.1 Conflict with federal legislation

II.1.g Licence suspension

Headnote

Motor vehicles --- Constitutional issues — Conflict with federal legislation — Licence suspension

Applicant was responsible for accident while he was driving uninsured vehicle — Administrator obtained default judgment against applicant — Applicant made arrangements to pay back debt by monthly payments, but later made assignment in bankruptcy — Debt to administrator was listed among applicant's obligations and valued at $195,823 — After discharge, applicant's driving privileges were suspended by operation of s. 102 of Traffic Safety Act (TSA) — Applicant's application for stay of suspension was granted — Appeal by administrator and Attorney General was dismissed — Appellate court found that impugned provisions of TSA had effect of frustrating Parliament's legislative purpose in enacting Bankruptcy and Insolvency Act (BIA) — Section 102 of TSA had unacceptable impact on rehabilitative purposes of bankruptcy regime and adverse impact on objective of providing fair and equal distribution to creditors — Appellate court found there was operational conflict between two statutes, and federal legislation had to prevail — Appellate court found Province was not entitled to deny applicant driver's licence because of unsatisfied personal injury debt that had been discharged in bankruptcy — Attorney General of Alberta appealed — Appeal dismissed — Conflict triggering federal paramountcy doctrine will arise in one of two situations — First is when operational conflict arises because it is impossible to comply with both laws, second is when operation of provincial law frustrates purpose of federal law — Alleged conflict arose between s. 178 of BIA, purpose of which was to ensure financial rehabilitation of debtor, and, on other hand, s. 102 of TSA — Purpose and effect of s. 102 was to deprive judgment debtor of driving privileges until judgment arising from motor vehicle accident was paid — Section 102 of TSA constituted debt collection mechanism — True incompatability existed between laws — No distinction exists between extinguishing and releasing debt, and there is no distinction between civil and administrative means to recover debt.

Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Constitutional jurisdiction of Federal government and provinces — Paramountcy of Federal legislation

Applicant was responsible for accident while he was driving uninsured vehicle — Administrator obtained default judgment against applicant — Applicant made arrangements to pay back debt by monthly payments, but later made assignment in bankruptcy — Debt to administrator was listed among applicant's obligations and valued at $195,823 — After discharge, applicant's driving privileges were suspended by operation of s. 102 of Traffic Safety Act (TSA) — Applicant's application for stay of suspension was granted — Appeal by administrator and Attorney General was dismissed — Appellate court found that impugned provisions of TSA had effect of frustrating Parliament's legislative purpose in enacting Bankruptcy and Insolvency Act (BIA) — Section 102 of TSA had unacceptable impact on rehabilitative purposes of bankruptcy regime and adverse impact on objective of providing fair and equal distribution to creditors — Appellate court found there was operational conflict between two statutes, and federal legislation had to prevail — Appellate court found Province was not entitled to deny applicant driver's licence because of unsatisfied personal injury debt that had been discharged in bankruptcy — Attorney General of Alberta appealed — Appeal dismissed — Conflict triggering federal paramountcy doctrine will arise in one of two situations — First is when operational conflict arises because it is impossible to comply with both laws, second is when operation of provincial law frustrates purpose of federal law — Alleged conflict arose between s. 178 of BIA, purpose of which was to ensure financial rehabilitation of debtor, and, on other hand, s. 102 of TSA — Purpose and effect of s. 102 was to deprive judgment debtor of driving privileges until judgment arising from motor vehicle accident was paid — Section 102 of TSA constituted debt collection mechanism — True incompatability existed between laws — No distinction exists between extinguishing and releasing debt, and there is no distinction between civil and administrative means to recover debt.

Bankruptcy and insolvency --- Discharge of bankrupt — Effect of discharge — Miscellaneous

Applicant was responsible for accident while he was driving uninsured vehicle — Administrator obtained default judgment against applicant — Applicant made arrangements to pay back debt by monthly payments, but later made assignment in bankruptcy — Debt to administrator was listed among applicant's obligations and valued at $195,823 — After discharge, applicant's driving privileges were suspended by operation of s. 102 of Traffic Safety Act (TSA) — Applicant's application for stay of suspension was granted — Appeal by administrator

and Attorney General was dismissed — Appellate court found that impugned provisions of TSA had effect of frustrating Parliament's legislative purpose in enacting Bankruptcy and Insolvency Act (BIA) — Section 102 of TSA had unacceptable impact on rehabilitative purposes of bankruptcy regime and adverse impact on objective of providing fair and equal distribution to creditors — Appellate court found there was operational conflict between two statutes, and federal legislation had to prevail — Appellate court found Province was not entitled to deny applicant driver's licence because of unsatisfied personal injury debt that had been discharged in bankruptcy — Attorney General of Alberta appealed — Appeal dismissed — Conflict triggering federal paramountcy doctrine will arise in one of two situations — First is when operational conflict arises because it is impossible to comply with both laws, second is when operation of provincial law frustrates purpose of federal law — Alleged conflict arose between s. 178 of BIA, purpose of which was to ensure financial rehabilitation of debtor, and, on other hand, s. 102 of TSA — Purpose and effect of s. 102 was to deprive judgment debtor of driving privileges until judgment arising from motor vehicle accident was paid — Section 102 of TSA constituted debt collection mechanism — True incompatability existed between laws — No distinction exists between extinguishing and releasing debt, and there is no distinction between civil and administrative means to recover debt.

Véhicules à moteur --- Questions d'ordre constitutionnel — Conflit avec la législation fédérale — Suspension de permis

Requérant a causé un accident alors qu'il était au volant d'un véhicule qui n'était pas assuré — Administrateur a obtenu un jugement par défaut contre le requérant — Requérant a conclu des arrangements afin de rembourser la dette sur une base mensuelle, mais a plus tard fait cession de ses biens — Créance de l'administrateur a été ajoutée à la liste des obligations du requérant et évaluée à 195 823 $ — Après que le requérant ait obtenu sa libération de dettes, les privilèges relatifs au permis de conduire du requérant ont été suspendus en application de l'art. 102 de la Traffic Safety Act (TSA) — Demande du requérant en vue d'obtenir la levée de la suspension a été accordée — Appel interjeté par l'administrateur et le procureur général a été rejeté — Cour d'appel a conclu que les dispositions de la TSA en litige avaient pour effet d'entraver l'atteinte de l'objectif poursuivi par le législateur fédéral en adoptant la Loi sur la faillite et l'insolvabilité (LFI) — Article 102 de la TSA avait un impact inacceptable sur l'objectif de réhabilitation du régime de faillite et un impact négatif sur l'objectif d'assurer une distribution équitable et égale parmi les créanciers — Cour d'appel a conclu qu'il y avait un conflit d'application entre les deux lois et que la législation fédérale devait prévaloir — Province n'avait pas le droit de refuser d'accorder un permis de conduire au requérant parce qu'une créance impayée concernant un préjudice corporel avait été annulée au terme du processus de faillite — Procureur général de l'Alberta a formé un pourvoi — Pourvoi rejeté — Conflit susceptible de déclencher l'application de la doctrine de la prépondérance fédérale survient dans deux circonstances — Première de ces circonstances naît lorsqu'un conflit d'application survient devant l'impossibilité de se conformer à deux lois à la fois et la deuxième de ces circonstances naît lorsque l'application d'une loi provinciale empêche d'atteindre l'objectif poursuivi par une loi fédérale — Conflit en question surviendrait entre l'art. 178 de la LFI, dont l'objectif était d'assurer la réhabilitation financière du débiteur, et l'art. 102 de la TSA — Objectif et l'effet de l'art. 102 étaient de priver un débiteur judiciaire de ses droits de conducteur jusqu'à ce que le montant accordé par le jugement relatif à l'accident d'automobile soit payé — Article 102 constituait un mécanisme de recouvrement de créances — Il s'agissait d'une véritable incompatibilité — Il n'existe aucune distinction entre l'extinction et la remise d'une dette et il n'y a aucune distinction entre le recouvrement d'une créance au moyen d'une procédure civile ou administrative.

Faillite et insolvabilité --- Compétence en matière de faillite et d'insolvabilité — Compétence constitutionnelle du gouvernement fédéral et des provinces — Prépondérance de la compétence fédérale

Requérant a causé un accident alors qu'il était au volant d'un véhicule qui n'était pas assuré — Administrateur a obtenu un jugement par défaut contre le requérant — Requérant a conclu des arrangements afin de rembourser la dette sur une base mensuelle, mais a plus tard fait cession de ses biens — Créance de l'administrateur a été ajoutée à la liste des obligations du requérant et évaluée à 195 823 $ — Après que le requérant ait obtenu sa libération de dettes, les privilèges relatifs au permis de conduire du requérant ont été suspendus en application de l'art. 102 de la Traffic Safety Act (TSA) — Demande du requérant en vue d'obtenir la levée de la suspension a été accordée — Appel interjeté par l'administrateur et le procureur général a été rejeté — Cour d'appel a conclu que

les dispositions de la TSA en litige avaient pour effet d'entraver l'atteinte de l'objectif poursuivi par le législateur fédéral en adoptant la Loi sur la faillite et l'insolvabilité (LFI) — Article 102 de la TSA avait un impact inacceptable sur l'objectif de réhabilitation du régime de faillite et un impact négatif sur l'objectif d'assurer une distribution équitable et égale parmi les créanciers — Cour d'appel a conclu qu'il y avait un conflit d'application entre les deux lois et que la législation fédérale devait prévaloir — Province n'avait pas le droit de refuser d'accorder un permis de conduire au requérant parce qu'une créance impayée concernant un préjudice corporel avait été annulée au terme du processus de faillite — Procureur général de l'Alberta a formé un pourvoi — Pourvoi rejeté — Conflit susceptible de déclencher l'application de la doctrine de la prépondérance fédérale survient dans deux circonstances — Première de ces circonstances naît lorsqu'un conflit d'application survient devant l'impossibilité de se conformer à deux lois à la fois et la deuxième de ces circonstances naît lorsque l'application d'une loi provinciale empêche d'atteindre l'objectif poursuivi par une loi fédérale — Conflit en question surviendrait entre l'art. 178 de la LFI, dont l'objectif était d'assurer la réhabilitation financière du débiteur, et l'art. 102 de la TSA — Objectif et l'effet de l'art. 102 étaient de priver un débiteur judiciaire de ses droits de conducteur jusqu'à ce que le montant accordé par le jugement relatif à l'accident d'automobile soit payé — Article 102 constituait un mécanisme de recouvrement de créances — Il s'agissait d'une véritable incompatibilité — Il n'existe aucune distinction entre l'extinction et la remise d'une dette et il n'y a aucune distinction entre le recouvrement d'une créance au moyen d'une procédure civile ou administrative.

Faillite et insolvabilité --- Libération du failli — Effet de la libération — Divers

Requérant a causé un accident alors qu'il était au volant d'un véhicule qui n'était pas assuré — Administrateur a obtenu un jugement par défaut contre le requérant — Requérant a conclu des arrangements afin de rembourser la dette sur une base mensuelle, mais a plus tard fait cession de ses biens — Créance de l'administrateur a été ajoutée à la liste des obligations du requérant et évaluée à 195 823 $ — Après que le requérant ait obtenu sa libération de dettes, les privilèges relatifs au permis de conduire du requérant ont été suspendus en application de l'art. 102 de la Traffic Safety Act (TSA) — Demande du requérant en vue d'obtenir la levée de la suspension a été accordée — Appel interjeté par l'administrateur et le procureur général a été rejeté — Cour d'appel a conclu que les dispositions de la TSA en litige avaient pour effet d'entraver l'atteinte de l'objectif poursuivi par le législateur fédéral en adoptant la Loi sur la faillite et l'insolvabilité (LFI) — Article 102 de la TSA avait un impact inacceptable sur l'objectif de réhabilitation du régime de faillite et un impact négatif sur l'objectif d'assurer une distribution équitable et égale parmi les créanciers — Cour d'appel a conclu qu'il y avait un conflit d'application entre les deux lois et que la législation fédérale devait prévaloir — Province n'avait pas le droit de refuser d'accorder un permis de conduire au requérant parce qu'une créance impayée concernant un préjudice corporel avait été annulée au terme du processus de faillite — Procureur général de l'Alberta a formé un pourvoi — Pourvoi rejeté — Conflit susceptible de déclencher l'application de la doctrine de la prépondérance fédérale survient dans deux circonstances — Première de ces circonstances naît lorsqu'un conflit d'application survient devant l'impossibilité de se conformer à deux lois à la fois et la deuxième de ces circonstances naît lorsque l'application d'une loi provinciale empêche d'atteindre l'objectif poursuivi par une loi fédérale — Conflit en question surviendrait entre l'art. 178 de la LFI, dont l'objectif était d'assurer la réhabilitation financière du débiteur, et l'art. 102 de la TSA — Objectif et l'effet de l'art. 102 étaient de priver un débiteur judiciaire de ses droits de conducteur jusqu'à ce que le montant accordé par le jugement relatif à l'accident d'automobile soit payé — Article 102 constituait un mécanisme de recouvrement de créances — Il s'agissait d'une véritable incompatibilité — Il n'existe aucune distinction entre l'extinction et la remise d'une dette et il n'y a aucune distinction entre le recouvrement d'une créance au moyen d'une procédure civile ou administrative.

The applicant was responsible for an accident while he was driving an uninsured vehicle. The administrator obtained default judgment against the applicant. The applicant made arrangements to pay back debt by monthly payments, but later made an assignment in bankruptcy. The debt to the administrator was listed among applicant's obligations and valued at $195,823.

After discharge, the applicant's driving privileges were suspended by operation of s. 102 of the Traffic Safety Act (TSA).

The applicant's application for a stay of the suspension was granted. An appeal by the administrator and the Attorney General was dismissed.

The appellate court found that the impugned provisions of the TSA had the effect of frustrating Parliament's legislative purpose in enacting the Bankruptcy and Insolvency Act (BIA). Section 102 of the TSA had an unacceptable impact on rehabilitative purposes of the bankruptcy regime and an adverse impact on the objective of providing fair and equal distribution to creditors.

The appellate court found there was operational conflict between the two statutes, and federal legislation had to prevail. The Province was not entitled to deny the applicant a driver's licence because of an unsatisfied personal injury debt that had been discharged in bankruptcy.

The Attorney General of Alberta appealed.

Held: The appeal was dismissed.

Per Gascon J. (Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ. concurring): Conflict triggering the federal paramountcy doctrine will arise in one of two situations. The first is when an operational conflict arises because it is impossible to comply with both laws. The second is when the operation of the provincial law frustrates the purpose of the federal law. Finding an operational conflict is not limited to examination of the actual words of the provisions at issue. The frustration of purpose branch is determined by examining whether effect of the provincial law frustrates the purpose of the federal law, even if it does not entail a direct violation of the federal law's provisions. If the operation of the provincial law has the effect of making it impossible to comply with the federal law, or if it is technically possible to comply with both laws, but the operation of the provincial law still has the effect of frustrating Parliament's purpose, there is a conflict. Such a conflict results in the provincial law being inoperative, but only to the extent of the conflict with the federal law.

In the case at bar, it was conceded that both laws were valid.

The alleged conflict arose between s. 178 of the BIA, the purpose of which was to ensure the financial rehabilitation of the debtor, and, on the other hand, s. 102 of the TSA. The purpose and effect of s. 102 was to deprive a judgment debtor of driving privileges until the judgment arising from a motor vehicle accident was paid. Section 102 of the TSA constituted a debt collection mechanism, allowing a judgment creditor to deprive the debtor of his or her driver's licence. The purpose was not to discourage people from driving without insurance. That a debtor could choose not to drive did not eliminate the operational conflict. The province still compelled payment of a provable claim that had been released, in contradiction with s. 178(2) of the BIA.

The laws at issue give inconsistent answers to the question whether an enforceable obligation existed. One law said yes while the other said no. One law consequently provided for the release of all claims provable in bankruptcy and prohibited creditors from enforcing them, while the other disregarded this release and allowed for the use of a debt enforcement mechanism. This created true incompatibility. No distinction exists between extinguishing and releasing a debt, and there is no distinction between civil and administrative means to recover a debt.

That the province was not required to use s. 102 amounted to a superficial application of the operational conflict test. It was impossible for the province to apply s. 102 of the TSA without contravening s. 178(2) of the BIA.

The purpose of the federal legislation was frustrated by the provincial legislation and the federal paramountcy doctrine was applied. The purpose of rehabilitating the bankrupt, in the BIA, was affected, in that s. 102 directly contradicted and defeated the purpose of the discharge provided for in s. 178(2). The matter was not one of forming a new binding contract with the discharged bankrupt for the repayment of the debt, with driving privileges as fresh consideration for such a contract. The effect and purpose of s. 102 was to compel payment of a discharged debt, which conflicted with s. 178(2). This made s. 102 of the TSA inoperable to the extent of the conflict, and could not ground the province's authority to withhold the respondent's driving privileges.

Per Côté J. (concurring in the result) (McLachlin C.J.C. concurring): The TSA frustrated the purpose of financial rehabilitation that underlay s. 178(2) of the federal BIA, and was inoperative to the extent of the conflict by reason of the doctrine of federal paramountcy. No operational conflict existed, rather the federal legislation was frustrated by the provincial. The conflict was indirect.

The majority's approach conflated the two branches of the federal paramountcy test, or at least blurred the difference between them. This conflation expanded the definition of conflict in the first branch, the operational

conflict branch, and increased the number of situations in which federal law might pre-empt a provincial law without an in-depth analysis of Parliament's intent. Rather than considering whether to comply with one statute is to defy the other, it considered whether the effects of the provincial statute seemed to be incompatible with the federal prohibition. Instead of considering only the actual words of both provisions, the majority judgment improperly took into account their purposes and their effects.

The provincial and federal provisions at issue did not expressly conflict as they were different in terms of their contents and the remedies provided. One of them did not permit what the other specifically prohibits. Even a superficial possibility of dual compliance will suffice to conclude that there is no operational conflict.

Under s. 178 of the BIA, a bankrupt is discharged from all claims provable in bankruptcy, and the section says nothing more. The Act did not revive claims extinguished under s. 178 of the BIA. If a debtor chooses not to drive, the province simply cannot enforce its claim. Rather, s. 102 allowed the province to suspend a driver's licence, which gave it leverage to compel payment of the debt. The bankrupt was still discharged in the literal sense of the words of s. 178(2) of the BIA.

The purpose of the Federal legislation was frustrated by the provincial legislation and the federal paramountcy doctrine was applied.

Le requérant a causé un accident alors qu'il était au volant d'un véhicule qui n'était pas assuré. L'administrateur a obtenu un jugement par défaut contre le requérant. Le requérant a conclu des arrangements afin de rembourser la dette sur une base mensuelle, mais a plus tard fait cession de ses biens. La créance de l'administrateur a été ajoutée à la liste des obligations du requérant et évaluée à 195 823 $.

Après que le requérant ait obtenu sa libération de dettes, les privilèges relatifs au permis de conduire du requérant ont été suspendus en application de l'art. 102 de la Traffic Safety Act (TSA).

La demande du requérant en vue d'obtenir la levée de la suspension a été accordée. L'appel interjeté par l'administrateur et le procureur général a été rejeté.

La Cour d'appel a conclu que les dispositions de la TSA en litige avaient pour effet d'entraver l'atteinte de l'objectif poursuivi par le législateur fédéral en adoptant la Loi sur la faillite et l'insolvabilité (LFI). L'article 102 de la TSA avait un impact inacceptable sur l'objectif de réhabilitation du régime de faillite et un impact négatif sur l'objectif d'assurer une distribution équitable et égale parmi les créanciers.

La Cour d'appel a conclu qu'il y avait un conflit d'application entre les deux lois et que la législation fédérale devait prévaloir. La province n'avait pas le droit de refuser d'accorder un permis de conduire au requérant parce qu'une créance impayée concernant un préjudice corporel avait été annulée au terme du processus de faillite.

Le procureur général de l'Alberta a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Gascon, J. (Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, JJ., souscrivant à son opinion) : Un conflit susceptible de déclencher l'application de la doctrine de la prépondérance fédérale survient dans deux circonstances. La première de ces circonstances naît lorsqu'un conflit d'application survient devant l'impossibilité de se conformer à deux lois à la fois. La deuxième de ces circonstances naît lorsque l'application d'une loi provinciale empêche d'atteindre l'objectif poursuivi par une loi fédérale. La recherche de la présence d'un conflit d'application ne se limite pas à l'examen du libellé des dispositions en litige. On arrive à conclure qu'un objectif est entravé après avoir vérifié si l'effet d'une loi provinciale porte atteinte à l'objectif d'une loi fédérale, même s'il n'y a pas de violation flagrante des dispositions de la loi fédérale. Si l'application de la loi provinciale a pour effet l'impossibilité de se conformer à une loi fédérale ou s'il est techniquement possible de se conformer aux deux législations, mais que l'application de la loi provinciale constitue néanmoins un obstacle à la réalisation de l'objectif poursuivi par le législateur fédéral, il y a conflit. Un tel conflit a pour conséquence de rendre la loi provinciale inopérante, mais uniquement dans la mesure où elle entre en conflit avec la législation fédérale.

En l'espèce, il a été reconnu que les deux lois en litige étaient valides.

Le conflit en question surviendrait entre l'art. 178 de la LFI, dont l'objectif est d'assurer la réhabilitation financière du débiteur, et l'art. 102 de la TSA. L'objectif et l'effet de l'art. 102 étaient de priver un débiteur judiciaire de ses droits de conducteur jusqu'à ce que le montant accordé par le jugement relatif à l'accident d'automobile soit payé. L'article 102 constituait un mécanisme de recouvrement de créances permettant au créancier judiciaire de priver

le débiteur de son permis de conduire. L'objectif poursuivi n'était pas de décourager les gens de conduire sans assurance. Le fait qu'un débiteur pourrait choisir de ne pas conduire n'éliminait pas le conflit d'application. La province contraignait toujours le paiement d'une réclamation prouvable dont le failli a été libéré, en contradiction avec l'art. 178(2) de la LFI.

Les lois en cause offrent des réponses contradictoires à la question de savoir s'il existait une obligation exécutoire. Une loi disait que oui, l'autre disait que non. Aussi, une loi prévoyait que le failli était libéré de toutes les réclamations prouvables dans le cadre de la faillite et interdisait aux créanciers d'en exiger le paiement, tandis que l'autre loi faisait fi de cette libération et permettait le recours à un mécanisme de recouvrement de cette créance. Il s'agissait là d'une véritable incompatibilité. Il n'existe aucune distinction entre l'extinction et la remise d'une dette et il n'y a aucune distinction entre le recouvrement d'une créance au moyen d'une procédure civile ou administrative. Le fait que la province n'était pas tenue de recourir à l'art. 102 constituait une application superficielle du critère servant à déterminer l'existence d'un conflit d'application. La province ne pouvait pas appliquer l'art. 102 de la TSA sans contrevenir à l'art. 178(2) de la LFI.

La législation provinciale empêchait l'atteinte de l'objectif poursuivi par la législation fédérale et la doctrine de la prépondérance fédérale s'appliquait. L'objectif de réhabilitation du failli poursuivi par la LFI était contrecarré en ce sens que l'art. 102 contredisait directement l'objectif visé par le processus de libération prévu à l'art. 178(2) et allait à son encontre. La question n'était pas de former un nouveau contrat ayant force exécutoire avec un failli libéré en vue du remboursement de la dette et prévoyant l'exercice de ses droits de conducteur comme nouvelle contrepartie. L'effet et l'objectif de l'art. 102 étaient de forcer le paiement d'une dette dont le failli a été libéré, ce qui entrait en conflit avec l'art. 178(2). Ceci rendait l'art. 102 de la TSA inopérant dans la mesure où ce conflit existait et ne pouvait servir de fondement au pouvoir de la province de suspendre les droits de conducteur de l'intimé.

Côté, J. (souscrivant à l'opinion des juges majoritaires quant au résultat) (McLachlin, J.C.C., souscrivant à son opinion) : La TSA empêchait l'atteinte de l'objectif de réhabilitation financière visé par l'art. 178(2) de la LFI, une loi fédérale, et était inopérante dans la mesure où ce conflit existait en raison de la doctrine de la prépondérance fédérale. Il n'existait aucun conflit d'application puisque c'était l'objectif poursuivi par la législation fédéral qui était contrecarré par la loi provinciale. Le conflit était indirect.

L'approche préconisée par les juges majoritaires confond les deux volets de l'analyse fondée sur la doctrine de la prépondérance fédérale ou obscurcit à tout le moins la différence entre les deux. Cette confusion élargit la définition de conflit sous le premier volet, celui du conflit d'application, et accroît le nombre de cas où une loi fédérale pourrait court-circuiter une loi provinciale sans que l'on analyse en profondeur l'intention du Parlement. Plutôt que d'examiner si l'observance d'une loi entraîne l'inobservance de l'autre, les juges majoritaires se demandent si les effets de la loi provinciale semblent contraires à l'interdiction fédérale. Au lieu d'examiner seulement le libellé des deux dispositions, ils prennent en considération leurs objets et leurs effets.

Les dispositions provinciale et fédérale en cause n'étaient pas expressément en conflit; elles différaient de par leur contenu et les recours qu'elles offraient. L'une ne permet pas ce que l'autre interdit expressément. Même une possibilité superficielle de se conformer aux deux lois suffit pour qu'un tribunal conclue à l'absence de conflit d'application.

En vertu de l'art. 178 de la LFI, un failli est libéré de toutes réclamations prouvables en matière de faillite. Cet article ne prévoit rien de plus. La TSA ne fait pas revivre une réclamation éteinte en vertu de l'art. 178 de la LFI. Si un débiteur choisit de ne pas conduire, la province ne peut tout simplement pas recouvrer sa créance. Cet article autorise plutôt la province à suspendre un permis de conduire, ce qui lui donne un moyen pour contraindre le débiteur à payer la dette. Le failli demeure libéré au sens littéral du libellé de l'art. 178(2) de la LFI.

L'objectif poursuivi par la législation fédérale était contrecarré par la législation provinciale, et la doctrine de la prépondérance fédérale a été appliquée.

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Cases considered by *Gascon J.*:

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NIL/TU,O Child & Family Services Society v. B.C.G.E.U. (2010), 2010 SCC 45, 2010 CarswellBC 2937, 2010 CarswellBC 2938, 9 Admin. L.R. (5th) 161, [2010] 12 W.W.R. 402, (sub nom. *NIL/TU,O Child & Family Services Society v. B.C. Government & Service Employees' Union)* [2010] 4 C.N.L.R. 284, (sub nom. *NIL/TU,O v. BCGSEU)* 2010 C.L.L.C. 220-062, 11 B.C.L.R. (5th) 1, D.T.E. 2010T-727, (sub nom. *NIL/TU,O Child and Family Services Society v. B.C. Government & Service Employees' Union)* 407 N.R. 338, 326 D.L.R. (4th) 21, 294 B.C.A.C. 1, 498 W.A.C. 1, (sub nom. *NIL/TU,O Child & Family Services Society v. B.C. Government & Service Employees' Union)* [2010] 2 S.C.R. 696, 90 C.C.P.B. 1, 92 C.C.E.L. (3d) 221 (S.C.C.) — considered

Newfoundland (Workplace Health, Safety & Compensation Commission) v. Ryan Estate (2013), 2013 SCC 44, 2013 CarswellNfld 282, 2013 CarswellNfld 283, 361 D.L.R. (4th) 195, (sub nom. *Ryan Estate v. Universal Marine Ltd.)* 447 N.R. 1, 2013 A.M.C. 2113, (sub nom. *Ryan Estate v. Universal Marine Ltd.)* 1054 A.P.R. 312, (sub nom. *Ryan Estate v. Universal Marine Ltd.)* 339 Nfld. & P.E.I.R. 312, (sub nom. *Marine Services International Ltd. v. Ryan Estate)* [2013] 3 S.C.R. 53, 3 C.C.L.T. (4th) 1 (S.C.C.) — considered

Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board) (1987), 77 N.R. 104, 58 C.R. (3d) 378, 28 Admin. L.R. 1, [1987] 2 S.C.R. 59, 44 D.L.R. (4th) 663, 81 N.B.R. (2d) 328, (sub nom. *Rio Hotel Ltd. v. Liquor Licensing Board (N.B.))* 205 A.P.R. 328, 1987 CarswellNB 24, 1987 CarswellNB 314 (S.C.C.) — referred to

Rothmans, Benson & Hedges Inc. v. Saskatchewan (2005), 2005 SCC 13, 2005 CarswellSask 162, 2005 CarswellSask 163, 250 D.L.R. (4th) 411, [2005] 1 S.C.R. 188, [2005] 9 W.W.R. 403 (S.C.C.) — considered

114957 Canada Ltée (Spray-Tech, Société d'arrosage) c. Hudson (Ville) (2001), 2001 SCC 40, 2001 CarswellQue 1268, 2001 CarswellQue 1269, (sub nom. *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town))* 200 D.L.R. (4th) 419, 19 M.P.L.R. (3d) 1, 271 N.R. 201, 40 C.E.L.R. (N.S.) 1, (sub nom. *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town))* [2001] 2 S.C.R. 241, 2001 CSC 40 (S.C.C.) — considered

Statutes considered by *Gascon J.*:

Aeronautics Act, R.S.C. 1985, c. A-2

Generally — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 69.3 [en. 1992, c. 27, s. 36(1)] — considered

s. 69.3(1) [en. 1992, c. 27, s. 36(1)] — considered

s. 69.3(2) [en. 1992, c. 27, s. 36(1)] — referred to

s. 69.4 [en. 1992, c. 27, s. 36(1)] — referred to

s. 72(1) — considered

s. 121(1) — considered

s. 136 — considered

s. 137(1) — referred to

s. 139 — referred to

s. 140.1 [en. 2005, c. 47, s. 90] — referred to

s. 141 — referred to

s. 172 — considered

s. 178 — considered

s. 178(1) — referred to

s. 178(2) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

Generally — referred to

s. 91 — considered

s. 91 ¶ 21 — referred to

s. 92 — considered

s. 92 ¶ 13 — considered

Family Farm Protection Act, S.M. 1986-87, c. 6

Generally — referred to

Farm Debt Review Act, R.S.C. 1985, c. 25 (2nd Supp.)

Generally — referred to

Motor Vehicle Accident Claims Act, R.S.A. 2000, c. M-22

Generally — referred to

s. 5(1) — referred to

s. 5(2) — referred to

s. 5(7) — referred to

Personal Property Security Act, R.S.O. 1990, c. P.10

Generally — referred to

Protection du territoire et des activités agricoles, Loi sur la, RLRQ, c. P-41.1

en général — referred to

Tobacco Act, S.C. 1997, c. 13

s. 30 — referred to

Tobacco Control Act, S.S. 2001, c. T-14.1

Generally — referred to

Traffic Safety Act, R.S.A. 2000, c. T-6

Generally — referred to

s. 54 — considered

s. 54(1) — considered

s. 54(4) — considered

s. 54(5) — referred to

s. 54(7) — referred to

s. 102 — unconstitutional

s. 102(1) — unconstitutional

s. 102(1)(a) — unconstitutional

s. 102(1)(b) — unconstitutional

s. 102(2) — unconstitutional

s. 102(2)(a) — considered

s. 102(2)(b) — unconstitutional

s. 102(2)(f) — unconstitutional

s. 103 — considered

s. 103(1) — considered

s. 103(2)(a) — considered

s. 103(2)(b) — considered

s. 103(4) — considered

Statutes considered by *Côté J.*:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 178 — considered

s. 178(2) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Farm Debt Review Act, R.S.C. 1985, c. 25 (2nd Supp.)

Generally — referred to

Immigration Act, R.S.C. 1985, c. I-2

Generally — referred to

s. 30 — referred to

s. 69(1) — referred to

Legal Profession Act, S.B.C. 1987, c. 25

Generally — referred to

s. 1 "practice of law" — considered

Marine Liability Act, S.C. 2001, c. 6

Generally — referred to

Traffic Safety Act, R.S.A. 2000, c. T-6

s. 102 — considered

Words and phrases considered:

bankruptcy and insovlency act

n many aspects, the BIA [*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3] is a complete code governing bankruptcy. It sets out which claims are treated as provable claims and which assets are distribute to creditors, and how. It then sets out which claims are released on discharge and which claims survive bankruptcy.

driving

Driving is unlike other activities. For many, it is necessary to function meaningfully in society

paramountcy

In keeping with co-operative federalism, the doctrine of paramountcy is applied with restraint. It is presumed that Parliament intends its laws to co-exist with provincial laws.

Termes et locutions cités:

conduite d'un véhicule

La conduite d'un véhicule se distingue d'autres activités. Pour bon nombre de personnes, elle est nécessaire pour fonctionner normalement dans la société

loi sur la faillite et l'insolvabilité

La LFI [*Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, c. B-3] constitue à maints égards un code complet en matière de faillite. Elle précise les réclamations qui sont considérées comme des réclamations prouvables et les biens qui sont distribués aux créanciers, et la façon dont ils le sont. Elle énonce ensuite les réclamations dont le failli est libéré par une ordonnance de libération et les réclamations qui subsistent après la faillite

prépondérance

Conformément à la théorie du fédéralisme coopératif, la doctrine de la prépondérance est appliquée avec retenue. On présume que le Parlement a voulu que ses lois coexistent avec les lois provinciales.

APPEAL by Attorney General from judgment reported at *Moloney v. Alberta (Administrator, Motor Vehicle Accident Claims Act)* (2014), 2014 ABCA 68, 2014 CarswellAlta 225, 9 C.B.R. (6th) 278, [2014] 4 W.W.R. 272, 91 Alta. L.R. (5th) 221, 370 D.L.R. (4th) 267, 64 M.V.R. (6th) 82, 569 A.R. 177 (Alta. C.A.), dismissing appeal from judgment granting application for judicial review of suspension of driver's licence.

POURVOI formé par le procureur général à l'encontre d'un jugement publié à *Moloney v. Alberta (Administrator, Motor Vehicle Accident Claims Act)* (2014), 2014 ABCA 68, 2014 CarswellAlta 225, 9 C.B.R. (6th) 278, [2014] 4 W.W.R. 272, 91 Alta. L.R. (5th) 221, 370 D.L.R. (4th) 267, 64 M.V.R. (6th) 82, 569 A.R. 177 (Alta. C.A.), ayant rejeté un appel interjeté à l'encontre d'un jugement ayant accordé une demande de contrôle judiciaire d'une décision ayant suspendu un permis de conduire.

***Gascon J.* (Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring):**

I. Overview

1 In Canada, the federal and provincial levels of government must enact laws within the limits of their respective spheres of jurisdiction. The *Constitution Act, 1867* defines which matters fall within the exclusive legislative authority of each level. Still, even when acting within its own sphere, one level of government will sometimes affect matters within the other's sphere of jurisdiction. The resulting legislative overlap may, on occasion, lead to a conflict between otherwise valid federal and provincial laws. In this appeal, the Court must decide whether such a conflict exists, and if so, resolve it.

2 The alleged conflict in this case concerns, on the one hand, the federal *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), and on the other hand, Alberta's *Traffic Safety Act*, R.S.A. 2000, c. T-6 ("*TSA*"). It stems from a car accident caused by the respondent while he was uninsured, contrary to s. 54 of the *TSA*. The province of Alberta compensated the individual injured in the accident and sought to recover the amount of the

compensation from the respondent. The latter, however, made an assignment in bankruptcy and was eventually discharged. The *BIA* governs bankruptcy and provides that, upon discharge, the respondent is released from all debts that are claims provable in bankruptcy. The *TSA* governs the activity of driving, including vehicle permits and driver's licences, and allows the province to suspend the respondent's licence and permits until he pays the amount of the compensation.

3 As a result of his bankruptcy and subsequent discharge, the respondent did not pay the amount of the compensation in full; because of this failure to pay, Alberta suspended his vehicle permits and driver's licence. The respondent contested this suspension, arguing that the *TSA* conflicted with the *BIA*, in that it frustrated the purposes of bankruptcy. The province replied that there was no conflict since the *TSA* was regulatory in nature and did not purport to enforce a discharged debt. The Court of Queen's Bench and the Court of Appeal found that there was a conflict between the federal and provincial laws. Relying on the doctrine of federal paramountcy, they declared the impugned provision of the *TSA* to be inoperative to the extent of the conflict. I agree with the outcome reached by the lower courts, and I would dismiss the appeal.

II. Facts

4 The car accident caused by the respondent occurred in 1989. In 1996, the individual injured in the accident obtained judgment against the respondent in the amount of $194,875. The Administrator appointed under the *Motor Vehicle Accident Claims Act*, R.S.A. 2000, c. M-22 ("*MVACA*"), indemnified the injured party for the amount of the judgment debt and was assigned the debt in accordance with the *MVACA*. Initially, the respondent made arrangements with the Administrator to pay the debt in instalments. Some years later, however, in January 2008, he made an assignment in bankruptcy. He listed the Administrator's claim in his Statement of Affairs. It is not disputed that the judgment debt assigned to the Administrator was a claim provable in bankruptcy. It was, by far, the respondent's most substantial debt and, in fact, the reason for his financial difficulties. At the time of the assignment, the outstanding amount due to the Administrator stood at $195,823.

5 In June 2011, the respondent obtained an absolute discharge, which no one opposed. In October of the same year, he received a letter from the Director, Driver Fitness and Monitoring, notifying him that, by application of s. 102(1) of the *TSA*, his operator's licence and vehicle registration privileges would be suspended until payment of the outstanding amount of the judgment debt. Later, in November, his lawyer received another letter, this time from Motor Vehicle Accident Recoveries, advising the respondent that he "remains indebted for the judgment debt obtained against him ... 'until the judgment is satisfied or discharged, otherwise than by a discharge in bankruptcy'" (A.R., at p. 49). The letter proposed that new payment arrangements be made, failing which the suspension of his driving privileges would continue.

6 Given this situation, in March 2012, the respondent sought an order from the Court of Queen's Bench to stay the suspension of his driving privileges. He claimed that he had been discharged in bankruptcy and that s. 178 of the *BIA* precluded the Administrator from enforcing the judgment debt.

III. Judicial History

A. Alberta Court of Queen's Bench, 2012 ABQB 644, 73 Alta. L.R. (5th) 44 (Alta. Q.B.)

7 Moen J. first found that, as a result of the discharge, there was no longer a liability on the basis of which the judgment could be enforced (para. 21). In her view, the question at issue was whether the discharge precluded the province from suspending the respondent's driving privileges because of the unpaid judgment debt. This entailed looking at the operation of the *TSA* and the *BIA* and determining whether the relevant provisions were in conflict, making the doctrine of paramountcy applicable. According to Moen J., an "operational conflict" could arise in two situations, namely where (1) "compliance with both acts is rendered inconsistent or impossible by directly

conflicting with an express provision of the *BIA*" or (2) "the *TSA* has the intent and/or effect of interfering with the provisions of the *BIA* or its fundamental objectives" (para. 30).

8 Moen J. emphasized the rehabilitative purpose of the *BIA* (para. 31). She described the purpose of the *TSA* as being the "protection of public safety via the regulation of traffic and motor vehicles" (para. 33), and the purpose of s. 102 of the *TSA* as "preventing 'irresponsible drivers from having the continued privilege of driving ... without being made to account for the normal consequences of their vast irresponsibilities'" (para. 34). She distinguished situations in which the purpose of licence suspension is the collection of a debt from those in which it is the regulation of conduct (paras. 37-42). She concluded that the sole purpose of s. 102 is the collection of an unpaid judgment debt. In her view, the provision had nothing to do with the regulation of the respondent's misconduct (para. 43). She thus held that the province's actions were not disciplinary, but rather "a method of debt collection, and a colourable attempt to circumvent the provisions of the *BIA*" (para. 45). This "improper purpose" of the *TSA* created an "operational conflict" with the *BIA* (para. 45). She therefore stayed both the enforcement of the judgment debt and the suspension of the respondent's driving privileges (para. 49), and she declared the *TSA* ineffective to the extent of the conflict with the *BIA* (para. 48).

B. Alberta Court of Appeal, 2014 ABCA 68, 91 Alta. L.R. (5th) 221 (Alta. C.A.)

9 Writing for a unanimous court, Slatter J.A. described the two types of conflict that trigger the application of the doctrine of paramountcy as follows: (1) "it is impossible to comply with both the provincial and the federal legislation", or (2) "even though it is technically possible to comply with both, the application of the provincial statute can fairly be said to frustrate Parliament's legislative purpose" (para. 10). He concluded that because the respondent could comply with both laws by not driving, there was no conflict under the first branch of the test (para. 10).

10 Turning to the second branch, Slatter J.A. described the two purposes of the *BIA* as being, first, equal distribution, and second, rehabilitation. He observed that s. 178 lists the debts that are not discharged by bankruptcy, none of which corresponds to judgment debts for damages resulting from motor vehicle accidents (paras. 13-15). According to him, while discharge from bankruptcy does not extinguish debts, nonetheless, "[w]hatever conceptual distinction there may be, it is somewhat artificial in the present context", as creditors cease to be able to enforce the discharged debts (para. 19). Slatter J.A. rejected the province's argument that driving privileges can be used as fresh consideration to revive a discharged debt; such consideration is not genuine and it is inconsistent with the policy of the *BIA* (paras. 20-21). Rejecting another of the province's arguments, he held that it is irrelevant that driving privileges do not constitute property of the bankrupt. The province cannot withhold privileges arbitrarily in a way that frustrates the purposes of the *BIA* (paras. 23-24).

11 Slatter J.A. observed that s. 102 of the *TSA* specifically provides that it operates notwithstanding a discharge in bankruptcy. In his view, this is a "*prima facie* signal of a potential operational conflict" (para. 39). Although s. 102 is not coercive and the respondent could choose not to drive, Slatter J.A. concluded that it nonetheless frustrates the purposes of the *BIA*. One of these purposes is that the discharged bankrupt "will not have to make any such 'choices'" and will be "free to make independent and unencumbered personal and economic decisions going forward" (para. 43). Because s. 102 is focused on debt collection and is not connected to traffic safety considerations (paras. 40 and 45-47), it interferes with a driver's ability to make a fresh start (paras. 48-49). Slatter J.A. also concluded that s. 102 disrupts fair and equal distribution to creditors because it permits the province to collect amounts in addition to the dividend ordinarily distributed to creditors (para. 50). He held that s. 102 frustrates both purposes of the *BIA* and that the words "otherwise than by a discharge in bankruptcy" are in "operational conflict" with the *BIA* (para. 54).

IV. Issue

12 The Chief Justice formulated the following constitutional question:

> Is s. 102(2) of Alberta *Traffic Safety Act*, R.S.A. 2000, c. T-6, constitutionally inoperative by reason of the doctrine of federal paramountcy?

Although the constitutional question, as formulated, refers only to s. 102(2), the proceedings below and the parties' submissions concern the section in its entirety. Accordingly, I will examine all of the relevant aspects of s. 102.

V. Analysis

13 Various government actors have been involved in this dispute. Unless otherwise specified, I will refer to the province of Alberta as encompassing these different actors. I will first review the principles applicable to the doctrine of federal paramountcy and then apply them to the facts of this appeal.

A. The Doctrine of Federal Paramountcy

14 Each level of government — Parliament, on the one hand, and the provincial legislatures, on the other — has exclusive authority to enact legislation with respect to certain subject matters. Sections 91 and 92 of the *Constitution Act, 1867* assign each power to the level of government best suited to exercise it: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.) ("*Secession Reference*"), at para. 58. Broad powers were given to the provincial legislatures with respect to local matters, in recognition of regional diversity, while powers relating to matters of national importance were given to Parliament, to ensure unity: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.), at para. 22.

15 Legislative powers are exclusive, and one government is not subordinate to the other: *Secession Reference*, at para. 58, citing *Reference re Initiative & Referendum Act (Manitoba)*, [1919] A.C. 935 (Jud. Com. of Privy Coun.), at p. 942. However, the legislative matrix is not as clearly defined as ss. 91 and 92 might suggest. It is often impossible for one level of government to legislate effectively within its jurisdiction without affecting matters that are within the other level's jurisdiction: *Western Bank*, at para. 29; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at p. 465. Furthermore, it is often impossible to make a statute fall squarely within a single head of power: *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.), at pp. 180-81. This leads to overlap in the exercise of provincial and federal powers. The tendency has been to allow these overlaps to occur as long as each level of government properly pursues objectives that fall within its jurisdiction: *Reference re Securities Act (Canada)*, 2011 SCC 66, [2011] 3 S.C.R. 837 (S.C.C.), at para. 57; *PHS Community Services Society v. Canada (Attorney General)*, 2011 SCC 44, [2011] 3 S.C.R. 134 (S.C.C.), at para. 62; *Western Bank*, at paras. 37 and 42. This tendency reflects the theory of co-operative federalism: *Western Bank*, at para. 24; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.), at para. 162.

16 That said, there comes a point where legislative overlap jeopardizes the balance between unity and diversity. In certain circumstances, the powers of one level of government must be protected against intrusions, even incidental ones, by the other level: *Western Bank*, at para. 32. To protect against such intrusions, the Court has developed various constitutional doctrines. For the purposes of this appeal, I need only refer to one: the doctrine of federal paramountcy. This doctrine "recognizes that where laws of the federal and provincial levels come into conflict, there must be a rule to resolve the impasse": *Western Bank*, at para. 32. When there is a genuine "inconsistency" between federal and provincial legislation, that is, when "the operational effects of provincial legislation are incompatible with federal legislation", the federal law prevails: *Newfoundland (Workplace Health, Safety & Compensation Commission) v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53 (S.C.C.), at para. 65, quoting *Western Bank*, at para. 69; see also *Marine Services*, at paras. 66-68; *Multiple Access*, at p. 168. The question thus becomes how to determine whether such a conflict exists.

17 First and foremost, it is necessary to ensure that the overlapping federal and provincial laws are independently valid: *Western Bank*, at para. 76; *Husky Oil*, at para. 87. This means determining the pith and substance of the impugned provisions by looking at their purpose and effect: *Western Bank*, at para. 27; *Reference re Firearms Act*

(Canada), 2000 SCC 31, [2000] 1 S.C.R. 783 (S.C.C.), at para. 16. Once a provision's true purpose is identified, its validity will depend on whether it falls within the powers of the enacting government: *Law Society (British Columbia) v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113 (S.C.C.), at para. 24. If the legislation of one level of government is invalid, no conflict can ever arise, which puts an end to the inquiry. If both laws are independently valid, however, the court must determine whether their concurrent operation results in a conflict.

18 A conflict is said to arise in one of two situations, which form the two branches of the paramountcy test: (1) there is an operational conflict because it is impossible to comply with both laws, or (2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment.

19 What is considered to be the first branch of the test was described as follows in *Multiple Access*, the seminal decision of the Court on this issue:

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other. [Emphasis added; p. 191.]

In *Western Bank*, Binnie and LeBel JJ. referred to this passage as "the fundamental test for determining whether there is sufficient incompatibility to trigger the application of the doctrine of federal paramountcy" (para. 71). Under that test, the question is whether there is an actual conflict in operation, that is, whether both laws "can operate side by side without conflict" (*Marine Services*, at para. 76) or whether both "laws can apply concurrently, and citizens can comply with either of them without violating the other": *Western Bank*, at para. 72; see also *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 60; *Marine Services*, at para. 68; *Burrardview Neighbourhood Assn. v. Vancouver (City)*, 2007 SCC 23, [2007] 2 S.C.R. 86 (S.C.C.), at paras. 77 and 81-82; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.), at para. 53; *R. v. Smith*, [1960] S.C.R. 776 (S.C.C.), at p. 800, per Martland J.

20 In her concurring reasons, my colleague Côté J. formulates this first branch of the test as impossibility of dual compliance as a result of or caused by "an express conflict" (paras. 93 and 122). She cites in support (paras. 102-103) this Court's use of the terms "express contradiction" in *114957 Canada Ltée (Spray-Tech, Société d'arrosage) c. Hudson (Ville)*, 2001 SCC 40, [2001] 2 S.C.R. 241 (S.C.C.), at para. 34, and *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961 (S.C.C.), at para. 17, as well as the use by Bastarache J. of the terms "express or 'operational conflict'" in *Western Bank* (para. 126) and *Lafarge* (para. 113). She insists that under this first branch, the express conflict or express contradiction must be found merely on the basis of the "actual words" of the provisions at issue (paras. 105 and 108) and their "literal" sense or requirement (para. 97). She considers that prior cases in which this Court found that an operational conflict existed either mischaracterized the test (at paras. 116-117 she cites *Lafarge*) or conflated it with the second branch pertaining to frustration of purpose (at paras. 115 and 118 she cites *Husky Oil* and *M & D Farm*).

21 I respectfully disagree with these propositions and with my colleague's assessment of this Court's past cases on the first branch of the paramountcy test. I would not characterize these as being "not helpful authority" (para. 118) and as having "confused" the two branches (para. 114). Rather, in my view, this Court's decisions on operational conflict have been coherent and consistent since *Multiple Access*.

22 First, the expression "express contradiction" used in those cases originated in *Multiple Access*. Dickson J. initially used it — at p. 187, in discussing prior decisions of the Court — to describe the test that he ultimately formulated, in the above-quoted passage, as that of "actual conflict in operation" or operational conflict (p. 191). An express contradiction is nothing more than a clear, direct or definite conflict in operation, as opposed to an indirect or imprecise one. It is not an additional condition for a finding of actual conflict in operation.

23 Second, I find no indication in the Court's decisions pertaining to this first branch that the assessment of an actual conflict in operation is limited to the actual words or to the literal meaning of the words of the provisions at issue; quite the contrary. In its recent decision in *Marine Services* for instance, in assessing whether there was an actual conflict in operation under the first branch (paras. 71-83), the Court did not limit itself to a mere literal reading of the provisions at issue. Rather, it found that a proper reading of the provisions based on the modern approach to statutory interpretation (paras. 77-79) led to the conclusion that the provincial and federal laws could operate side by side without conflict (para. 76). With respect, my colleague misreads my remarks when she states that I support in this regard a broad interpretation of ambiguous federal statutes under this first branch (paras. 111-113). This is not so. *Marine Services* emphasizes that it is the proper meaning of the provision that remains central to the analysis, not merely its literal sense. As I explain below, the provisions at issue in this case are not ambiguous, and I do not give them a broad interpretation to find their ordinary and undisputed meaning. The harmonious interpretation referred to by my colleague is a rule of constitutional interpretation that applies to both branches of the paramountcy test, not merely the first one: *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53 (S.C.C.), at para. 68. It has, however, no bearing on the actual conflict in operation that is, in my view, established here when both laws operate.

24 Finally, I consider that in *Husky Oil* (para. 87) and *M & D Farm* (para. 40), Gonthier J. and Binnie J. respectively referred to the "actual conflict in operation" concept drawn from *Multiple Access* without confusing the two branches of the paramountcy test. As for the reasons of Binnie and LeBel JJ. in *Lafarge*, issued on the same day as *Western Bank* (in which they also penned the majority reasons), I find it hard to suggest that they misstated the test or conflated its two branches, which they in fact analyzed separately (the first at paras. 81-82 and the second at paras. 83-85). On operational conflict, their reference to an "impossibility of ... simultaneous application" (*Lafarge*, at para. 77) echoed the similar comments made in *Western Bank* to the effect that the test amounts to assessing whether "the [two] laws can apply concurrently" (*Western Bank*, at para. 72): see also, on the concept of possible concurrent "application" of both laws, *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188 (S.C.C.), at para. 23.

25 If there is no conflict under the first branch of the test, one may still be found under the second branch. In *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121 (S.C.C.), the Court formulated what is now considered to be the second branch of the test. It framed the question as being "whether operation of the provincial Act is compatible with the federal legislative purpose" (p. 155). In other words, the effect of the provincial law may frustrate the purpose of the federal law, even though it does "not entail a direct violation of the federal law's provisions": *Western Bank*, at para. 73.

26 That said, the case law assists in identifying typical situations where overlapping legislation will not lead to a conflict. For instance, duplicative federal and provincial provisions will generally not conflict: *Marcotte c. Banque de Montréal*, 2014 SCC 55, [2014] 2 S.C.R. 725 (S.C.C.), at para. 80; *Western Bank*, at para. 72; *Multiple Access*, at p. 190; *Hall*, at p. 151. Nor will a conflict arise where a provincial law is more restrictive than a federal law: *Lemare Lake*, at para. 25; *Marine Services*, at paras. 76 and 84; *Laferrière c. Québec (Juge de la Cour du Québec)*, 2010 SCC 39, [2010] 2 S.C.R. 536 (S.C.C.) ("*COPA*"), at paras. 67 and 74; *Western Bank*, at para. 103; *Rothmans*, at paras. 18 ff.; *Spraytech*, at para. 35; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 964. The application of a more restrictive provincial law may, however, frustrate the federal purpose if the federal law, instead of being merely permissive, provides for a positive entitlement: *Bruyère c. Québec (Commission de la santé & de la sécurité du travail)*, 2011 SCC 60, [2011] 3 S.C.R. 635 (S.C.C.) ("*HRSD*"), at paras. 32-33 and 36; *Lafarge*, at paras. 84-85; *Mangat*, at para. 72; *Hall*, at p. 153. As will become evident from the discussion below, this appeal involves two laws that directly contradict each other, rather than a provincial law which does not fully contradict the federal one, but is only more restrictive than it: see *M & D Farm*; *Clarke v. Clarke*, [1990] 2 S.C.R. 795 (S.C.C.).

27 Be it under the first or the second branch, the burden of proof rests on the party alleging the conflict. Discharging that burden is not an easy task, and the standard is always high. In keeping with co-operative federalism, the doctrine of paramountcy is applied with restraint. It is presumed that Parliament intends its laws to co-exist with provincial laws. Absent a genuine inconsistency, courts will favour an interpretation of the federal legislation that allows the concurrent operation of both laws: *Western Bank*, at paras. 74-75, citing *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.) ("*Law Society of B.C.*"), at p. 356; see also *Rothmans*, at para. 21; *O'Grady v. Sparling*, [1960] S.C.R. 804 (S.C.C.), at pp. 811 and 820. Conflict must be defined narrowly, so that each level of government may act as freely as possible within its respective sphere of authority: *Husky Oil*, at para. 162, per Iacobucci J. (dissenting, but not on this particular point), referring to *Deloitte, Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board)*, [1985] 1 S.C.R. 785 (S.C.C.), at pp. 807-8, per Wilson J.

28 This is not to say, however, that courts must refrain from applying the doctrine where the two laws are genuinely inconsistent. In the assessment of such inconsistency for the purposes of paramountcy, a provincial intention to interfere with the federal jurisdiction is neither necessary nor sufficient. In fact, an intention to intrude may call into question the independent validity of the provincial law: *Husky Oil*, at paras. 44-45. The focus of the paramountcy analysis is instead on the effect of the provincial law, rather than its purpose:

> ... there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy ... in order to render the provincial law inapplicable. It is sufficient that the effect of provincial legislation is to do so.
>
> [Emphasis added.]
>
> (*Husky Oil*, at para. 39)

Assessing the effect of the provincial law requires looking at the substance of the law, rather than its form. The province cannot do indirectly what it is precluded from doing directly: *Husky Oil*, at para. 39.

29 In sum, if the operation of the provincial law has the effect of making it impossible to comply with the federal law, or if it is technically possible to comply with both laws, but the operation of the provincial law still has the effect of frustrating Parliament's purpose, there is a conflict. Such a conflict results in the provincial law being inoperative, but only to the extent of the conflict with the federal law: *Western Bank*, at para. 69; *Rothmans*, at para. 11; *Mangat*, at para. 74. In practice, this means that the provincial law remains valid, but will be read down so as to not conflict with the federal law, though only for as long as the conflict exists: *Husky Oil*, at para. 81; E. Colvin, "Constitutional Law — Paramountcy — Duplication and Express Contradiction — Multiple Access Ltd. v. McCutcheon" (1983), 17 *U.B.C.L. Rev.* 347, at p. 348.

30 I now turn to the application of the doctrine to the facts of this appeal.

B. Application

(1) The Legislative Schemes at Issue

31 The first step of the analysis is to ensure that the impugned federal and provincial provisions are independently valid. Early in the proceedings, the parties recognized the validity of the relevant provisions of the *BIA* and the *TSA*. Before this Court, they again conceded the validity of both laws. The only question is whether their concurrent operation results in a conflict. This requires analyzing the legislative schemes at issue at the outset so as to reach a proper understanding of the provisions that are allegedly in conflict.

(a) The Bankruptcy and Insolvency Act

32 Parliament enacted the *BIA* pursuant to its jurisdiction over matters of bankruptcy and insolvency under s. 91(21) of the *Constitution Act, 1867*. The *BIA*, notably through the specific provisions discussed below, furthers two purposes: the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation (*Husky Oil*, at para. 7).

33 The first purpose of bankruptcy, the equitable distribution of assets, is achieved through a single proceeding model. Under this model, creditors of the bankrupt wishing to enforce a claim provable in bankruptcy must participate in one collective proceeding. This ensures that the assets of the bankrupt are distributed fairly amongst the creditors. As a general rule, all creditors rank equally and share rateably in the bankrupt's assets: s. 141 of the *BIA*; *Husky Oil*, at para. 9. In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), at para. 22, the majority of the Court, per Deschamps J., explained the underlying rationale for this model:

> The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise.

Avoiding inefficiencies and chaos, and favouring an orderly collective process, maximizes global recovery for all creditors: *Husky Oil*, at para. 7; R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 3.

34 For this model to be viable, creditors must not be allowed to enforce their provable claims individually, that is, outside the collective proceeding. Section 69.3 of the *BIA* thus provides for an automatic stay of proceedings, which is effective as of the first day of bankruptcy:

> **69.3** (1) Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

(See *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005 (S.C.C.), at pp. 1015-16.)

35 Yet there are exceptions to the principle of equitable distribution. Section 136 of the *BIA* provides that some creditors will be paid in priority. These creditors are referred to as "preferred creditors". There are also creditors that are paid only after all ordinary creditors have been satisfied: ss. 137(1), 139 and 140.1 of the *BIA*. Furthermore, the automatic stay of proceedings does not prevent secured creditors from realizing their security interest: s. 69.3(2) of the *BIA*; *Husky Oil*, at para. 9. A court may also grant leave permitting a creditor to begin separate proceedings and enforce a claim: s. 69.4 of the *BIA*. These exceptions reflect the policy choices made by Parliament in furthering this purpose of bankruptcy.

36 The second purpose of the *BIA*, the financial rehabilitation of the debtor, is achieved through the discharge of the debtor's outstanding debts at the end of the bankruptcy: *Husky Oil*, at para. 7. Section 178(2) of the *BIA* provides:

> (2) Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.

From the perspective of the creditors, the discharge means they are unable to enforce their provable claims: *Schreyer v. Schreyer*, 2011 SCC 35, [2011] 2 S.C.R. 605 (S.C.C.), at para. 21. This, in effect, gives the insolvent person a "fresh start", in that he or she is "freed from the burdens of pre-existing indebtedness": Wood, at p. 273; see also *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109 (S.C.C.), at p. 120. This fresh start is not only designed for the well-being of the bankrupt debtor and his or her family; rehabilitation helps the discharged

bankrupt to reintegrate into economic life so he or she can become a productive member of society: Wood, at pp. 274-75; L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf), at p. 6-283. In many cases of consumer bankruptcy, the debtor has very few or no assets to distribute to his or her creditors. In those cases, rehabilitation becomes the primary objective of bankruptcy: Wood, at p. 37.

37 Although it is an important purpose of the *BIA*, financial rehabilitation also has its limits. Section 178(1) of the *BIA* lists debts that are not released by discharge and that survive bankruptcy. Furthermore, s. 172 provides that an order of discharge may be denied, suspended, or granted subject to conditions. These provisions demonstrate Parliament's attempt to balance financial rehabilitation with other policy objectives, such as confidence in the credit system, that require certain debts to survive bankruptcy: Wood, at pp. 273 and 289.

38 Discharge is the main rehabilitative tool contained in the *BIA*, but it is not the only one. As Professor Wood, at p. 273, observes:

> The bankruptcy discharge is one of the primary mechanisms through which bankruptcy law attempts to provide for the economic rehabilitation of the debtor. However, it is not the only means by which bankruptcy law seeks to meet this objective. The exclusion of exempt property from distribution to creditors, the surplus income provisions, and mandatory credit counselling also are directed towards this goal.

39 Another means of rehabilitation is the automatic stay of proceedings contained in s. 69.3 of the *BIA*. The stay not only ensures that creditors are redirected into the collective proceeding described above, it also ensures that creditors are precluded from seizing property that is exempt from distribution to creditors. This is an important part of the bankrupt's financial rehabilitation:

> The rehabilitation of the bankrupt is not the result only of his discharge. It begins when he is put into bankruptcy with measures designed to give him the minimum needed for subsistence.
>
> (*Vachon v. Canada (Employment & Immigration Commission)*, [1985] 2 S.C.R. 417 (S.C.C.), at p. 430.]

40 In many aspects, the *BIA* is a complete code governing bankruptcy. It sets out which claims are treated as provable claims and which assets are distributed to creditors, and how. It then sets out which claims are released on discharge and which claims survive bankruptcy. That said, the fact remains that the operation of the *BIA* depends upon the survival of various provincial rights: *Husky Oil*, at para. 85; *Hall*, at p. 155. In this regard, s. 72(1) of the *BIA* provides:

> **72.** (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

On the one hand, given the procedural nature of the *BIA*, the bankruptcy regime relies heavily on the continued existence of provincial substantive rights, and thus the continued operation of provincial laws: Wood, at pp. 7-8; *Husky Oil*, at para. 30. The ownership of certain assets and the existence of particular liabilities depend upon provincial law: P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 1, at p. 25-8. On the other hand, the *BIA* cannot operate without affecting property and civil rights. Section 72(1) confirms this by stating that, where there is a genuine inconsistency between provincial laws regarding property and civil rights and federal bankruptcy legislation, the *BIA* prevails: see *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123 (S.C.C.), at para. 47.

41 In the context of this appeal, we are specifically concerned with an alleged conflict between, on the one hand, one provision of the *BIA*, namely s. 178, the purpose of which is to ensure the financial rehabilitation of the debtor, and, on the other hand, one provision (s. 102) of the provincial scheme, to which I will now turn.

(b) The Alberta Traffic Safety Act

42 The *TSA* is the provincial scheme with which the *BIA* is alleged to conflict. Pursuant to s. 92(13) of the *Constitution Act, 1867*, provincial legislatures have the power to legislate with regard to property and civil rights. The Court has long recognized that this power includes traffic regulation and the authority to set conditions for driver's licences and vehicle permits: *Ross v. Ontario (Registrar of Motor Vehicles)* (1973), [1975] 1 S.C.R. 5 (S.C.C.), at pp. 13-14; *O'Grady*, at p. 810; *Prince Edward Island (Provincial Secretary) v. Egan*, [1941] S.C.R. 396 (S.C.C.), at pp. 402 and 415; see also *Gonzalez v. Alberta (Driver Control Board)*, 2003 ABCA 256, 232 D.L.R. (4th) 237 (Alta. C.A.) (hereinafter Thomson), at para. 25. The *TSA* is a comprehensive legislative scheme for traffic regulation, "covering virtually all aspects of the regulation of highways and motor vehicles in Alberta", with the aim of ensuring road safety: *Thomson*, at para. 5; Alberta, Legislative Assembly, *Alberta Hansard*, 3rd Sess., 24th Leg., April 12, 1999, at p. 927.

43 Under s. 54(1) of the *TSA*, no one is allowed to drive or have a motor vehicle on a public road unless the vehicle is insured. Under s. 54(4), a person who contravenes s. 54(1) is liable to a fine or imprisonment. The Registrar of Motor Vehicle Services may also disqualify a person from driving and cancel his or her vehicle registration until that person shows proof of insurance: s. 54(5) and (7).

44 In the event that an uninsured driver causes an accident, Alberta has implemented a compensation program governed by the *MVACA*. A victim injured in the accident may sue the uninsured driver for damages. If the victim is successful but the uninsured driver does not pay, the victim may then apply to the Administrator under the *MVACA* for compensation in the amount of the unsatisfied judgment: s. 5(1). If authorized, the payment is drawn from the General Revenue Fund of the province: s. 5(2). The judgment is then assigned to the Administrator, who can take steps to enforce it against the judgment debtor. The Administrator is thus deemed to be the judgment creditor: s. 5(7).

45 Section 102 of the *TSA*, the provision at issue in this appeal, complements the *MVACA* program. It allows the Registrar to suspend the debtor's driver's licence and vehicle permits until the judgment debt is paid, up to a maximum amount of $200,000:

> **102(1)** If
>
> (a) a judgment for damages arising out of a motor vehicle accident is rendered against a person by a court in Alberta or in any other province or territory in Canada, and
>
> (b) that person fails, within 15 days from the day on which the judgment becomes final, to satisfy the judgment,
>
> the Registrar, subject to sections 103 and 104 and the regulations, may do one or both of the following:
>
> (c) disqualify the person from driving a motor vehicle in Alberta;
>
> (d) suspend the registration of any motor vehicle registered in that person's name.
>
> **(2)** When, under subsection (1), a person is disqualified from driving a motor vehicle in Alberta or the certificate of registration of that person's motor vehicle is suspended,
>
> (a) the disqualification or the suspension, as the case may be, remains in effect and shall not be removed, and
>
> (b) no motor vehicle shall be registered in that person's name,

> until the judgment is satisfied or discharged, otherwise than by a discharge in bankruptcy, to the extent of
>
> . . . . .
>
> (f) at least $200 000, exclusive of interest and costs, if the judgment arises out of a motor vehicle accident occurring on or after January 1, 1986.

46 Section 103 is also a relevant part of this scheme. It allows the judgment debtor to apply for the "privilege" of paying the outstanding judgment debt in instalments. The debtor may recover his or her driving privileges as long as the payments are being made:

> **103(1)** A judgment debtor to whom this Part applies may on notice to the judgment creditor apply to the court in which the trial judgment was obtained for the privilege of paying the judgment in instalments, and the court may, in its discretion, so order, fixing the amounts and times of payment of the instalments.
>
> **(2)** If the Minister responsible for the administration of the *Motor Vehicle Accident Claims Act* has made a payment with respect to a judgment pursuant to the *Motor Vehicle Accident Claims Act*, the judgment debtor
>
> (a) may apply to the Minister responsible for the administration of the Motor Vehicle Accident Claims Act for the privilege of paying the judgment in instalments, in which case that Minister may cause an agreement to be entered into with the debtor for payment by instalments, or
>
> (b) may apply to the court pursuant to subsection (1) *for the* privilege of paying the judgment to the Minister responsible for the administration of the *Motor Vehicle Accident Claims Act* in instalments, in which case the debtor must give notice of the application to the Administrator of the *Motor Vehicle Accident Claims Act*, who may appear personally or by counsel and be heard on the application.
>
> **(3)** Except in a case to which subsection (2) applies, a judgment debtor and the judgment creditor may enter into an agreement for the payment of the judgment in instalments.
>
> **(4)** While the judgment debtor is not in default in payment of the instalments, the judgment debtor is deemed not to be in default for the purposes of this Part in payment of the judgment, and the Minister in the Minister's absolute discretion may restore the operator's licence and the certificate of registration of the judgment debtor.
>
> **(5)** Notwithstanding subsection (4), if the Minister is satisfied that the judgment debtor has defaulted with respect to complying with the terms of the court order or of the agreement, the judgment debtor's operator's licence and registration shall again be suspended and remain suspended as provided in section 102.

It is worth mentioning that, in theory, ss. 102 and 103 of the *TSA* do not operate solely in favour of the province. They could also operate in favour of a third party. For instance, the Registrar could suspend the driver's privileges solely for the benefit of a victim of an accident who holds an unsatisfied judgment.

47 The purpose and effect of s. 102 are obvious when it is read in its context: it is meant to deprive the judgment debtor of driving privileges until the judgment arising from a motor vehicle accident is paid in full, or periodic payments in satisfaction of the judgment are being made under s. 103. It is, in substance, a debt collection mechanism. Since the parties conceded that the judgment debt in this appeal is a claim provable in bankruptcy, I would add that the purpose and effect of s. 102, in the context of this appeal, are to suspend a debtor's driving privileges until payment of a provable claim.

48 Alberta disputes this. It submits that s. 102 is not, in substance, a debt enforcement scheme. It contends that the provision merely imposes an additional monetary condition to obtain the privilege of driving. In the appellant's view, this condition mirrors the amount of the judgment debt because it reflects the actual regulatory cost of the driver's failure to comply with the insurance requirement. Alberta maintains that the "payment obligation is

inherently regulatory in nature" and that repayment of the judgment debt "is merely incidental to the satisfaction of the regulatory requirement" (A.F., at para. 31). It insists that the purpose of the provision is to discourage people from driving without insurance.

49 I disagree. While it is plausible that s. 102 might discourage drivers from driving uninsured, this is neither its main purpose nor its main effect. For one, the deterrent effect of s. 102, if any, is not tied to the failure to maintain proper insurance. The deterrent effect materializes only if the uninsured driver causes an accident. The accident must also cause injury to a third party. In addition, the victim must seek damages and obtain a judgment. Yet this is still not sufficient. The uninsured driver must also be incapable of satisfying the judgment in question or refuse to do so. Clearly, it is the failure to pay the judgment debt that triggers s. 102, not the failure to be insured. Furthermore, failure to comply with the insurance requirement is already subject to a penalty under s. 54 of the *TSA*. In sharp contrast to s. 102, s. 54 imposes a monetary penalty (and, in case of default, imprisonment) for the mere failure to comply with the insurance requirement, without more.

50 The distinction Alberta attempts to make between a judgment debt and a regulatory charge is also irrelevant for two reasons. First, s. 102 is clearly aimed at the repayment of a judgment debt. Second, even if it were aimed at recovering the resulting regulatory charge, such a charge would nonetheless be a claim provable in bankruptcy, and as such, it would remain a debt subject to the bankruptcy process.

51 On the first point, the language of the provision is clear: its objective is the satisfaction of the judgment debt. Section 102 is triggered when the judgment debtor "fails... to satisfy the judgment": s. 102(1). It provides that driving privileges will be suspended "until the judgment is satisfied or discharged": s. 102(2). Section 103 is also informative; the suspension of driving privileges stops as soon as payments are being made. The suspension resumes, however, when the debtor defaults.

52 The letters received by the respondent are telling in this regard. On October 27, 2011, the Director, Driver Fitness and Monitoring, wrote this:

> This letter will serve as notification that due to your unsatisfied motor vehicle accident claim, your operator's licence and vehicle registration privileges will be suspended indefinitely ... .
>
> ... the suspension will remain in effect until the following condition(s) are met:
>
> > • satisfy any outstanding Motor Vehicle Accident Claims Fund claim. [Emphasis added; A.R. at p. 48.]

On November 15, 2011, Motor Vehicle Accident Recoveries added this:

> ... I advise that your client, Joseph William Moloney, remains indebted for the judgment debt obtained against him. Section 102(2) of the Traffic Safety Act (copy attached) states that he remains indebted "until the judgment is satisfied or discharged, otherwise than by a discharge in bankruptcy".
>
> Accordingly, we would request that your client contact our office to make payment arrangements suitable to his circumstances. Failure to do so will result in the continued suspension of his driving privileges. [Emphasis added; A.R., at p. 49.]

These letters make no mention of the respondent's failure to comply with the insurance requirement, or of the accident for which he is responsible.

53 In addition, as I mentioned, s. 102 could be used in favour of a third party victim who obtains a judgment but chooses not to seek compensation from the Administrator under the *MVACA*. In such a case, there is no "regulatory cost", since no public funds are being spent. The only effect of s. 102 is to deprive the debtor of driving privileges until he or she pays the judgment creditor.

54 With respect to the second point, even if we were to accept the distinction advocated by Alberta between the judgment debt and the resulting regulatory charge, it has no practical implication. A regulatory charge remains a debt owed to the province, which s. 102 is meant to collect. Not only is it a debt, but it is, like the underlying judgment debt, a provable claim.

55 According to s. 121(1) of the *BIA*, a provable claim must meet three criteria: (1) there must be a debt, liability or obligation owed to a creditor, (2) which was incurred before the debtor became bankrupt, and (3) it must be possible to attach a monetary value to the debt, liability or obligation (*AbitibiBowater Inc., Re*, 2012 SCC 67, [2012] 3 S.C.R. 443 (S.C.C.), at para. 26). Even if the judgment debt were characterized as a regulatory charge, it would meet these criteria. The regulatory charge would arise from a payment made to the victim of an accident caused by the respondent. The respondent's liability to the province arose prior to his assignment in bankruptcy, and it is clearly monetary in nature. As a result, the province's claim for the regulatory charge would be provable in bankruptcy and must be treated as part of the bankruptcy process: *AbitibiBowater*, at para. 40; *Vachon*, at p. 426; *Ontario (Minister of Finance) v. Clarke*, 2013 ONSC 1920, 115 O.R. (3d) 33 (Ont. S.C.J.), at para. 52.

56 Therefore, whether one considers the province's claim as a judgment debt or as the resulting regulatory charge, it is still provable in bankruptcy. It follows that the effect of s. 102 is to allow a judgment creditor to deprive the debtor of his or her driving privileges until the debt is paid. In the end, the provision thus compels the payment of a provable claim. Driving is unlike other activities. For many, it is necessary to function meaningfully in society. As such, driving often cannot be seen as a genuine "choice": *R. v. White*, [1999] 2 S.C.R. 417 (S.C.C.), at para. 55. The effect of the provincial scheme undoubtedly amounts to coercion in that regard.

57 Before leaving this provincial scheme to consider whether the enforcement mechanism conflicts with the *BIA*, I briefly discuss an argument raised solely by the intervener Superintendent of Bankruptcy on the validity of one component of s. 102(2) of the *TSA*. The impugned provision states that the suspension of driving privileges continues "until the judgment is satisfied or discharged, otherwise than by a discharge in bankruptcy". While the parties have conceded the validity of the provision, the Superintendent of Bankruptcy, who is also the appellant in the companion appeal, *407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)*, 2015 SCC 52 (S.C.C.), argued before us that the words "otherwise than by a discharge in bankruptcy" are *ultra vires* the province and, as a result, severable. In his view, this "phrase is invalid since the Province attempts to explicitly render a discharge in bankruptcy ineffective as against a provincial debt that Parliament has not exempted from the effects of bankruptcy" (factum, at para. 11).

58 As stated previously, neither the parties nor the courts below disputed that s. 102, as a whole, is *intra vires* the province. The dominant purpose and effect of s. 102 are to suspend driving privileges until payment of a judgment debt. This enforcement scheme is part of the provincial regulation of driving privileges in Alberta. There is no doubt that assuring the financial responsibility of drivers and regulating driving privileges fall within the province's jurisdiction regarding property and civil rights under s. 92(13) of the *Constitution Act, 1867*. Given this and the way the case has been argued and decided, this appeal is, in my view, properly disposed of by applying the doctrine of paramountcy and ascertaining whether a conflict exists between the *BIA* and the *TSA*.

59 Whether the provincial scheme has the effect of rendering a discharge in bankruptcy "ineffective as against a provincial debt" or negating the operability of a federal law as the Superintendent of Bankruptcy argues (factum, at paras. 11-12) is better resolved as a question of paramountcy. I would add that the words "otherwise than by a discharge in bankruptcy" are necessary only because the province lists the discharge in general, in addition to the satisfaction of the debt, as an event ending the suspension of the privilege. Had the legislation defined the satisfaction of the debt as the sole event capable of ending the suspension, the dominant feature of the provision would remain the same, although the issue of conflict with a discharge in bankruptcy would still arise.

(2) The Conflict Between the BIA and the TSA

(a) Operational Conflict

60 The Court of Appeal concluded that there was no operational conflict, although it used that term throughout its judgment in reference to conflict generally. It explained that the respondent could resist the payment by foregoing his driving privileges and choosing not to drive (para. 10). The reasons of the Court of Appeal, as well as the submissions of the parties, save for those of the Superintendent of Bankruptcy, relate almost exclusively to the second branch of the applicable test. I believe the Court of Appeal and the parties are mistaken on this point. I therefore respectfully disagree with my colleague Côté J., who holds in her concurring reasons that there is no operational conflict, since a bankrupt "can either opt not to drive or voluntarily pay the discharged debt" (para. 123). In a case like this one, the test for operational conflict cannot be limited to asking whether the respondent can comply with both laws by renouncing the protection afforded to him or her under the federal law or the privilege he or she is otherwise entitled to under the provincial law. In that regard, the debtor's response to the suspension of his or her driving privileges is not determinative. In analyzing the operational conflict at issue in this case, we cannot disregard the fact that whether the debtor pays or not, the province, as a creditor, is still compelling payment of a provable claim that has been released, which is in direct contradiction with s. 178(2) of the *BIA*:

> If [the respondent] pays the debt, then the provincial law will have required him to pay a debt that has been released by the federal law. If [he] does not pay the debt, then the provincial law will have punished him — by withholding his driver's licence — for failing to pay a debt that has been released by the federal law.
>
> (*Gorguis v. Saskatchewan Government Insurance*, 2011 SKQB 132, 372 Sask. R. 152 (Sask. Q.B.), at para. 25; sent back for rehearing by the Saskatchewan Court of Appeal, which did not address the court's comments on this point (2013 SKCA 32, 414 Sask. R. 5 (Sask. C.A.)).)

Thus, the laws at issue give inconsistent answers to the question whether there is an enforceable obligation: one law says yes and the other says no.

61 On the one hand, s. 178(2) of the *BIA* provides that "an order of discharge releases the bankrupt from all claims provable in bankruptcy". In my view, it is undisputed that a discharge under s. 178 of the *BIA* releases a debtor, thus preventing creditors from enforcing claims that are provable in bankruptcy. My colleague appears to suggest (at para. 96) that, since the actual words of the section say "nothing more" than that the bankrupt is discharged, or since the discharge merely releases provable claims, an interpretation to the effect that the release of such claims means that they cannot be enforced would "add words to the provision". With respect, this amounts to depriving the words of s. 178(2) of their obvious and ordinary meaning. In *Schreyer*, LeBel J. wrote that, "[a]s is clear from the words of s. 178(2) *BIA*, the discharge operates to release the bankrupt from all claims provable in bankruptcy". He added that, "[f]or creditors, the discharge means that they "cease to be able to enforce claims against the bankrupt that are provable in bankruptcy" (para. 21). I know of no authority that suggests that the words "order of discharge" or "releases" in that context mean anything other than that the provable claim is unenforceable. To give the words used in s. 178(2) their proper meaning is not to interpret the provision broadly.

62 On the other hand, s. 102(2) of the *TSA* empowers the province to continue to pressure a debtor by withholding his or her driving privileges "until the judgment is satisfied or discharged, otherwise than by a discharge in bankruptcy". As I mentioned above in my analysis of the legislative schemes, the language of this provision is clear: it provides for the satisfaction of the judgment debt by excluding the impact of a discharge in bankruptcy.

63 One law consequently provides for the release of all claims provable in bankruptcy and prohibits creditors from enforcing them, while the other disregards this release and allows for the use of a debt enforcement mechanism on such a claim by precisely excluding a discharge in bankruptcy. This is a true incompatibility. Both laws cannot operate concurrently (*Sun Indalex*, at para. 60; *Lafarge*, at para. 82; *M & D Farm*, at para. 41; *Multiple Access*, at p. 191), "apply concurrently" (*Western Bank*, at para. 72) or "operate side by side without

conflict" (*Marine Services*, at para. 76). The facts of this appeal indeed show an actual conflict in operation of the two provisions. This is a case where the provincial law says "yes" ("Alberta can enforce this provable claim"), while the federal law says "no" ("Alberta cannot enforce this provable claim"). The provincial law gives the province a right that the federal law denies, and maintains a liability from which the debtor has been released under the federal law. This conflict can hardly be characterized as "indirect" as my colleague suggests (paras. 92 and 128). Nor can I characterize as merely "implicit" the clear prohibition in s. 178(2) against enforcing provable claims that have been discharged. It is not in dispute that s. 178(2) is a prohibitive provision; considering the meaning of the words "order of discharge" and "releases", what the provision "exactly" prohibits is the enforcement of discharged provable claims. There is no other "possible ramification" in terms of what this section prohibits.

64 There was indeed much discussion about the effect of a discharge in the parties' submissions. To avoid a finding of conflict, Alberta submitted that in bankruptcy, the debt is not extinguished but merely "released". It asserted that the *BIA* precludes only the "civil enforcement" of the debt through "civil process"; it does not affect the province's ability to insist on licensing requirements.

65 In *Schreyer*, LeBel J. described the effect of discharge. While recognizing that the debt is not extinguished, he explained that a discharge prevents creditors from enforcing those claims that are provable in bankruptcy:

> ... every claim is swept into the bankruptcy and ... the bankrupt is released from all of them upon being discharged unless the law sets out a clear exclusion or exemption... .
>
> The only reservation I have with the decision of the Court of Appeal in the case at bar relates to its numerous statements that the operation of s. 178(2) *BIA* has the effect of "extinguishing" the equalization claim. With respect, this provision does not purport to extinguish claims that are provable in bankruptcy pursuant to s. 121 *BIA*, but "releases" the debtor from such claims: see, on this point, *Re Kryspin* (1983), 40 O.R. (2d) 424 (H.C.J.), at pp. 438-39; and *Ross, Re* (2003), 50 C.B.R. (4th) 274 (Ont. S.C.J.), at para. 15. As is clear from the words of s. 178(2) *BIA*, the discharge operates to release the bankrupt from all claims provable in bankruptcy. For creditors, the discharge means that they "cease to be able to enforce claims against the bankrupt that are provable in bankruptcy". [Emphasis added; paras 20-21.]
>
> (Citing Houlden, Morawetz and Sarra, at p. 6-283.)

66 This description is consistent with the term "releases" found in s. 178(2), which means "[l]iberation from an obligation, duty, or demand; the act of giving up a right or claim to the person against whom it could have been enforced": *Black's Law Dictionary* (10th ed. 2014), at p. 1480. As a result of s. 178(2), creditors are deemed to give up their right to enforce their provable claims. The verb "enforce", as used by LeBel J. and Houlden, Morawetz and Sarra, means "to compel obedience": *Black's Law Dictionary*, at p. 645. The non-extinguishment of the debt may be relevant in some cases, such as those involving the liability of a third party (see *Buchanan, Re*, 2007 NSCA 68, 255 N.S.R. (2d) 286 (N.S. C.A.); *Miller, Re* (2001), 27 C.B.R. (4th) 107 (Ont. S.C.J.)). This is, however, of no practical relevance to this appeal. Section 178(2) is clear: a creditor cannot compel the debtor to pay a debt that was released on discharge.

67 In this appeal, the payment which the province seeks to recover is a provable claim. In substance, the purpose and effect of s. 102 are to compel payment of that provable claim. That claim was properly released, since neither the province's judgment debt, nor the resulting regulatory charge, is exempt from discharge under s. 178(1). As a provable claim is subject to s. 178(2), the province is precluded from compelling payment of the judgment debt.

68 Contrary to the appellant's contention, nothing suggests that s. 178(2) merely precludes civil enforcement of provable claims. Accepting the appellant's argument would amount to adding words to the provision that do not exist, and that the legislator did not include. While being expressly precluded from compelling payment of a discharged provable claim, the province could create an administrative scheme that had the effect of coercing a

discharged debtor to pay a debt that has been released. The appellant's argument must be rejected. Pursuant to s. 178(2) of the *BIA*, creditors are precluded from compelling payment of a claim provable in bankruptcy, through either civil or administrative processes.

69 Neither can the question under the operational conflict branch of the paramountcy test be whether it is possible to refrain from applying the provincial law in order to avoid the alleged conflict with the federal law. To argue that the province is not required to use s. 102 in the context of bankruptcy, or that it can choose not to withhold the respondent's driving privileges, leads to a superficial application of the operational conflict test. To suggest that a conflict can be avoided by complying with the federal law to the exclusion of the provincial law cannot be a valid answer to the question whether there is "actual conflict in operation", as the majority of the Court put it in *Multiple Access*: see also *COPA*, at para. 64. To so conclude would render the first branch of the paramountcy test meaningless, since it is virtually always possible to avoid the application of a provincial law so as not to cause a conflict with a federal law. Furthermore, any provincial law that could survive the first branch under the latter argument would necessarily also survive the second branch. If it is possible to avoid operational conflict simply by declining to apply the provincial law, the same could be done to avoid any frustration of the federal purpose under the second branch.

70 In fact, this would be tantamount to rendering the provincial law inoperative to the extent of the conflict even before a conflict is found. Under the doctrine of paramountcy, this is precisely the remedy that courts grant once a conflict is found; it is not a tool courts can use to avoid finding a conflict. The remedy of not applying the provincial law cannot be determinative of whether a conflict exists in the first place. In this case, whether or not the province has discretion not to apply s. 102 is irrelevant: see *Lafarge*, at para. 75. The province chose to take advantage of the scheme. The question is whether it can do so while also complying with the *BIA*.

71 This view, with which my colleague disagrees, appears to me to be consistent with this Court's jurisprudence on operational conflict. For instance, in *M & D Farm*, the creditor held a mortgage on the debtors' family farm. After defaulting on the mortgage, the debtors obtained a stay of proceedings under the federal *Farm Debt Review Act*, R.C.S. 1985, c. 25 (2nd Supp.). While the stay was still in effect, the creditor sought, and was granted, leave under the provincial *Family Farm Protection Act*, C.C.S.M., c. F15, which authorized the immediate commencement of foreclosure proceedings. The question arose as to whether there was a conflict between the federal stay and the provincial leave. The Court concluded that there was an operational conflict (pp. 982-85), and this conclusion was later reaffirmed in *Lafarge*, at para. 82, and again in *Lemare Lake*, at para. 18. As I read *M & D Farm*, the fact that the debtors could choose to voluntarily pay the mortgage debt, as my colleague suggests, did not mean that there was no operational conflict. Nor was conflict avoided because the creditor could have chosen not to seek leave to commence foreclosure proceedings. There was an operational conflict because the provincial law expressly authorized the very proceedings that the federal stay precluded.

72 More recently, in *Sun Indalex*, Deschamps J., with Moldaver J. concurring, found that there was an operational conflict (the Court was unanimous on this point). On the one hand, there was an order made under the federal *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, which authorized an insolvent company to obtain debtor-in-possession ("DIP") financing and granted priority to the DIP lender. On the other hand, the provincial *Personal Property Security Act*, R.S.O. 1990, c. P.10, gave priority to the administrator of the company's employee pension plans: para. 60. Deschamps J. did not avoid the operational conflict by concluding, for instance, that the debtor could have chosen not to seek DIP financing in the first place.

73 My analysis does not "expan[d] the definition of conflict in the first branch" of the paramountcy test, nor does it "conflate" its two branches, contrary to what my colleague indicates (paras. 93 and 106). In my view, this analysis instead applies the principles developed by this Court on federal paramountcy to the operational conflict situation at issue here, where the federal law includes a prohibition that the provincial law effectively disregards. I discuss the two legislative schemes separately from the application of the two branches of the paramountcy test. My analysis of the operational conflict focuses on the existence of an actual and direct conflict between the

provisions at issue. The two branches are not "conflated" simply because, in a situation like the current one, the wording of s. 178(2) and the clear prohibition it contains happen to exemplify the goal behind the provision and one of the key objectives of the *BIA*, that is, the financial rehabilitation of the debtor. I consider that my colleague's remarks to the effect that impossibility of dual compliance is a "secondary consideration" in my discussion of operational conflict (para. 99) are misplaced as well. The classic statement of the test for operational conflict in *Multiple Access* that she cites with approval (para. 100) is precisely the one I am relying upon here. It is in light of that statement that I find there is no real possibility of dual compliance as understood by this Court. Indeed, the opposite conclusion would depend on a creditor refusing to apply (or a debtor refusing to comply with) the provincial law, or, alternatively, on a debtor renouncing (or a creditor refusing to comply with) the protection afforded by the federal law. To find a possibility of dual compliance with the conflicting laws at issue — on the basis of hypotheticals that call for "single" compliance, by any one of the actors involved, with one law but not with the other — would be inconsistent with this Court's precedents on federal paramountcy.

74 In this regard, this case is distinguishable from precedents like *Rothmans* and *COPA*, on which my colleague relies. Those cases both dealt with provincial laws that took a more restrictive approach to matters covered by permissive federal laws. In each of them, the relevant statutes were held not to create an operational conflict. In *COPA*, the federal *Aeronautics Act*, R.S.C. 1985, c. A-2, allowed private citizens to build airports, while the provincial *Act respecting the preservation of agricultural land and agricultural activities*, R.S.Q., c. P-41.1, prohibited such activities on agricultural land absent an administrative authorization: para. 8. In *Rothmans*, s. 30 of the federal *Tobacco Act*, S.C. 1997, c. 13, permitted the display of tobacco products at retail, while the provincial *Tobacco Control Act*, S.S. 2001, c. T-14.1, banned the advertising, display and promotion of tobacco products in places where persons under 18 years of age were allowed. *Rothmans* and *COPA* did not involve a direct contradiction between the two applicable laws as does the instant case. They merely involved one law that imposed stricter conditions in allowing activities that were also permitted by the government at the other level. In the case at bar, the question with respect to operational conflict is whether debts incurred while driving uninsured can be enforced even though the debtor has been discharged from bankruptcy. On this question, the two laws directly contradict each other.

75 I therefore conclude that s. 102 of the *TSA* allows the province, or a third party creditor, to enforce a provable claim that has been released. To that extent, it conflicts with s. 178(2) of the *BIA*. It is impossible for the province to apply s. 102 without contravening s. 178(2) and, as a result, for the respondent to simultaneously be liable to pay the judgment debt under the provincial scheme and be released from that same claim pursuant to s. 178(2): *Lafarge*, at para. 82; *M & D Farm*, at para. 41. Section 178 is a complete code in that it sets out which debts are released on discharge and which debts survive bankruptcy. In effect, s. 102 creates a new class of exempt debts that is not listed in s. 178(1). Hence, in the words used by my colleague in her reasons (paras. 95, 110 and 128), "the provincial law allows the very same thing" — the enforcement of a debt released under s. 178(2) of the *BIA* — that "the federal law prohibits". The result is an operational conflict between the provincial and federal provisions.

76 Although this conclusion makes it unnecessary to discuss the second branch of the test, I will nonetheless address it in order to respond to the province's arguments.

(b) Frustration of Federal Purpose

(i) Financial Rehabilitation

77 Like the lower courts, I find that the province's use of its administrative powers relating to driving privileges to burden the respondent until he repays a discharged debt frustrates the financial rehabilitation of the bankrupt. The effect of s. 102 directly contradicts and defeats the purpose of the discharge provided for in s. 178(2):

> The *BIA* permits an honest but unfortunate debtor to obtain a discharge from debts subject to reasonable conditions. The *Act* is designed to permit a bankrupt to receive, after a specified period a complete discharge

> of all his or her debts in order that he or she may be able to integrate into the business of life of the country as a useful citizen free from the crushing burden of debts... .
>
> [Emphasis added.]
>
> (Houlden, Morawetz and Sarra, at p. 1-2.1)

As explained already, the language of s. 178(2) makes it clear that the purpose of this provision is to give effect to one of the goals underlying the *BIA* regime — the financial rehabilitation of the debtor — by releasing "the bankrupt from all claims provable in bankruptcy". In other words, s. 178(2) is aimed precisely at providing the bankrupt with a fresh start. The facts of this case establish that the province's use of s. 102 despite the respondent's discharge undermines this purpose.

78 The respondent was a truck driver. In 1996, after the accident, the province was assigned the judgment rendered against him in the amount of $194,875. In 2008, after attempting to pay the debt in instalments for about 12 years, he made an assignment in bankruptcy. At that time, the outstanding amount of the debt had increased to $195,823; it was, by far, the largest of the respondent's financial liabilities. In 12 years, the respondent had not been able to keep up with his interest payments. The crushing burden of the province's claim against him was the main reason for his bankruptcy. In 2012, at the time his application for discharge was heard, the respondent had only managed to pay the judgment debt down to $192,103.79. By the effect of s. 102, he was exiting bankruptcy while carrying the same financial burden that had caused his bankruptcy four years earlier. If s. 102 is allowed to operate despite the respondent's discharge, the respondent is not offered the opportunity to rehabilitate that Parliament intended to give him. This is particularly compelling in the respondent's case. As a truck driver, his ability to gain a livelihood is tied to his ability to drive. But more generally, inability to drive can constitute a significant impediment to any person's capacity to earn income: see *Lucar, Re* (2001), 32 C.B.R. (4th) 270 (Ont. S.C.J.), at paras. 22-23.

79 In furthering financial rehabilitation, Parliament expressly selected which debts survive bankruptcy and which are discharged: s. 178(1) and (2). It did so having regard to competing policy objectives. This is a delicate exercise, because the more claims that survive bankruptcy, the more difficult it becomes for a debtor to rehabilitate: *AbitibiBowater*, at para. 35; *Schreyer*, at para. 19. In 1970, the Study Committee on Bankruptcy and Insolvency Legislation emphasized this concern:

> ... much of the rehabilitative effect of his discharge and release from debts is lost, when a bankrupt is left with substantial debts after his discharge. Indeed, in some cases, it may almost be regarded as a mockery of the bankruptcy system to take all of the sizable property of a debtor, distribute it among the creditors and then leave the debtor to cope with some of his largest creditors from whose debts he has not been released.
>
> (*Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970), at para. 3.2.085)

When operating in the context of bankruptcy, s. 102 undermines this balancing exercise and imperils the bankrupt's ability to rehabilitate. In effect, s. 102 creates a new class of debts that survive bankruptcy. As such, it leaves the debtor with a substantial financial liability that was not contemplated by Parliament. Had Parliament intended judgment debts arising from motor vehicle accidents, or the resulting regulatory charges, to survive bankruptcy, it would have stated so expressly in s. 178(1) of the *BIA*. It did not. Together, s. 178(1) and (2) are comprehensive. It is beyond the province's constitutional authority to interfere with Parliament's discretion in that regard.

80 Notwithstanding this, Alberta asserts that, like any creditor, the province is allowed to form a new binding contract with the discharged bankrupt for the repayment of the debt. In its view, the respondent's driving privileges can serve as fresh consideration for such a contract. I disagree. Like the Court of Appeal, I conclude that this alleged fresh consideration is neither genuine nor consistent with the purpose of s. 178(2).

81 As a general rule, a creditor cannot cause a debtor to revive an obligation from which the debtor was released, unless the creditor offers fresh consideration: Wood, at p. 301. Between private parties, it is arguable that a debtor may freely agree to revive a discharged debt in exchange for the creditor's provision of goods or services. The province, however, is unlike any private creditor. While a private creditor is under no obligation to provide goods or services, the province cannot withhold the respondent's driving privileges arbitrarily. Suspension of privileges by administrative bodies must be based on a legal rule: see *Roncarelli c. Duplessis*, [1959] S.C.R. 121 (S.C.C.), at pp. 141-42; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 (S.C.C.), at para. 59; *Secession Reference*, at para. 71; *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.), at para. 10. In the case at bar, the effect and purpose of s. 102 are to compel payment of a discharged debt, which conflicts with s. 178(2). As a result, s. 102 is, to that extent, inoperative and cannot ground the province's authority to withhold the respondent's privileges. If those privileges are being suspended on the sole basis that the respondent refuses to satisfy a judgment debt that was released in bankruptcy, the province is acting without authority. The province's promise to refrain from doing what it has no authority to do cannot constitute fresh consideration capable of supporting any contract. This includes a contract for the repayment of a discharged debt. More importantly, the respondent need not enter into such a contract in order to recover his driving privileges, because the province has no authority to withhold them.

82 Finally, Alberta's other assertion, to the effect that Parliament's power over bankruptcy and insolvency matters does not extend to the regulation of driving privileges, does not entail that the province can withhold those privileges on the basis of an unpaid released debt. In my view, the province is conflating the scope of Parliament's authority and the consequences of the conflict between the *BIA* and the *TSA*. The financial responsibility of drivers is a valid matter of provincial concern and jurisdiction, and the province can set the conditions for driving privileges with this consideration in mind. Nonetheless, when the province denies a person's driving privileges on the sole basis that he or she refuses to pay a debt that was discharged in bankruptcy, the province's condition conflicts with s. 178(2) of the *BIA* and is, to that extent, inoperative. To so conclude does not transfer the power to regulate driving privileges to Parliament. The obligation to grant those privileges flows from the provisions of the provincial law that remain operative.

83 The rehabilitative purpose of s. 178(2) is not meant to give debtors a fresh start in all aspects of their lives. Bankruptcy does not purport to erase all the consequences of a bankrupt's past conduct. However, by ensuring that all provable claims are treated as part of the bankruptcy regime, the *BIA* gives debtors an opportunity to rehabilitate themselves financially. While this does not amount to erasing all regulatory consequences of their past conduct, it is certainly meant to free them from the financial burden of past indebtedness.

(ii) Equitable Distribution

84 The Court of Appeal concluded that the *TSA* also disrupts the equitable distribution purpose of the *BIA*. In that court's view, the province's legislative scheme allows it to obtain more than the ordinary dividend paid under the bankruptcy regime, which is contrary to the objective of the *BIA* to "treat all creditors of the same class equally" (para. 50). For its part, the province asserts that s. 102 does not alter the priorities set out in the *BIA*, since payment for the privilege of driving does not draw on the estate of the bankrupt that is available to other creditors.

85 I disagree with this conclusion of the Court of Appeal. The purpose of s. 178, the only provision of the *BIA* that is at issue in this appeal, is to give the discharged bankrupt a fresh start. The section sets out the limits of this fresh start by excluding specific debts from being released by the order of discharge (s. 178(1)), and it provides for the consequences of that order by releasing the bankrupt from all other provable claims (s. 178(2)). Section 178 does not further the purpose of equitable distribution of assets. What the Court of Appeal points to are the consequences of survival of the judgment debt as a result of s. 102 of the *TSA*, despite the discharge contemplated in s. 178. This concerns the financial rehabilitation purpose of the *BIA* and nothing more.

86 This Court has repeatedly cautioned against giving "too broad a scope to paramountcy on the basis of frustration of federal purpose": *Lemare Lake*, at para. 23, quoting *Marcotte*, at para. 72; *Marine Services*, at para. 69; *Western Bank*, at para. 74. In the federal paramountcy analysis, it is therefore always essential to ascertain the exact purpose of the specific provision of the federal law that is at issue. The Court of Appeal does not cite any authority supporting the assertion that s. 178 has purposes other than the debtor's financial rehabilitation. Although other provisions of the *BIA*, discussed earlier in these reasons and dealing mostly with the property of the bankrupt and the administration of the bankrupt's estate, are meant to ensure this equitable distribution purpose, those provisions are not at issue in the case at bar. At best, the assertion made by the Court of Appeal unduly broadens the *BIA*'s equitable distribution purpose and the related single proceeding model. This is contrary to the presumption of constitutionality according to which, "[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes": *Western Bank*, at para. 75, quoting *Law Society of B.C.*, at p. 356; *Marine Services*, at para. 69.

87 Professor Wood, at p. 3, explains as follows the rationale behind the collective proceeding through which equitable distribution is achieved:

> The race to grab assets in the absence of a collective insolvency regime does not provide an environment within which an efficient and orderly liquidation can occur. The process is inefficient because each creditor must separately attempt to enforce their claims against the debtor's assets, and this produces duplication in enforcement costs. The piecemeal selling off of assets also results in a much smaller recovery than if a single person were in control of the liquidation. Similarly, the race to seize assets does not produce an environment within which negotiations with creditors can easily occur. A reasonable creditor who is inclined to negotiate with the debtor will be unlikely to do so if other creditors are actively taking steps to make away with the debtor's realizable assets; instead, the creditor will feel compelled to join the wild dash to seize assets. Although some of the creditors (those who are able to strike first) are better off in such a scenario, the creditors as a group receive less than if a more orderly liquidation or negotiated arrangement had taken place.
>
> (See also *Husky Oil*, at para. 7.)

88 The single proceeding model is focused on ensuring the orderly distribution of assets and reducing inefficiencies, and ultimately on maximizing global recovery for creditors. If, after the bankrupt's discharge, that is, after the administration of the estate and the orderly distribution contemplated by the *BIA*, the province is allowed to compel a bankrupt to make payments outside the collective proceeding and to obtain property that would not, in any event, be distributed to the creditors as part of the bankruptcy process, I fail to see how the single proceeding model is disrupted. The assets to be distributed to creditors remain the same, and they are still allocated according to the bankruptcy scheme and any priorities it dictates. Whether or not s. 102 of the *TSA* operates after the discharge does not impact the orderly distribution to creditors, nor does it affect the pool of assets to be distributed to them. In this regard, the judgment debt is not "preferred" or given any kind of priority under the *BIA* scheme; it is quite simply unaffected by the bankruptcy process as a result of the provincial scheme in the same way as the other debts listed in s. 178(1) that are not released by the order of discharge. The operation of s. 102 does not cause any chaos or inefficiencies in the bankruptcy process. If anything, allowing s. 102 to operate increases global recovery for the other creditors while leaving the single proceeding intact.

89 Thus, although it is clear that the purpose of s. 178(2) is to ensure the debtor's financial rehabilitation and that s. 102 frustrates that purpose, I am not convinced that the operation of the provincial scheme in the context of this appeal interferes with the equitable distribution of assets, a purpose that is undoubtedly served by other provisions of the *BIA*, but not by s. 178.

VI. Disposition

90 In my view, the doctrine of paramountcy dictates that s. 102 of the *TSA* is inoperative to the extent that it conflicts with the *BIA*, and in particular s. 178(2). Therefore, the province cannot withhold the respondent's driving privileges on the basis of an unsatisfied but discharged judgment debt. I would dismiss the appeal with costs and answer the constitutional question as follows:

> Is s. 102(2) of Alberta *Traffic Safety Act*, R.S.A. 2000, c. T-6, constitutionally inoperative by reason of the doctrine of federal paramountcy?
>
> Answer: Yes, s. 102 of the Alberta *Traffic Safety Act* is inoperative to the extent that it is used to enforce a debt discharged in bankruptcy.

***Côté J.* (McLachlin C.J.C. concurring):**

91 I agree that what is at the core of this appeal is the frustration of a federal purpose. Therefore, I concur with Gascon J. insofar as he finds that s. 102 of the Alberta *Traffic Safety Act*, R.S.A. 2000, c. T-6 ("*TSA*"), frustrates the purpose of financial rehabilitation that underlies s. 178(2) of the federal *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), and that s. 102 is accordingly inoperative to the extent of the conflict by reason of the doctrine of federal paramountcy. However, I do not believe that there is an operational conflict to speak of in this appeal.

92 There is no doubt in my mind that s. 102 of the *TSA* allows Alberta to do indirectly what it is implicitly prohibited from doing under s. 178(2) of the *BIA*, but in light of the indirect nature of the conflict, this issue is properly dealt with on the basis of the second branch of the federal paramountcy test, not the first.

93 In my respectful view, Gascon J.'s analysis contrasts with the clear standard that has been adopted for the purpose of determining whether an operational conflict exists in the context of the federal paramountcy test: impossibility of dual compliance as a result of an express conflict. My colleague's approach conflates the two branches of the federal paramountcy test, or at a minimum blurs the difference between them and returns the jurisprudence to the state it was at before the second branch was recognized as a separate branch. And it has an additional serious adverse effect: by expanding the definition of conflict in the first branch, it increases the number of situations in which a federal law might be found to pre-empt a provincial law without an in-depth analysis of Parliament's intent.

94 To support his approach, my colleague relies on cases that were decided before "frustration of purpose" was recognized as a separate branch of the test. He also relies on subsequent decisions in which the two branches were confused. In my view, *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961 (S.C.C.) ("*M & D Farm*"), and *Burrardview Neighbourhood Assn. v. Vancouver (City)*, 2007 SCC 23, [2007] 2 S.C.R. 86 (S.C.C.) ("*Lafarge*"), cannot be found to represent a consistent and coherent approach to the interplay between the two branches.

95 In the case at bar, it is clear from the provisions themselves that as a result of how the two legislatures decided to exercise their respective powers, dual compliance is not impossible. The provincial and federal provisions at issue do not expressly conflict; they are different in terms of their contents and of the remedies that they provide. One of them does not permit what the other specifically prohibits.

96 Under s. 178 of the *BIA*, a bankrupt is discharged from all claims provable in bankruptcy. That section says nothing more. One must be careful, in light of the federal purpose of financial rehabilitation, not to add words to the provision.

97 Thus, s. 102 of the *TSA* does not revive an extinguished claim *per se*; if a debtor chooses not to drive, the province simply cannot enforce its claim. Rather, s. 102 allows the province to suspend a driver's licence, which gives it some leverage to compel payment of the debt *if the driver decides to drive*. The bankrupt is still

discharged in the literal sense of the words of s. 178(2) of the *BIA*. This is not a situation of express conflict in which one law says "yes" while the other says "no". The two statutes answer different questions. In the end, the literal requirement of the federal statute is, strictly speaking, met. It therefore follows that the two acts can operate side by side without conflict. To conclude otherwise would be to disregard the distinct contents of the two provisions and the remedies that they provide.

98 This is why I am of the view that this appeal must be decided on the basis of the frustration of a federal purpose, an issue in respect of which the applicable standard is higher, and that requires an in-depth analysis of Parliament's intent.

I. Impossibility of Dual Compliance

99 In my colleague's discussion of operational conflict, *impossibility* of dual compliance, instead of being at the forefront of the analysis, seems to be a secondary consideration. Yet it is the undisputed standard for determining whether an operational conflict exists, and one that very few cases will meet.

100 In the jurisprudence, impossibility of dual compliance has become synonymous with operational conflict: see e.g. P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 16-4 ("Impossibility of dual compliance"). This may largely be due to this Court's repeated emphasis on the definition of operational conflict articulated by Dickson J. (as he then was) in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.) ("*Multiple Access*"): "... there is actual conflict in operation ... where one enactment says 'yes' and the other says 'no'; 'the same citizens are being told to do inconsistent things'; compliance with one is defiance of the other" (p. 191 (emphasis added)).

101 In *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188 (S.C.C.) ("*Rothmans*"), Major J. stressed that *Multiple Access* is "often cited for the proposition that there is an inconsistency for the purposes of the doctrine if it is impossible to comply simultaneously with both provincial and federal enactments" (para. 11). Major J. also described an operational conflict as a situation in which the provincial law "mak[es] it impossible to comply" with the federal law (para. 14). Binnie and LeBel JJ. would subsequently state in *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.), that provincial and federal laws are incompatible where "it is impossible to comply with both laws" (para. 75). Impossibility of dual compliance continues to be the standard for conceptualizing operational conflict and determining whether one exists: see e.g. *Laferrière c. Québec (Juge de la Cour du Québec)*, 2010 SCC 39, [2010] 2 S.C.R. 536 (S.C.C.) ("*COPA*"), at para. 64.

102 The requirement of an "express contradiction", discussed in *114957 Canada Ltée (Spray-Tech, Société d'arrosage) c. Hudson (Ville)*, 2001 SCC 40, [2001] 2 S.C.R. 241 (S.C.C.) ("*Spraytech*"), at para. 34, is inseparable from impossibility of dual compliance as a clear expression of the prudent measure of restraint displayed in the line of cases in which the first branch of the federal paramountcy test was developed. It echoes the proposition that for the two laws to conflict, each one has to say exactly the opposite of what the other says (one law says "yes" and the other says "no"). A less direct conflict is simply not enough.

103 In *Canadian Western Bank*, Bastarache J. indicated that the only type of conflict capable of triggering the first branch is one that is "express" (para. 126). See also *Lafarge*, at para. 113. In *M & D Farm*, on which my colleague relies extensively, Binnie J., writing for the Court, acknowledged that the federal enactment will prevail only in the event of "an express contradiction" (para. 17). The Court had also previously used the expression "direct conflict" to characterize this requirement: *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59 (S.C.C.), at pp. 64-65. Peter W. Hogg states that the requirement is "a very tight restriction on the paramountcy doctrine, since cases where the provincial law expressly contradicts the federal law are few and far between": "Paramountcy and Tobacco" (2006), 34 *S.C.L.R.* (2d) 335, at p. 338 (emphasis added). In the absence of an express conflict, the two provisions are deemed to be capable of operating side by side. This idea

also underlies the reasons of the majority in *COPA*, who found that there was no operational conflict, because the federal statute did not require the construction of an aerodrome, whereas the provincial law prohibited it (para. 65).

104 In light of the modern jurisprudence, this restrained approach to operational conflict is therefore inescapable. There are good reasons for maintaining such a strict standard for operational conflict. Iacobucci J. (dissenting, but not on this point) explained the rationale behind it in *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.):

> In closing, although I find there to be no conflict between s. 133(1) and the *Bankruptcy Act*, I posit that, even if there were to be some element of conflict, this must be evaluated in light of the fact that the provincial legislation is *intra vires*. Legislation that is *intra vires* is permitted to have an incidental and ancillary effect on a federal sphere. I would emphasize again that this Court has traditionally declined to invoke the paramountcy doctrine in the absence of actual operational conflict. I am uncomfortable with the "water-tight" approach to federal bankruptcy legislation propounded by the respondents. To interpret the quartet as requiring the invalidation of provincial laws which have any effect on the bankruptcy process is to undermine the theory of co-operative federalism upon which (particularly post-war) Canada has been built. In *Deloitte Haskins [and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785], at pp. 807-8, Wilson J. recognized it to be appropriate to adopt as narrow a definition of operational conflict as possible in order to allow each level of government as much area of activity as possible within its respective sphere of authority. [Emphasis added; para. 162.]

Such a high standard is consistent with co-operative federalism and with the idea, as eloquently expressed by my colleague Abella J. for the majority in *NIL/TU,O Child & Family Services Society v. B.C.G.E.U.*, 2010 SCC 45, [2010] 2 S.C.R. 696 (S.C.C.), that "[t]oday's constitutional landscape is painted with the brush of co-operative federalism", which requires that courts accept an overlap "between the exercise of federal and provincial competencies" as inevitable (para. 42). If, in practice, the wording of the statutes makes it possible to comply with both of them, then co-operative federalism requires this Court to find that the federal and provincial statutes are compatible, at least at the first stage of the analysis. If there is a doubt in this regard, the issue should be addressed at the second stage, since an interpretation of the federal and provincial legislation that results in a finding of compatibility should be favoured at the first stage.

105 This is where I cannot agree with my colleague. Rather than assessing the possibility of dual compliance and the existence or absence of an express operational conflict, Gascon J. begins by characterizing the effect of s. 102 of the *TSA*. In his view, that effect is to permit the enforcement of a discharged debt. He then finds that compelling the payment of such a debt is prohibited by s. 178(2) of the *BIA*, as its purpose is to give the bankrupt a fresh start. My colleague interprets s. 178(2) of the *BIA* broadly on the basis of Parliament's intent to foster the financial rehabilitation of the bankrupt, and this results in a conflict. In other words, rather than considering whether to comply with one statute is to defy the other, he considers whether the effects of the provincial statute seem to be incompatible with the federal prohibition. Instead of considering only the actual words of both provisions, he takes into account their purposes and their effects.

106 As I mentioned above, his analysis thus conflates the two branches of the federal paramountcy test, or at a minimum blurs the difference between them and returns the jurisprudence to the state it was at before the second branch was recognized as a separate branch.

107 With all due respect, as the Chief Justice stated in *COPA*, the two branches of the modern federal paramountcy test relate to "two different forms of conflict" (para. 64). See also *Newfoundland (Workplace Health, Safety & Compensation Commission) v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53 (S.C.C.) ("*Marine Services*"), at para. 68. While it is true that they overlap, it is not true that a finding of an operational conflict in the first branch will necessarily entail a finding of frustration of a federal purpose in the second branch. An overlap between the two forms of conflict does not mean the branches are necessarily redundant. The party that invokes

the frustration of a federal purpose bears the burden of proof, and the standard of proof is high: *COPA*, at para. 66. The federal scheme may be drafted in a manner that does not match the record of Parliament's intent, but that results in an express conflict with a provincial law. If the frustration of a federal purpose can be used to find that an operational conflict exists, there is really no point in having two branches of the test. If the Court wishes to merge the two branches, it cannot do so without overruling *Rothmans*, *COPA* and *Marine Services* on this point.

108 The first branch of the federal paramountcy test is concerned with incompatibility *of the provisions*, that is, an incompatibility that is evident on the face of the provisions themselves. An analysis in this regard takes the federal statute as a starting point and focusses on its actual wording. This analysis requires an inquiry, based on the wording of the federal statute, into whether there is room for the provincial law to operate. In this context, the content of each of the laws and the remedies that they provide are of considerable importance.

109 For all these reasons, even a superficial possibility of dual compliance will suffice for a court to conclude that there is no operational conflict: *Law Society (British Columbia) v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113 (S.C.C.) ("*Mangat*"), at para. 72. By the same logic, a duplication of federal and provincial legislation will not on its own amount to operational conflict: *Multiple Access*, at p. 190, per Dickson J. for the majority. In addition, where federal legislation is broad and permissive, a restrictive provincial scheme will usually be deemed not to conflict with it, because it will be possible to comply with both of them by conforming to the more restrictive provincial law: *Bruyère c. Québec (Commission de la santé & de la sécurité du travail)*, 2011 SCC 60, [2011] 3 S.C.R. 635 (S.C.C.), at para. 20. Such was the case in *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121 (S.C.C.) ("*Bank of Montreal*"), *Spraytech*, *Rothmans*and *COPA*.

110 If the federal law is prohibitive, as in the case at bar, the question becomes what *exactly* it prohibits. If the provincial law allows the very same thing the federal law prohibits, there is an operational conflict. If it does not do so, the analysis shifts to the second branch.

111 My colleague contends, relying on *Marine Services*, that the modern approach to statutory interpretation applies to ambiguous federal statutes. According to him, the analysis regarding an express conflict cannot be limited to a literal reading of the statute. Parliament's intent can thus be used to find that an operational conflict exists where there would otherwise be none.

112 With all due respect, *Marine Services* does not stand for that proposition; rather, it reaffirms the idea that co-operative federalism supports an interpretation of the federal and provincial legislation that results in a finding of compatibility at the first stage of the test. In *Marine Services*, this Court resolved the ambiguity in the *Marine Liability Act*, S.C. 2001, c. 6, by finding that "[a]n interpretation recognizing the absence of conflict between the statutes is borne out by the broader context, the scheme and object of the *MLA* and Parliament's intent" (para. 79). Yet Gascon J. is doing the opposite, that is, concluding that an operational conflict exists even though there is an interpretation of the two laws that results in a finding of compatibility.

113 If permissive federal legislation is to be interpreted restrictively in order to avoid an operational conflict, I see no reason to generally treat ambiguous provisions differently. Following my colleague's approach, the frustration of federal purpose analysis can result in findings of two different forms of conflict. That is clearly not the conclusion this Court reached in *Bank of Montreal*. It should be noted that the federal provision at issue in that case could easily have been characterized as being ambiguous. Thus, a broader interpretation could have been adopted to the effect that Parliament's intent resulted in an operational conflict; instead, the Court considered it necessary to extend the federal paramountcy test by creating the frustration of purpose branch. Whereas Parliament's intent had originally been irrelevant to the federal paramountcy test, it would now be the touchstone of this new branch.

114 The Court has never really addressed the interrelation between the two branches. In many cases from both before and after *Rothmans*, *Canadian Western Bank* and *COPA*, it seems to me that the two branches have been

confused, as the Court has concluded that there was an operational conflict in the context of the first branch while referring to the federal purpose.

115 For instance, Gonthier J., writing for the majority in *Husky Oil*, found that there was a "clear operational conflict in that ss. 133(1) and (3) in their operation together entail a reordering or subverting of the federal order of priorities under the *Bankruptcy Act*" (para. 87). As the Ontario Court of Appeal noted in its reasons in the companion case, *Moore, Re*, 2013 ONCA 769, 118 O.R. (3d) 161 (Ont. C.A.), the decision of the majority in *Husky Oil* is best understood as one involving frustration of federal purpose rather than operational conflict:

> Although not so described in the case, in my view, the majority in *Husky Oil* is best understood as a decision involving frustration of a federal purpose rather than an operational conflict. Firstly, the majority did not rely on *Multiple Access* but on *Hall*, a case which is now viewed as a frustration of purpose decision. Secondly, the majority relied on the effect of the provincial legislation and indirect conflict to ground its paramountcy analysis and not the strict operational conflict test found in *Multiple Access*. [para. 75]

116 In *Lafarge*, the majority did recognize the two branches of the federal paramountcy test, but stated the test incorrectly:

> We restated the requirements for federal paramountcy in our reasons in *Canadian Western Bank*. The party raising the issue must establish the existence of valid federal and provincial laws and the impossibility of their simultaneous application by reason of an operational conflict or because such application would frustrate the purpose of the enactment, as explained by our Court in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13, at paras. 11-14. (See also *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, 2001 SCC 67, at paras. 68-71; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121.) [para. 77]

117 The conflation of frustration of a purpose with impossibility of dual compliance is even more apparent at para. 75 of that case, where the majority stated that the two statutes "would create an operational conflict that would flout the federal purpose". Interestingly, the majority did not refer to an operational conflict in terms of impossibility of dual compliance or a situation in which one enactment says "yes" and the other says "no". They merely applied *M & D Farm* and found that there was an operational conflict, just as my colleague proposes to do in the case at bar. In my opinion, *Lafarge* should also be understood as a decision involving the frustration of a federal purpose rather than an operational conflict.

118 Although *M & D Farm* was decided on the basis of an operational conflict, it is not helpful authority on the modern doctrine of federal paramountcy either, as Binnie J. made no distinction between the first and second branches of the federal paramountcy test. At the time that case was decided, the concept of frustration of purpose had been referred to in *Bank of Montreal*, but this Court had not yet explicitly recognized the two branches of the federal paramountcy test. Although the Court found in *M & D Farm* that there was an operational conflict, in doing so it relied on passages from *Bank of Montreal* in which La Forest J. had inquired into whether "requir[ing] the bank to defer to the provincial legislation is to displace the legislative intent of Parliament" (*Bank of Montreal*, at p. 153; see *M & D Farm*, at para. 41). I agree that there was in fact an operational conflict in *M & D Farm*, but for different reasons, as I will explain below.

119 Finally, in *Mangat*, the federal legislation (*Immigration Act*, R.S.C. 1985, c. I-2) permitted non-lawyers to appear on behalf of clients before the Immigration and Refugee Board (ss. 30 and 69(1)). The provincial legislation (*Legal Profession Act*, S.B.C. 1975, c. 25) prohibited non-lawyers from practising law. As defined in s. 1 of the *Legal Profession Act*, the expression "practice of law" included "appearing as counsel or advocate" in the expectation of a fee. Mr. Mangat was an immigration consultant. The Law Society of British Columbia applied for a permanent injunction to prevent him from practising law. The Court found the law to be inoperative, but used the term "operational conflict" in respect of both branches of the paramountcy test:

> In this case, there is an operational conflict as the provincial legislation prohibits non-lawyers to appear for a fee before a tribunal but the federal legislation authorizes non-lawyers to appear as counsel for a fee. At a superficial level, a person who seeks to comply with both enactments can succeed either by becoming a member in good standing of the Law Society of British Columbia or by not charging a fee. Complying with the stricter statute necessarily involves complying with the other statute. However, following the expanded interpretation given in cases like *M & D Farm* and *Bank of Montreal*, *supra*, dual compliance is impossible....
>
> This case should be distinguished from *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40. In that case, it was possible to comply with the federal, provincial, and municipal statutes or regulations without defeating Parliament's purpose. As previously shown, in this case, it is impossible to comply with the provincial statute without frustrating Parliament's purpose. [Emphasis added; paras. 72-73.]

120 In my view, the Court actually found in that case that there was no operational conflict (as that concept is understood today), as it noted in the above passage that the statutes at issue allowed dual compliance at a "superficial level"; the words "superficial level" corresponded to the operational conflict branch. And it then found that dual compliance was not possible on the basis of an "expanded interpretation", citing *M & D Farm* and *Bank of Montreal*; the words "expanded interpretation" referred to the frustration of purpose branch.

121 In light of the above cases, I find it difficult to conclude, as my colleague urges me to do, that the approach taken by this Court on this issue has been entirely consistent.

122 Although this Court's past decisions are not always helpful when it comes to drawing a distinction between the two branches, they do support three propositions: (1) that the applicable standard for the first branch is *impossibility* of dual compliance caused by an express conflict, (2) that this is a high standard that should be applied with restraint, and only in very few cases, and (3) that the two branches are distinct and address different forms of conflict.

123 Consequently, I find that the analysis at the first stage should really be as simple as the Ontario Court of Appeal put it, and it is no surprise to me that both parties made next to no submissions on the point. The determining question is whether the province's legislation provides a path on which dual compliance is possible. Because such a path exists in this case as a result of the wording of the two provisions, dual compliance cannot be found to be impossible. Unlike in *M & D Farm*, the two statutes in the instant case have different contents and provide for different remedies. Since the bankrupt is under no compulsion in this regard, he or she can either opt not to drive or voluntarily pay the discharged debt, in which case there will be no operational conflict between the provincial and federal laws. The only thing Alberta can do is suspend a bankrupt's driver's license.

124 It is important to note that although operational conflict and frustration of purpose are described as two "branches" of a single test, either one is sufficient to trigger the application of the doctrine of federal paramountcy. Where enactments are found to be in operational conflict, the inquiry can end there without further investigation into the purposes of the enactments. A high standard at the first stage merely means that in most cases, the purpose and effects of the legislation at issue will need to be analyzed at the second stage.

125 Requiring courts to deal with the issue in the second branch has many advantages. For the frustration of purpose analysis, the federal legislative intent with which the provincial law is alleged to be incompatible must be established by the party relying on it. Clear proof of intent is required. The party must first establish the purpose of the relevant federal statute and then prove that the provincial law is incompatible with or frustrates this purpose: *COPA*, at para. 66.

126 In the second branch, the court can proceed with a careful analysis of Parliament's intent and, if possible, interpret the federal law so as not to interfere with the provincial law: *Canadian Western Bank*, at para. 75. Before

concluding that the provincial law is inoperative, the court can also consider whether the federal government supports the operation of that law. In *Rothmans*, this Court emphasized that in resolving federalism issues, a court must bear in mind the position of the government at the other level (para. 26). In that case, the federal government intervened in favour of the provincial law, arguing that it had been enacted for the same health-related purpose as the federal law. The Court found that there was no frustration of purpose.

127 Considering that the doctrine of federal paramountcy operates at the expense of provincial jurisdiction and reduces legislative overlap, these principles encourage governments at both levels to take the lead in defining the scope of their legislative powers. They facilitate intergovernmental dialogue and serve as safeguards of provincial autonomy. In my view, the approach I suggest is more consistent with the principle of co-operative federalism as applied in *Canadian Western Bank*. It also sets a clear precedent by reaffirming that a provincial law will rarely be found to be inoperative in the first branch of the analysis.

128 My colleague concludes that this approach would render the first branch of the federal paramountcy test meaningless; in his opinion, it is virtually always possible to avoid the application of a provincial law so as not to cause a conflict with a federal law. I disagree that the "impossibility" standard, if applied strictly, would render the first branch of the federal paramountcy test meaningless. If the provincial law *allows or requires* something that the federal law explicitly *prohibits*, or if the conflict is direct rather than indirect, there will be an operational conflict. But that is just not the case here. In fact, the effect of my colleague's approach is to render the *second* branch meaningless, since a frustration of federal purpose analysis can now be used to interpret federal statutes broadly in order to find that an operational conflict exists where there would otherwise be none.

129 Following my approach, one would still find that there was an operational conflict in *M & D Farm*, in which the federal law imposed an absolute stay of proceedings on the very procedures the provincial statute allowed to commence or to continue. In that case, the express requirement of the federal statute was in direct conflict with the provincial law. On the one hand, the federal *Farm Debt Review Act*, R.S.C. 1985, c. 25 (2nd Supp.), permitted a farmer to obtain a stay of a creditor's proceedings and required the creditor, before demanding payment, to give notice that it intended to commence foreclosure proceedings. On the other hand, under the provincial statute, the creditor could obtain an order authorizing the immediate commencement of such proceedings. Unlike in the case at bar, the two statutes had similar contents and provided for similar remedies: both dealt specifically with the process for realizing on farmers' debts, and both established procedures for commencing or continuing proceedings against farmers.

130 The approach I suggest would also result in a finding that there was an operational conflict in *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), in which the federal statute, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, gave a court the power to order that a security or charge rank in priority *over the claim of any secured creditor of the company*, whereas the provincial statute created a priority in favour of the administrator of the company's employee pension plan. The federal legislation was not only permissive, but granted the court a very specific power; the provincial legislature was left little leeway to interfere with this power. Because the provincial statute provided, on a mandatory basis, for a different order of priority, it was impossible to comply with both laws without rendering the court's power under the federal statute meaningless.

131 I would add that what is "virtually always possible", as my colleague puts it, at para. 69 of his reasons, is to find *some* conflict in the application of two laws. This is why the case law requires something more, namely impossibility of dual compliance and an express conflict. It is also why the focus is on the wording of the federal statute and not on its every possible ramification.

132 In the end, the issue in this case is whether the *effect* of the province withholding driving privileges in this manner produces a conflict with the purposes of the *BIA*, thereby accomplishing indirectly what the province cannot do directly. Thus, it is on the basis of the second branch of the federal paramountcy test, not the first, that this appeal must be decided.

133 I adopt my colleague's analysis and conclusion on this point. As the frustration of one federal purpose is sufficient to trigger the application of the doctrine of federal paramountcy, I need not address the second proposed ground for frustration of purpose, that of equitable distribution.

Appeal dismissed.

Pourvoi rejeté.

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Tab 6

2017 ABQB 508
Alberta Court of Queen's Bench

Re Canada North Group Inc

2017 CarswellAlta 1609, 2017 ABQB 508, [2017] A.W.L.D. 5084,
2017 D.T.C. 5110, 283 A.C.W.S. (3d) 255, 51 C.B.R. (6th) 282

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

And In the Matter of a Plan of Arrangement of Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., D.J. Catering Ltd., 816956 Alberta Ltd. and 1371047 Alberta Ltd.

S.D. Hillier J.

Heard: July 27, 2017
Judgment: August 17, 2017
Docket: Edmonton 1703-12327

Counsel: S.A. Wanke, S. Norris, for Applicants / Cross-Respondents
C.P. Russell, Q.C., for Respondent / Cross-Applicant
D.R. Bieganek, Q.C., for Monitor, Ernst &Young LLP
J. Oliver, for Business Development Bank of Canada
T.M. Warner, for ECN Capital Corp.
M.J. McCabe, Q.C., for PricewaterhouseCoopers
R.J. Wasylyshyn, for Weslease Income Growth Fund LP
H.M.B. Ferris, for First Island Financial Services Ltd.
G.F. Body, for Canada Revenue Agency

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.vii Extension of order
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Extension of order
Debtors were group of companies involved in work camps in natural resource sector, modular construction manufacturing, camp land rentals, and real estate holdings including golf course — Debtors had used services of secured creditor for significant period of time — Debtors' operations and profitability were significantly impacted by downturn in economy — Debtors issued notices of intention to make proposals under Bankruptcy and Insolvency Act and obtained initial stay of proceedings under s. 11.02(1) of Companies' Creditors Arrangement Act (CCAA) — Debtors brought application for extension of stay under s. 11.02(2) of CCAA, and for ancillary relief — Creditor brought cross-application for order lifting stay and appointing either full or interim receiver — Application granted; cross-application dismissed — Stay was extended with date for review being set; debtor-in-possession (DIP) financing was increased; affiliated company was added as debtor; monitor's first report was approved; and stay was expanded to included third parties involved in debtors' projects — Chief restructuring

officer had begun consultations with unsolicited parties who had expressed interest, and structure for plan of arrangement was now important priority — It was not shown that debtors had failed to act in good faith to extent of disentitling extension sought, and extension of stay was in best interest subject to further vigorous review within reasonable period of time — Increase in DIP financing was required to address anticipated cash flow shortage resulting from welcome work during what was typically slower season for debtors — Operations of affiliated company were inextricably linked to those of debtors.

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Alexis Paragon Limited Partnership, Re (2014), 2014 ABQB 65, 2014 CarswellAlta 165, 9 C.B.R. (6th) 43 (Alta. Q.B.) — referred to

Azure Dynamics Corp., Re (2012), 2012 BCSC 781, 2012 CarswellBC 1545, 91 C.B.R. (5th) 310 (B.C. S.C. [In Chambers]) — referred to

Canwest Publishing Inc. / Publications Canwest Inc., Re (2010), 2010 ONSC 222, 2010 CarswellOnt 212, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) — considered

GuestLogix Inc., Re (2016), 2016 ONSC 1348, 2016 CarswellOnt 3323 (Ont. S.C.J.) — considered

Hunters Trailer & Marine Ltd., Re (2001), 2001 ABQB 1094, 2001 CarswellAlta 1636, 30 C.B.R. (4th) 206, 305 A.R. 175 (Alta. Q.B.) — referred to

Muscletech Research & Development Inc., Re (2006), 2006 CarswellOnt 720, 19 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]) — considered

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Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — referred to

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4519922 Canada Inc., Re (2015), 2015 ONSC 124, 2015 CarswellOnt 178, 22 C.B.R. (6th) 44 (Ont. S.C.J. [Commercial List]) — referred to

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s. 47 — referred to

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Generally — referred to

s. 99(a) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — referred to

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

s. 36.1(2) [en. 2007, c. 36, s. 78] — considered
Judicature Act, R.S.A. 2000, c. J-2
s. 13(2) — referred to
Personal Property Security Act, R.S.A. 2000, c. P-7
s. 65(7) — referred to

APPLICATION by debtors for extension of stay under s. 11.02(2) of *Companies' Creditors Arrangement Act*, and for ancillary relief; CROSS-APPLICATION by creditor for order lifting stay and appointing either full or interim receiver.

***S.D. Hillier J.*:**

I Introduction

1 Canada North Camps Inc. (CNC), Campcorp Structures Ltd., D.J. Catering Ltd., 816956 Alberta Ltd. and 1371047 Alberta Ltd. (collectively, the Group) request extension of a Stay under s. 11.02(2) of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA*) until November 3, 2017 and ancillary orders.

2 The Canadian Western Bank (CWB) cross-applies for an order lifting the Stay and appointing either a full or interim Receiver pursuant to s. 243 (or ss. 47 and 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*)), s. 13(2) of the *Judicature Act*, RSA 2000, c J-2, s. 99(a) of the *Business Corporations Act*, RSA 2000, c B-9, and s. 65(7) of the *Personal Property Security Act*, RSA 2000, c P-7.

II History

3 The Group operates or provides a number of services including work camps in the natural resource sector, modular construction manufacturing, camp land rentals as well as real estate holdings including a golf course. CWB has been the Group's major secured creditor for a significant period of time.

4 1919209 Alberta Ltd. (1919) is an insolvent affiliated debtor holding company of two of the companies in the Group. It was incorporated to lease camp equipment from Weslease Income Growth Fund LP (Weslease) and provide that camp equipment to Canada North Camps Inc. for its use. 1919's operations are integrated with those of the other applicants.

5 CNC entered into an agreement to construct a camp on Wandering River. 1371047, and Wandering River Properties Ltd. (owned 2/3 by 1371047) subsequently purchased a parcel for that purpose. CNC joined with the local Heart Lake First Nation and formed Heart Lake CNC LP, Heart Lake Canada North Group GP Ltd., Wandering River Properties Ltd., and Canada North Group LP Holdings Ltd.

6 An action by Max Fuel Distributors Ltd. as against Shayne McCracken arises from the operation of the camp business. The other creditors of the Group are stayed from enforcing collateral claims against Shayne McCracken.

7 The Group's operations and profitability have been significantly impacted since 2014 by the downturn in the economy. Earlier attempts by the Group and CWB to deal with the debt and cash flow issues proved to be unsuccessful.

8 In March 2017, the parties signed a Forbearance Agreement but problems continued. When they were unable to reach a new resolution in a full meeting on June 21, 2017, the Group issued Notices of Intention to make proposals under the *BIA* effective June 26, 2017.

9 On July 5, 2017, Nielsen J. granted an initial Stay under s. 11.02(1) of the *CCAA*. He imposed numerous terms, including that:

- Ernst & Young be appointed as Monitor;
- R. e. I. Group Inc. be appointed as Chief Restructuring Officer (CRO);
- the Stay continue until August 3, 2017, subject to review;
- Debtor in Possession (DIP) financing from the Business Development Bank of Canada (BDC) be made available, not to exceed $1M;
- Notice of Intention proceedings under the *BIA* be "taken up" and continued under the *CCAA*.

10 On July 27, 2017, the Group applied under s. 11.02(2) of the *CCAA* for an extension of the Stay to November 3, 2017. It also applied to add 1919 as an applicant in these proceedings.

11 As well, it applied to expand the Stay to apply to proceedings against the entities involved in the Wandering River contract, and against Shayne McCracken.

12 Finally, the Group applied for an increase in the DIP financing to a maximum of $2,500,000 and an interim lender's charge up to the same amount due to elevated costs associated with a significant short-term increase in work under a camps contract with the British Columbia provincial government for workers on the wildfires.

13 The CWB cross-applied for an order lifting the Stay and appointing a full or interim Receiver.

14 The Monitor sought approval of his First Report and activities, a suspension of limitation periods on claims, and the power to examine the parties regarding questioned transactions on lot sales prior to the *CCAA* Order (preferences) under s. 36.2 of the *CCAA*. Other interested parties also made submissions as affecting their interests.

15 In an oral decision, this Court extended the Stay to September 29, 2017 with a review to be held on September 26, 2017. The cross-application was dismissed. The Court also issued a series of ancillary directions. The parties were advised that written reasons would be issued dealing with the main issue as to extension of the Stay or appointment of a Receiver. These are the written reasons.

III Affidavit Evidence

16 The Group's stated preliminary plan is to return operations to profitability as demand increases, consider sale of some of its assets, and seek new financing or equity investment as required in order to provide a viable Plan of Arrangement.

17 The Group has presented extensive affidavits from Ms. Shayne McCracken, Director and Secretary of the applicants, in support of the various applications, containing the following key assertions:

- the Group has acted in good faith and with due diligence, working closely with the CRO and cooperating with the Monitor as they gain an understanding of the business and structure;
- the Group has specifically worked with the CRO and Monitor to improve financial reporting and accounting processes;
- together they have taken initial steps to develop a Plan of Arrangement to present to creditors, including a detailed overview of assets and liabilities;
- the Group has been the subject of unsolicited investment and purchase interest, which the Group, Monitor and CRO are pursuing;
- meetings have taken place with interested parties as well as arrangements related to drawdowns on DIP financing;
- work has included contracts with the Province of British Columbia to address efforts in consequence of raging wildfires in that province.

18 Ms. McCracken's affidavits purport to meet head on the concerns of CWB with the accounting treatment of certain accounts receivable, particularly in relation to the Grand Rapids Pipeline Project and the margining of custom negotiated deferred revenue. In late 2016, cost estimates were prepared for demobilization of the Grand Rapids camp, including removal of the camp for just over $2M and reclamation work estimated at roughly $5.36M based on detailed costing. Ms. McCracken asserted that the practice of clients assuming the costs of setting up and removing camps by advance invoicing is used by others in the camp industry.

19 The margining of custom negotiated deferred revenue allows the Group access to necessary financing to commence work prior to being paid. Ms. McCracken found support for the accounting practice in question in the custom negotiated deferred revenue term of the margining requirement that was part of the credit agreement with CWB.

20 Two significant receivables were placed on the books between March and May 2017 (it is unclear when they were actually posted and sent to the client) on Grand Rapids. This ostensibly led to a claim against the financing and increased CWB's exposure significantly at a time when the parties were trying to sort things out following the Forbearance Agreement in mid-March.

21 Ms. McCracken specifically denied CWB's allegation that these invoices were provided in bad faith to artificially inflate the amount available on the operating line. She deposed that the invoicing for this work was reviewed by the Group's corporate counsel. As well, it was part of the financial reporting to CWB and there were regular conversations with account managers at CWB who were aware of the origin and nature of all significant receivables, including the Grand Rapid receivables. Ms. McCracken maintained the view that the receivables were appropriately margined as deferred revenue.

22 Ms. McCracken noted that Grand Rapids has now raised issues with respect to payment of some of the invoices and a meeting is scheduled with it in Calgary in early August to discuss payment of those invoices.

23 Ms. Jessica Taha filed extensive material for CWB challenging the Stay, and supporting the appointment of a Receiver. The following assertions are germane, particularly as concerns margining of receivables:

- the Group had been margining receivables for which work had not yet been done (citing Grand Rapids);

- as a result, the operating line was overdrawn by over $3.8M for work not yet done which only came to light at the June 21, 2017 meeting; subsequent information reflects that it is overdrawn by $8M;

- the Group had only performed 10% of required work on one contract and only 40% for another, and none of this was consistent with the margining as represented by the Group, and arranged between the parties dating back to 2012;

- despite representations to the contrary before Nielsen J., CWB was not aware of this prior to the June 21, 2017 meeting.

24 Ms. Taha attested to her belief that as the level of work dropped dramatically in the economic downturn, the Group changed its approach without advising CWB, and started to render invoices for work which had not yet been done, categorizing those invoices as deferred revenue capable of margining.

25 In response, Ms. McCracken maintained her position that the Grand Rapids deferred revenue was properly included in the financial statements. She deposed that Ms. Taha's position that deferred revenue was only permitted to be used for margining based on the percentage of the work performed is inconsistent with the supporting material provided by Ms. Taha. The Group kept their branch representatives apprised of the status of the deferred revenue inclusions in the margining calculations and none raised a concern.

26 In counter response, CWB prepared three affidavits of senior officers at the Edmonton Main Branch deposing that they were unaware of the material amounts that were being margined without the work having been done, and each was unaware of anyone else at CWB having had such knowledge until the meeting on June 21, 2017.

27 Glenn MacDougall, Manager of ECN Capital Corp. (ECN), also filed an affidavit. ECN is an equipment lessor and creditor of the Group. In short, he opines that the work resulting from the BC wildfires is a temporary salve on the Group's financial circumstances, and it is unlikely that the Group will be able to make a viable Plan of Arrangement. He deposed that ECN would be materially prejudiced by the continuation of the Stay, as it will erode the value of ECN's security.

28 With respect to expanding the Stay, Ms. McCracken deposed that direct claims against affiliates have been reviewed. The Group now seeks to expand the stay to specific affiliates where those affiliates are facing claims directly connected to the overall camp operations, in order to preserve the *status quo*, prevent unnecessary expenditures of effort on litigation, maximize recovery for all parties, and allow for an orderly determination of priority and claims.

29 Regarding inclusion of 1919, Ms. McCracken deposed that 1919 has no revenue other than lease income from Canada North and is completely dependent on such payments to fulfill its obligations under the leases. It is included in the consolidated cash flow projections and financial statements for the Group, as it is treated as a flow through entity. The equipment it leases is essential to the uninterrupted operations of the Group.

30 Finally, Ms. McCracken explained that the increased work for the B.C. government, although welcome, creates a cash flow issue as the work is invoiced approximately a week after completion and receipt of payment typically takes approximately four weeks from invoicing. Consequently, the Group anticipates a cash flow shortage in August 2017 that will not be met by the present DIP facility. On July 21, 2017, the interim lender approved an increase to the DIP financing to a maximum of $2,500,000.

IV Monitor's First Report

31 The Monitor has provided a First Report, advising of various steps taken in conjunction with the CRO, highlights of which include:

General

- a new cash management procedure has been initiated to ensure efficient control of cash and cash reporting, with a review of cash flow projections;
- the Group's management and staff have been making significant efforts in all respects and are cooperating fully with the efforts of the CRO;
- based on the Monitor's own work with Group management, the Group appears to have acted in good faith and with due diligence;
- the actual end cash balance for the two weeks ending July 15, 2017 was higher than projected by over $400K and collections higher than projected by nearly $350K;
- while cash disbursements were lower, this was largely due to temporary deferrals;
- the contracts relating to the B.C. wildfires will have a significant positive impact on future cash inflows and receivables.

Accounts Receivable

- the Group has used atypical accounting practices as reflected in four areas;
- the steps being adopted in response to CWB's concerns include removing Grand Rapids and Heart Lake related receivables as a conservative strategy while quantum is reviewed;
- some but not all of the room guarantees or reservations have been reversed out.

Status of Restructuring Efforts and Related Plan

- the Group's business and operations are very complex;
- the CRO believes, based on preliminary work to date and co-operation of the management team, that there is certainly potential for a going concern plan that could provide significantly greater value to stakeholders as compared to a liquidation;
- the CRO is of the initial view that several profit and gross margin improvements have been realized by the Group due to changes to operations, staffing and other operational matters.

1919

- the leasing arrangement with Weslease has been extended for use by the Group valued at approximately $6M and listed as: three Jack+Jill dorms, two power distribution centres and one waste water treatment plant;
- expansion of the Stay to include 1919 is reasonable.

32 As well, the Monitor and the Group have been in contact with various parties who have expressed interest in participating in a restructuring through refinancing, purchasing assets or investing in the Group.

V Law

33 An initial Stay under s. 11.02(1) of the *CCAA* may be imposed for a maximum period of 30 days. The role of this Court on a subsequent application under s. 11.02(2) is not to re-evaluate the initial decision, but rather

to consider whether the applicant has established that the current circumstances support an extension as being appropriate and that the applicant has acted, and is acting, in good faith and with due diligence, as required under s. 11.02(3).

34 The purpose of the *CCAA* is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Appropriateness of an extension under the *CCAA* is assessed by inquiring into whether the order sought advances the policy objectives underlying the *CCAA*. A stay can be lifted if the reorganization is doomed to failure, but where the order sought realistically advances those objectives, a *CCAA* court has the discretion to grant it: *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at paras 15, 70, 71, [2010] 3 S.C.R. 379 (S.C.C.).

35 In applying for an extension, the applicant must provide evidence of at least "a kernel of a plan" which will advance the *CCAA* objectives: *North American Tungsten Corp., Re*, 2015 BCSC 1376, 2015 CarswellBC 2232 (B.C. S.C.) at para 26, citing *Azure Dynamics Corp., Re*, 2012 BCSC 781, 91 C.B.R. (5th) 310 (B.C. S.C. [In Chambers]).

36 Pursuant to s. 11.02(3), the applicant is required to demonstrate that it has acted, and continues to act, in good faith. Honesty is at the core of "good faith": *San Francisco Gifts Ltd., Re*, 2005 ABQB 91 (Alta. Q.B.) at para16, (2005), 10 C.B.R. (5th) 275 (Alta. Q.B.).

37 Section 11.02(3) refers to consideration of good faith and due diligence in both the past and present tense. Romaine J. in *Alberta Treasury Branches v. Tallgrass Energy Corp*, 2013 ABQB 432 (Alta. Q.B.) at para 13, (2013), 8 C.B.R. (6th) 161 (Alta. Q.B.) confirmed the language of s. 11.02(3), to the effect that the court needs to be satisfied that the applicant has acted in the past, and is acting, in good faith. See also *Alexis Paragon Limited Partnership, Re*, 2014 ABQB 65 (Alta. Q.B.) at para 16, (2014), 9 C.B.R. (6th) 43 (Alta. Q.B.).

38 By contrast, in *Muscletech Research & Development Inc., Re*, [2006] O.J. No. 462 (Ont. S.C.J. [Commercial List]) at para 4, (2006), 19 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]), Farley J. held that the question of good faith relates to how the parties are conducting themselves in the context of the *CCAA* proceedings. Courts in subsequent cases adopted this view: *Pacific Shores Resort & Spa Ltd., Re*, 2011 BCSC 1775 (B.C. S.C. [In Chambers]) at para 31-32, [2011] B.C.J. No. 2482 (B.C. S.C. [In Chambers]), and *4519922 Canada Inc., Re*, 2015 ONSC 124 (Ont. S.C.J. [Commercial List]) in paras 44-46, (2015), 22 C.B.R. (6th) 44 (Ont. S.C.J. [Commercial List]).

39 In *GuestLogix Inc., Re*, 2016 ONSC 1348, [2016] O.J. No. 1129 (Ont. S.C.J.), the Court expanded the stay to proceedings against a guarantor, noting that it was insolvent and in default of its obligations, highly integrated with the debtor company, and the debtor company would be able to include all the assets of the guarantor in a potential transaction if the guarantor were added.

40 The Court has broad equitable jurisdiction to determine appropriate allocation among assets of administration, interim financing and directors' charges: *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094, 30 C.B.R. (4th) 206 (Alta. Q.B.). The Court in *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) at para 54, (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) set out factors to be considered in determining priority of charges under s. 11.52 of the *CCAA* which are critical to the successful restructuring of the business:

(a) the size and complexity of the businesses being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.

41 Section 11.2(4) of the *CCAA* provides that in deciding whether to make an order allowing DIP financing, the Court must consider:

(a) the period during which the company is expected to be subject to *CCAA* proceedings;

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

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

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

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

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

(g) the monitor's report.

42 In *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145 (Ont. S.C.J.) at paras 12-18, (2014), 20 C.B.R. (6th) 116 (Ont. S.C.J.) the Court discussed the authority under s. 11.2 to grant priority to the DIP lender's charge to secure the DIP loan. In addition to the factors set out in s. 11.2(4), it considered the following in granting priority:

(a) notice had been given to all of the secured parties likely to be affected and broadly to all *PPSA* registrants, and other interested entities;

(b) the maximum amount of the DIP loan was appropriate based on the anticipated cash flow requirements of the applicant as reflected in its cash flow projections for the entire restructuring period, in order to continue to carry on its business during the restructuring period;

(c) the cash flows were the subject of a favourable report of the Monitor in its First Report;

(d) the Applicant's business would continue to be managed by the applicant's management with the assistance of the CRO during the restructuring period;

(e) the existing operational relationships between the applicant and its largest creditor would continue; and

(f) the DIP loan would assist in, and enhance, the restructuring process.

VI Analysis

Extension of Order

43 Various factors were profiled by Ms. Wanke before Nielsen J. to support the Group's position that a restructuring under the *CCAA* is possible; if the objective is liquidation, then appointment of a Receiver is appropriate. Nielsen J. recognized the possibility of a successful restructuring in rejecting the application to appoint a Receiver and granting the application to impose a Stay under the *CCAA* with a Monitor and CRO. In recognizing that a lot of work had been done, he found that those supporting the steps to restructure should be given that

opportunity in the collective best interest despite the prejudice of deferral and risk as regards repayment of CWB and other creditors.

44 I now have the responsibility to measure the progress in the period leading up to expiry of the initial Stay. Without second-guessing the initial decision, I must assess the current circumstances, including the good faith and due diligence of the parties in light of steps taken to date.

45 The legislative objective of a *CCAA* order is to provide the Court considerable scope to maintain the *status quo* for a company to make proposal arrangements to facilitate remaining in operation for a collective benefit. One may have preferred to see some further advancement on the "germ of a Plan" but I am satisfied that the CRO has begun consultations with unsolicited parties who have expressed an interest and that a structure for such a Plan is now an important priority.

46 I am mindful that the Monitor was obliged to report on just under three weeks of activity in rendering a First Report by July 24, 2017. Various factors have impacted the lack of concrete progress on a Plan at this point, including the value of the Group as a going concern estimated at $97M (equipment, manufacturing and real estate) with diverse activities, assets and work product, the complexity of restructuring, and the need to modernize the sophistication of a family operation that is unable to operate as it has done historically.

47 Professional advisors are now in place assisting in this required modernization. Potential investors have and continue to express interest in the Group. It appears that DIP funding has been used prudently to cover operational expenses including higher than expected professional expenses. Cash flows are quite healthy and the Group owns a number of assets of marketable value.

48 CWB notes that Nielsen J. indicated on the initial Stay application that the Group would have to show more than a germ of a plan at the next hearing. It is not entirely surprising that three weeks did not prove long enough to complete the steps necessary to create a Plan of Arrangement. There is no allegation of delay or inertia by the Monitor or the CRO in performance of significant responsibilities undertaken since confirmation of their appointment July 5, 2017. The Monitor reported that the Group has been working with due diligence and in full cooperation. A number of competing interests require the attention of the Monitor. Having considered all of the circumstances before the Court, I am satisfied that the Group has established due diligence.

49 It bears noting that CWB is not the only party who would be affected by receivership. Employees, other creditors, clients, and the public would also be affected. Changes have already been implemented by the CRO, as observed and reported by the Monitor.

50 The Group has had the recent opportunity to enter into contracts with the Province of B.C. in relation to the wildfires. It appears that despite the Group's liquidity crisis — impacted by various factors, including market conditions — the business of the Group may well be salvageable. This assessment appears to be supported by: the cash flow projections, recoveries on receivables, and changes begun by the CRO in consultation with the Monitor with particular regard to increased work potential and to increase the sophistication of accounting.

51 However, CWB takes the position that the Group has been in default of its obligations to CWB for many months. CWB extended time for the Group to find refinancing and continued to make available to the Group the operating line facility in the amount of $12,000,000, margined on accounts receivable of the Group. CWB asserts that the Group took advantage of CWB by falsely including one or more multi-million dollar accounts receivable for which the work had not yet been done.

52 The parties disagree as to whether the law supports serious consideration of past bad faith if it is relevant to the viability of the *CCAA* proposal or its continuation.

53 The language of s. 11.02(3) of the *CCAA* does not temporally restrict the consideration of bad faith. The wording of that provision is captured broadly in *Tallgrass*. It would appear that *Muscletech* and the cases which followed it stand for the proposition that courts should look only to conduct in the context of the *CCAA* process. This represents a restrictive reading of s. 11.02(3) and the purpose of such a narrow interpretation is unclear.

54 It is logical that past due diligence will usually have minimal relevance as a factor. However, past bad faith illuminated after *CCAA* proceedings have been initiated may undermine the confidence of creditors and the Court in the viability of *CCAA* proceedings. In my view, past bad faith may well be a relevant factor in the Court's assessment under s. 11.02(3). This is in keeping with the approach taken in *Alexis Paragon Limited Partnership, Re*, 2014 ABQB 65 (Alta. Q.B.) at paras 37-38.

55 I note that the facts in this case are distinguishable from those in *San Francisco* where the alleged deception appeared to be aimed at deriving an advantage from customers through knock off products and counterfeit safety labels, rather than deriving an advantage from a financing secured creditor through accounting practices as alleged here by CWB.

56 Again, the major issue in this regard is, and has been profiled as, the status of accounts receivable in terms of the margining of contracts for work not yet performed or not fully performed.

57 CWB takes the position that, upon consultation with her client and corporate counsel, Ms. Wanke misrepresented the situation to Nielsen J. in her oral submissions on July 5, 2017. While this Court is not reviewing the basis for Nielsen J.'s order, the issue of margining was raised at that time and the allegation of bad faith remains a live issue. I understand the interpretation placed by CWB on the representations made in front of Nielsen J. both from Affidavits and then information provided to legal counsel. Ms. Wanke summarized her understanding as being that this was part of the camp business on the books of the Group and not a lack of good faith. I accept her expression on this review to the effect that she would have preferred to have been more familiar with the Grand Rapids contract at the time but that this issue only surfaced latterly. She said she would have stated the client's position somewhat differently, but that the net effect remains that the margining was consistent with the Group's understanding of its entitlement.

58 CWB's concerns regarding the margining are understandable. It takes the position that while margining on deferred revenue was permissible, the Grand Rapids contracts do not qualify for that treatment according to the terms as agreed to between the parties notwithstanding the assertions advanced by the Group. CWB says there was an understanding as relates to the formula to be applied to these receivables that was violated, especially as to the two major Grand Rapids accounts issued between the end of March 2017 and beginning of May 2017. Counsel for CWB took the Court through a number of documents relating to the credit agreement between CWB and the Group to explain what the Group's reasonable understanding should have been in relation to contracts qualifying for special treatment of the accounts receivable for margining purposes.

59 The Monitor has reviewed and discounted a number of entries as inappropriate; it will likely have to further endorse commitment to revise other receivables. The Court agrees that a commitment to revise other receivables may be appropriate. However, there are a number of priorities competing for the attention of the CRO. It is difficult to measure whether any breaches of the protocol were intentionally deceptive as distinct from aggressive and misguided. That distinction is harder to make based on duelling affidavits as distinct from oral testimony, questioning or at minimum some objective detailed analysis by the Monitor to assist the Court's interpretation of events.

60 I have struggled to understand the treatment of invoicing as to the records of accounts receivable, particularly as the idea of charging for work not done is rather foreign to my experience as to the entitlement to collect. So too, the deferral of the time for payment extending from 45 days to 120 days obfuscates the idea of entitlement.

The matter is complicated by the risk and relative reliability of these receivables as assets, distinct from a bad or at least tainted debt that needs to be monitored for collection procedures. All of these aspects appear to arise in far greater sums for 2016 than in any previous year which, understandably, is further troubling to principals at CWB.

61 I endorse the concerns of CWB as legitimate. Even in the absence of a finding of bad faith, the practice employed as reflected in treatment of the Grand Rapids receivables raises legitimate concerns regarding the future viability of the Group. I accept that the practice in question has resulted in margining which has led to overall debt to CWB which is incongruent with the Group's receivables as they would be represented in the normal course, as confirmed in the Monitor's First Report.

62 I also note CWB's concern that the cash flow projection relied on by the Monitor did not take into account unpaid professional fees relating to the work toward reorganization, and the projected loss to the end of October 2017 is considerably offset only by the fortuitous and uncertain wildfire camp work. CWB's receivables, to the extent they are collectible, are being used up by payment of the professional fees and interim financing.

63 Nevertheless, I am not prepared to conclude on the basis of the material as presented to me that the Group has failed to act in good faith to the extent of disentitling the extension sought.

64 Clearly, the parties now disagree on the interpretation of the arrangement between them as regards margining based on deferred revenue. The issue before this Court is not the correct interpretation of the various document referred to by CWB's counsel, but rather whether the Group's reliance on its understanding amounted to bad faith. There has been no trial of the latter issue. While raising questions, the evidence adduced on this application falls short of supporting a finding of bad faith in the sense of knowing reliance on an unsupportable interpretation of the documents, or intentional concealing of the practice or any relevant financial information. This is particularly so in light of the evidence of the Group's understanding that the arrangement between CWB and the Group expressly contemplated that the Group was permitted to margin deferred revenue when no work had been done.

65 If the CWB was not aware of the effect or extent of this type of margining, it is not clear from the evidence that the Group understood it was acting other than consistently with the intention of the parties in this regard. This view of the matter is generally supported by the Monitor's information that the sophistication of all facets of the accounting system in place has not kept up with the sophistication of its business. The CRO is working to address accounting practices which require improvement.

66 There is undeniably a considerable difference in the parties' interpretations of the conduct and reporting. Obviously, a debtor may be motivated to maximize access to funding. The past practice here is somewhat unclear, but even if the Group exceeded the terms or protocol as generally agreed, I do not ascribe bad faith to its actions.

67 Overall, I find that extension of the Stay is in the best interest. However, a further vigorous review must take place within a reasonable period of time.

68 The November 3, 2017 date targeted by the Group is not reasonable in the circumstances.

69 As such, the next hearing is set for September 26, 2017. The Court will require a Report from the Monitor at least 7 business days prior to that date.

Increase in DIP Financing

70 Ms. McCracken suggests in her affidavit that they only need a small increase in the DIP loan to cover operations in light of healthy cash flows and significant assets.

71 While the creditors may rightly take issue with the characterization of the increase as "small", I approve the request to increase the DIP financing from $1M to $2.5M in the form of order proposed by counsel for the

Group to address the anticipated cash flow shortage resulting from welcome work during what is typically a slower season for the Group. Counsel for CWB took no issue with the form of order.

72 At the close of submissions, counsel for CRA alerted the Court, as well as BDC in particular, that it took issue with the increase in DIP financing and that it would be applying for priority with respect to $1.14M owing to the Minister by the Group for unremitted source deductions and GST. It was seeking an order to vary so as to put the administrative charge, director's charge and interim lender charges in second place behind the CRA. In light of that information, BDC counsel indicated that the CRA's position would not impair BDC's ability to advance the DIP financing, noting that the matter would be argued at a later date.

1919

73 The application to add 1919 was not opposed. As was the case in *Guestlogix*, the operations of 1919 are inextricably linked to those of the Group, as it leases important equipment and provides it Canada North.

74 I order that 1919 be added as a party included in the Group. Counsel for the Group agreed to include in the order a clause restating the allocation provision in the initial Stay Order to recognize that Welease has made this concern known at this point. Counsel for CWB did not take issue with such a provision in the order.

Approval of Monitor's First Report

75 And at the request of the Monitor, I approve:

- his First Report and activities;
- suspend the limitation periods on claims;
- confer power to examine parties on questioned transactions regarding lot sales prior to *CCAA*.

76 The further Report of the Monitor is required at least 7 days before the next hearing.

Expansion of Stay

77 The Stay is expanded to apply to proceedings against Heart Lake and associated parties involved in the Grand Rapids contracts, and proceedings by Max Fuel against Ms. McCracken. Counsel for CWB did not take issue with this. In the result, the applications for appointment of a Receiver, interim or otherwise, are dismissed.

Sealing of Confidential Information

78 I order that the confidential information identified as such on the Court file be sealed.

Service Protocol to Reduce Costs

79 The Monitor is to maintain a service list of parties who provide the Monitor with email addresses. Those parties may be served by email effective the date of the email. All others are to be served by the Monitor posting its and others' materials on its website, effective as at the date of posting.

VII Conclusion

80 I have determined that it is in the collective interest to extend the *CCAA* Stay to September 29, 2017. The Order will be subject to review by me on September 26, 2017 in usual consultation with the Court Coordinator.

Application granted; cross-application dismissed.

End of Document

Most Negative Treatment: Application/Notice of Appeal
Most Recent Application/Notice of Appeal: R. v. Canada North Group Inc. | 2019 CarswellAlta 2506 | (S.C.C., Oct 24, 2019)

2019 ABCA 314
Alberta Court of Appeal

Canada v. Canada North Group Inc.

2019 CarswellAlta 1815, 2019 ABCA 314, [2019] 12 W.W.R. 635, [2019] A.W.L.D. 3632, [2019] A.W.L.D. 3690, 309 A.C.W.S. (3d) 464, 437 D.L.R. (4th) 122, 72 C.B.R. (6th) 161, 93 Alta. L.R. (6th) 29, 95 B.L.R. (5th) 222

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

Her Majesty the Queen in Right of Canada (Appellant / Applicant) and Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd. and 1919209 Alberta Ltd. (Respondents / Respondents) and Ernst & Young Inc. in its capacity as Monitor (Respondent / Respondent) and Business Development Bank of Canada (Respondent / Respondent) and Insolvency Institute of Canada (Intervenor) and Canadian Association of Insolvency and Restructuring Professionals (Intervenor)

Patricia Rowbotham, Thomas W. Wakeling, Frederica Schutz JJ.A.

Heard: October 4, 2018
Judgment: August 29, 2019
Docket: Edmonton Appeal 1703-0237-AC

Proceedings: affirming *Canada North Group Inc (Companies' Creditors Arrangement Act)* (2017), 2017 ABQB 550, 2017 CarswellAlta 1631, [2018] 2 W.W.R. 731, 60 Alta. L.R. (6th) 103, 52 C.B.R. (6th) 308, J.E. Topolniski J. (Alta. Q.B.); leave to appeal allowed *Canada v. Canada North Group Inc.* (2017), 2017 ABCA 363, 2017 CarswellAlta 2213, 54 C.B.R. (6th) 5, Frans Slatter J.A. (Alta. C.A.)

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Subject: Civil Practice and Procedure; Corporate and Commercial; Estates and Trusts; Income Tax (Federal); Insolvency; Tax — Miscellaneous
Related Abridgment Classifications
Bankruptcy and insolvency
X Priorities of claims
X.5 Claims of Crown
X.5.a Federal
X.5.a.iv Income tax, unemployment insurance, and Canada Pension Plan

X.5.a.iv.B Creation of statutory trust

Tax

I General principles

I.5 Priority of tax claims in bankruptcy proceedings

Headnote

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

In bankruptcy proceedings, hearing was held to determine whether court-ordered "super-priority" security interests granted in proceeding could take priority over statutory deemed trusts in favour of Minister of National Revenue of Canada Revenue Agency (CRA) for unremitted source deductions — Court determined it could grant priority only to charges necessary for restructuring — Trial judge found purpose of deemed trust in fiscal statutes was met, as deemed trusts maintained priority status over all other security interests save those ordered under ss. 11.2, 11.51, and 11.52 of Companies' Creditors Arrangement Act (CCAA) — Trial judge found CRA's interest was security interest, not proprietary interest, and impact and interplay of "notwithstanding" language in s. 227(4.1) of Income Tax Act did not change conclusion — Trial judge found it was logical to infer that Parliament intended to create co-existing statutory scheme that accomplished goals of both fiscal statues and CCAA — Trial judge found CCAA gave court ability to rank priority charges ahead of CRA's security interest arising out of deemed trusts — Crown appealed — Appeal dismissed — Crown's statutorily deemed trusts could be subordinated to priming charges — Sections 11.2, 11.51 and 11.52 of CCAA give court ability to grant priority to charges necessary for restructuring ahead of Crown's security interest arising out of statutory deemed trusts — Crown's interest under deemed statutory trust provisions of relevant fiscal statutes was akin to that of secured creditor, but ranked ahead of all other secured creditors — Crown's interest was not proprietary — Fiscal statutes and CCAA harmoniously showed intention to reconcile objective of tax collection with Parliament's commitment to facilitate CCAA restructurings — Absurd consequences could follow if Crown's interest could not be subordinated, as interim financing of CCAA restructurings would simply end — If deemed trusts had absolute priority, s. 6(3) of CCAA, which prohibits court from sanctioning compromise unless payment is made to Crown, would be unnecessary — Court's authority to displace Crown's claim to facilitate restructuring, and implied exception rule, supported conclusion Crown's interest was subordinate.

Bankruptcy and insolvency --- Priorities of claims — Claims of Crown — Federal — Income tax, unemployment insurance, and Canada Pension Plan — Creation of statutory trust

In bankruptcy proceedings, hearing was held to determine whether court-ordered "super-priority" security interests granted in proceeding could take priority over statutory deemed trusts in favour of Minister of National Revenue of Canada Revenue Agency (CRA) for unremitted source deductions — Court determined it could grant priority only to charges necessary for restructuring — Trial judge found purpose of deemed trust in fiscal statutes was met, as deemed trusts maintained priority status over all other security interests save those ordered under ss. 11.2, 11.51, and 11.52 of Companies' Creditors Arrangement Act (CCAA) — Trial judge found CRA's interest was security interest, not proprietary interest, and impact and interplay of "notwithstanding" language in s. 227(4.1) of Income Tax Act did not change conclusion — Trial judge found it was logical to infer that Parliament intended to create co-existing statutory scheme that accomplished goals of both fiscal statues and CCAA — Trial judge found CCAA gave court ability to rank priority charges ahead of CRA's security interest arising out of deemed trusts — Crown appealed — Appeal dismissed — Crown's statutorily deemed trusts could be subordinated to priming charges — Sections 11.2, 11.51 and 11.52 of CCAA give court ability to grant priority to charges necessary for restructuring ahead of Crown's security interest arising out of statutory deemed trusts — Crown's interest under deemed statutory trust provisions of relevant fiscal statutes was akin to that of secured creditor, but ranked ahead of all other secured creditors — Crown's interest was not proprietary — Fiscal statutes and CCAA harmoniously showed intention to reconcile objective of tax collection with Parliament's commitment to facilitate CCAA restructurings — Absurd consequences could follow if Crown's interest could not be subordinated, as interim financing of CCAA restructurings would simply end — If deemed trusts had absolute priority, s. 6(3) of CCAA, which prohibits court from sanctioning compromise unless payment is made to Crown, would be unnecessary — Court's authority

to displace Crown's claim to facilitate restructuring, and implied exception rule, supported conclusion Crown's interest was subordinate.

In the course of proceedings under the Companies' Creditors Arrangement Act (CCAA), the Canada Revenue Agency (CRA) requested a determination of whether court-ordered "super-priority" security interests granted in the proceeding took priority over statutory deemed trusts in favour of the Minister of National Revenue for unremitted source deductions.

The trial judge found the court could grant priority only to those charges necessary for restructuring. The purpose of the deemed trust in the relevant fiscal statutes was met, as the deemed trusts maintained priority status over all other security interests save those ordered under ss. 11.2, 11.51, and 11.52 of the CCAA.

The trial judge found the CRA's interest was a security interest, not a proprietary interest, and the impact and interplay of the "notwithstanding" language in s. 227(4.1) of the Income Tax Act did not change that conclusion. It was logical to infer that Parliament intended to create a co-existing statutory scheme that accomplished the goals of both the fiscal statues and the CCAA. The trial judge found the CCAA gave the court ability to rank priority charges ahead of the CRA's security interest arising out of the deemed trusts at issue.

The Crown appealed.

Held: The appeal was dismissed.

Per Rowbotham J.A. (Schutz J.A. concurring): The Crown's statutorily deemed trusts could be subordinated to the priming charges. Sections 11.2, 11.51 and 11.52 of the CCAA give a court the ability to grant priority to charges necessary for restructuring ahead of the Crown's security interest arising out of statutory deemed trusts.

The Crown's interest under the deemed statutory trust provisions of the relevant fiscal statutes was akin to that of a secured creditor, but ranked ahead of all other secured creditors. The Crown's interest was not proprietary.

Reading the fiscal statutes and the CCAA harmoniously showed an intention to reconcile the objective of tax collection with Parliament's commitment to facilitate CCAA restructurings. Absurd consequences could follow if the Crown's interest could not be subordinated, as interim financing of CCAA restructurings would simply end.

If the deemed trusts had absolute priority, s. 6(3) of the CCAA, which prohibits the court from sanctioning a compromise unless payment is made to the Crown, would be unnecessary.

The court's authority to displace the Crown's claim to facilitate restructuring, and the implied exception rule, supported the conclusion the Crown's interest was subordinate.

Per Wakeling J.A. (dissenting): The appeal should be allowed. The only plausible meaning of s. 227(4.1) of the Income Tax Act was that the Crown had a claim to the deemed trust funds that superseded any claim by those holding priming charges, and the CCAA was consistent with this interpretation. The effects on the CCAA proceedings were a result of a policy choice by Parliament and should be addressed by Parliament.

The absurdity doctrine was not applicable as there was no flaw in the text of the legislation. The court could not ignore the plain meaning merely because it concluded the consequences were mischievous.

Table of Authorities

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[2002] 3 C.T.C. 285, 212 D.L.R. (4th) 615, [2002] G.S.T.C. 23, 288 N.R. 347, [2003] 1 W.W.R. 1, [2002] 2 S.C.R. 720, 45 C.B.R. (4th) 213 (S.C.C.) — considered

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R. v. Rodgers (2006), 2006 SCC 15, 2006 CarswellOnt 2498, 2006 CarswellOnt 2499, 37 C.R. (6th) 1, (sub nom. *R. v. Jackpine)* 207 C.C.C. (3d) 225, [2006] 1 S.C.R. 554, (sub nom. *R. v. Jackpine)* 266 D.L.R. (4th) 101, (sub nom. *R. v. Jackpine)* 347 N.R. 201, (sub nom. *R. v. Jackpine)* 210 O.A.C. 200, 140 C.R.R. (2d) 1 (S.C.C.) — refered to in a minority or dissenting opinion

R. v. Zundel (1992), 16 C.R. (4th) 1, 75 C.C.C. (3d) 449, 10 C.R.R. (2d) 193, (sub nom. *R. v. Zundel (No. 2))* 56 O.A.C. 161, [1992] 2 S.C.R. 731, (sub nom. *R. v. Zundel (No. 2))* 140 N.R. 1, 95 D.L.R. (4th) 202, 1992 CarswellOnt 109, 1992 CarswellOnt 995 (S.C.C.) — refered to in a minority or dissenting opinion

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Saville v. Virginia Railway & Power Co. (1913), 76 S.E. 954, 114 Va. 444 (U.S. Va. S.C.) — refered to in a minority or dissenting opinion

Spencer v. Commonwealth (2010), [2010] H.C.A. 28, 241 C.L.R. 118 (Australia H.C.) — refered to in a minority or dissenting opinion

Stock v. Frank Jones (Tipton) Ltd. (1978), [1978] 1 W.L.R. 231, [1978] 1 All E.R. 948, [1978] I.C.R. 347 (U.K. H.L.) — refered to in a minority or dissenting opinion

Sussex Peerage Case (1844), 8 E.R. 1034, [1843-60] All E.R. Rep. 55, 11 Cl. & F. 85 (U.K. H.L.) — refered to in a minority or dissenting opinion

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — refered to in a minority or dissenting opinion

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Victoria (City) v. Bishop of Vancouver Island (1921), [1921] 3 W.W.R. 214, [1921] 2 A.C. 384, 59 D.L.R. 399, 1921 CarswellBC 83 (Jud. Com. of Privy Coun.) — refered to in a minority or dissenting opinion

Warburton v. Loveland (1832), 5 E.R. 499, 2 Dow & Clark 480, 6 E.R. 806 (Ireland H.L.) — refered to in a minority or dissenting opinion

West Coast Hotel Co. v. Parrish (1937), 300 U.S. 379, 81 L.Ed. 703, 57 S.Ct. 578, 108 A.L.R. 1330 (U.S. Wash. S.C.) — refered to in a minority or dissenting opinion

Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development) (2018), 2018 SCC 4, 2018 CSC 4, 2018 CarswellNat 158, 2018 CarswellNat 159, 417 D.L.R. (4th) 239, 32 Admin. L.R. (6th) 1, [2018] 1 S.C.R. 83, [2018] 4 C.N.L.R. 225 (S.C.C.) — refered to in a minority or dissenting opinion

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Cases considered by *Patricia Rowbotham J.A.*:

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Statutes considered by *Patricia Rowbotham J.A.*:

Canada Pension Plan, R.S.C. 1985, c. C-8

Generally — referred to

s. 23(4) — considered
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 2(1) "secured creditor" — considered

s. 6(3) — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — referred to

s. 11.2(2) [en. 2005, c. 47, s. 128] — considered

s. 11.09(1) [en. 2005, c. 47, s. 128] — considered

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.51(1) [en. 2005, c. 47, s. 128] — referred to

s. 11.51(2) [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

s. 11.52(1) [en. 2007, c. 36, s. 66] — referred to

s. 11.52(2) [en. 2007, c. 36, s. 66] — considered
Employment Insurance Act, S.C. 1996, c. 23
Generally — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266] — considered
Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to

s. 224(1.2) — considered

s. 224(1.3) "security interest" — considered

s. 227(4) — considered

s. 227(4.1) — considered
Rules considered by *Patricia Rowbotham J.A.*:
Alberta Rules of Court, Alta. Reg. 124/2010
R. 14.88 — referred to
Statutes considered by *Thomas W. Wakeling J.A.* (dissenting):
Bank Act, S.C. 1991, c. 46
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Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 81.1 [en. 1992, c. 27, s. 38(1)] — referred to

s. 81.2 [en. 1992, c. 27. s. 38(1)] — referred to
Canada Pension Plan, R.S.C. 1985, c. C-8

Generally — referred to

s. 23(3) — considered

s. 23(4) — considered

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 11(g) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 2(1) "secured creditor" — considered

s. 3(1) — referred to

s. 9 — considered

s. 11 — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — considered

s. 11.02(1) [en. 2005, c. 47, s. 128] — referred to

s. 11.2(2) [en. 2005, c. 47, s. 128] — considered

s. 11.51(1) [en. 2005, c. 47, s. 128] — considered

s. 11.51(2) [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

s. 11.52(1) [en. 2007, c. 36, s. 66] — considered

s. 11.52(2) [en. 2007, c. 36, s. 66] — considered

s. 37 — considered

s. 37(1) — considered

s. 37(2) — considered

s. 6(3) — considered

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

Generally — referred to

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

Generally — referred to

Pt. XXIII — referred to

Pt. XXI — referred to

s. 9 — considered

s. 718 — considered

Employment Insurance Act, S.C. 1996, c. 23
Generally — referred to

s. 86(2) — considered

s. 86(2.1) [en. 1998, c. 19, s. 266] — considered
Excise Tax Act, R.S.C. 1985, c. E-15
Generally — referred to
Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to

s. 224(1.3) "secured creditor" — considered

s. 224(1.3) "security interest" — considered

s. 227(4) — considered

s. 227(4.1) — considered

s. 227(4.1)(a) — considered

s. 227(4.1)(b) — considered
Income Tax Amendments Act, 1997, S.C. 1998, c. 19
Generally — referred to
Interpretation Act, R.S.A. 2000, c. I-8
s. 10 — referred to
Winding-up and Restructuring Act, R.S.C. 1985, c. W-11
Generally — referred to

APPEAL by Crown from judgment reported at *Canada North Group Inc (Companies' Creditors Arrangement Act)* (2017), 2017 ABQB 550, 2017 CarswellAlta 1631, 52 C.B.R. (6th) 308, 60 Alta. L.R. (6th) 103, [2018] 2 W.W.R. 731 (Alta. Q.B.), setting out priority of security interests.

***Patricia Rowbotham J.A.*:**

Introduction

1 The issue on this appeal is one of statutory interpretation, and whether the chambers judge correctly interpreted s. 227(4.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (*ITA*) and ss. 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA*).

2 Leave to appeal was granted on a single issue: whether the chambers judge erred in law in determining that the "super-priority" charges made in favour of the interim financier, the directors of the debtor companies, and the Monitor and its counsel under the *CCAA* (the "Priority Charges" or "Priming Charges") have priority over statutory deemed trusts in favour of the Crown for unremitted source deductions as created by the *ITA*, the *Canada Pension Plan*, RSC 1985, c C-8 (*CPP*) and the *Employment Insurance Act*, SC 1996, c 23 (*EIA*) (collectively, the "Fiscal Statutes"): *Canada v. Canada North Group Inc.*, 2017 ABCA 363 (Alta. C.A.) at para 5.

3 This appeal pits two of Parliament's objectives against each other: avoiding the social and economic costs of a debtor liquidating its assets (*Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para 15; *Indalex Ltd., Re*, 2013 SCC 6 (S.C.C.) at para 205); and the collection of source deductions, which lie "at the heart" of income tax collection (*First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49 (S.C.C.) at para 22). What

charges have priority: court-ordered Priority Charges in favour of those who participate in *CCAA* restructuring proceedings or unremitted source deductions in favour of the Crown?

4 The chambers judge held that the *CCAA* gives the court the ability to rank court-ordered Priority Charges ahead of the Crown's interest arising out of statutory deemed trusts.

5 The Crown, as represented by the Minister of National Revenue (CRA), appeals, claiming that Parliament's intention to give paramount priority to the Crown's claims for unremitted source deductions over claims of those involved in *CCAA* proceedings is clear from the language of the *CCAA* and the Fiscal Statutes.

6 The respondent interim lender (Business Development Bank of Canada) and the respondent court-appointed Monitor (Ernst & Young Inc.) argue that the chambers judge's interpretation is correct as it gives effect to the policy objectives of both the Fiscal Statutes and the *CCAA*. The intervenors (the Canadian Association of Insolvency and Restructuring Professionals and the Insolvency Institute of Canada) also argue that the appeal should be dismissed.

7 All parties acknowledge the chilling effect on commercial restructuring that will result if the Crown's position prevails.

8 For the reasons that follow I dismiss the appeal.

Background Facts

Initial Order

9 On July 5, 2017, the Court of Queen's Bench issued an order granting the Debtors [1] protection under the *CCAA* (the "Initial Order"). The Initial Order provided for a total of $1,650,000 in Priming Charges in the following priority:

- Administration Charge of $500,000 in favour of the court-appointed Monitor;
- Interim Lender's Charge of $1,000,000 in favour of the interim financier; and
- Directors' Charge of $150,000.

10 The Interim Lender's Charge was later increased to $3,500,000 and the Administration Charge to $950,000.

11 The court's authority to order these Priming Charges is found in the *CCAA*. Parliament has afforded the court the discretion to order Priming Charges in an amount that the court considers appropriate: ss. 11.52(1), 11.51(1) and 11.2(1) of the *CCAA*. Sections 11.52(2), 11.2(2) and 11.51(2) of the *CCAA* (the "Priming Provisions") each provide as follows:

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

12 Consistent with the discretionary authority of the court, paragraph 44 of the Initial Order provides that the Priming Charges have priority over the claims of secured creditors:

> Each of the Directors' Charge, Administration Charge and the Interim Lender's Charge ... shall constitute a charge on the Property and subject always to section 34(11) of the *CCAA* such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise ... in favour of any Person.

13 Paragraph 46(d) of the Initial Order provides that the Priming Charges "shall not otherwise be limited or impaired in any way by...(d) the provisions of any federal or provincial statutes".

Crown's Application to Vary the Initial Order

14 On July 31, 2017, the Crown applied to vary the Priming Charges in the Initial Order on the grounds that paragraphs 44 and 46(d) of the Initial Order failed to recognize the Crown's legislative proprietary interest in unremitted source deductions (i.e., employees' income tax, employees' CPP contributions and employees' EI premiums). At the time of the Initial Order, two of the Debtor corporations had failed to remit to the Crown a total of $685,542.93 in source deductions.

15 The Crown argued that s. 227(4.1) of the *ITA*, s. 23(4) of the *CPP* and s. 86(2.1) of the *EIA* provide that the Crown's claims for unremitted source deductions have priority over the claims of all other creditors of a debtor, notwithstanding any other federal statute, including the *CCAA*.

16 Sections 227(4) and (4.1) of the *ITA* provide:

> 227(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.
>
> (4.1) **Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law,** where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> > (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests. [Emphasis added]

17 In *First Vancouver* at para 3, Iacobucci J explained the effect of these provisions:

> Section 153(1) of the *ITA* requires employers to deduct and withhold amounts from their employees' wages ("source deductions") and remit these amounts to the Receiver General by a specified due date. By virtue of s. 227(4), when source deductions are made, they are deemed to be held separate and apart from the property of the employer in trust for Her Majesty. If the source deductions are not remitted to the Receiver General by the due date, the deemed trust in s. 227(4.1) of the *ITA* becomes operative and attaches to property of the employer to the extent of the amount of the unremitted source deductions. As well, the trust is deemed to have existed from the moment the source deductions were made.

18 Sections 23(4) of the *CPP* and s. 86(2.1) of the *EIA* are identical to s. 227(4.1) of the *ITA*.

19 The chambers judge dismissed the Crown's application. She rejected the Crown's argument that the trust provisions in the Fiscal Statutes create a proprietary rather than secured interest. She preferred the analysis of Romaine J in *Temple City Housing Inc., Re*, 2007 ABQB 786 (Alta. Q.B.), leave to appeal to CA refused, 2008 ABCA 1 (Alta. C.A.) over that of Moir J in *Rosedale Farms Limited, Hassett Holdings Inc., Resurgam Resources (Re)*, 2017 NSSC 160 (N.S. S.C.). The chambers judge held that the definition of a "security interest" in s. 224(1.3) of the *ITA* includes a "deemed or actual trust". The *ITA* is the enabling statute of the Crown's deemed trusts. It would be inconsistent to characterize the deemed trusts in a way contrary to their enabling statutes.

20 She then held that the Crown's statutorily deemed trusts could be subordinated by court-ordered Priming Charges. In her view, the Crown's position implied that the Fiscal Statutes and the *CCAA* are in conflict. While it appeared that Parliament had drafted provisions that purport to grant super-priority to court-ordered Priming Charges under the *CCAA* while at the same time granting super-priority to the Crown's deemed trusts under the Fiscal Statutes, she held that this apparent conflict could be avoided by interpreting the statutes harmoniously. The chambers judge stated at para 96, citing *Thibodeau c. Air Canada*, 2014 SCC 67 (S.C.C.) [footnotes omitted]:

> [T]here is a conflict between two provisions of the same legislature "**only** when the existence of the conflict, in the restrictive sense of the word, **cannot be avoided by interpretation**" (emphasis added). Nothing in these *CCAA* sections directly conflict with s. 227(4.1) [of the *ITA*] and thus, one must attempt to interpret these provisions without conflict.

21 Applying the principle of statutory interpretation that legislation should be construed in a manner that preserves the harmony, coherence, and consistency of the entire legislative scheme, she held that the Crown's statutory deemed trusts have priority over all security interests, except those ordered under the Priming Provisions of the *CCAA*. She concluded that ss. 11.2, 11.51 and 11.52 of the *CCAA* gave the court the ability to grant priority to charges necessary for restructuring ahead of the Crown's security interest arising out of the deemed trusts.

Leave to Appeal

22 As there are sufficient assets in the estate to satisfy both the Priming Charges and the Crown's claim, the issues on appeal are moot. Nevertheless, leave to appeal was granted given the importance of the issue: *Canada v. Canada North Group Inc.*

Analysis

23 The main issue on appeal is whether the Crown's deemed trusts under the Fiscal Statutes can be subordinated to the Priming Charges by a court order under ss. 11.2, 11.51 and 11.52 of the *CCAA*? The Crown asked the court first to determine whether its deemed trust is a proprietary interest or a security interest.

24 These are questions of law, reviewable for correctness: *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.) at para 8.

25 Before turning to these questions, I review the applicable principles of statutory interpretation.

The Correct Approach to Statutory Interpretation

26 The guiding rule of statutory interpretation is this:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> (*Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para 21, (1998), 36 O.R. (3d) 418 (headnote only) (S.C.C.))

27 A governing principle of statutory interpretation is the presumption of coherence:

> It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal.
>
> (R Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (LexisNexis Canada, 2014) at para 11.2)

28 Courts presume that legislation passed by Parliament does not contain contradictions or inconsistencies, and that each provision is capable of operating without coming into conflict with any other: *Thibodeau* at para 93 citing R Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (2008) at 325. As the majority explained in *Lévis (Ville) c. Côté*, 2007 SCC 14 (S.C.C.) at para 47:

> The starting point in any analysis of legislative conflict is that legislative coherence is presumed, and an interpretation which results in conflict should be eschewed unless it is unavoidable.

29 If a conflict is unavoidable, meaning it cannot be resolved by adopting an interpretation that would remove the inconsistency, the court is faced with the question of which provision should prevail having regard to the legislature's intent: *Lévis* at para 58.

1. Is the Crown's deemed trust a proprietary interest or a security interest?

30 Do the statutory deemed trust provisions of the Fiscal Statutes create a security interest over the debtor's property, rendering the Crown a "secured creditor" for the purposes of the Priming Provisions in the *CCAA*, or does the Crown have a proprietary interest in the debtor's property that is subject to the deemed trust, thereby removing assets from the debtor's estate?

31 The chambers judge held that the former interpretation was correct. The Crown argues for the latter interpretation.

32 I conclude that the chambers judge correctly interpreted the nature of the Crown's interest. The Crown's interest under the deemed statutory trust provisions of the Fiscal Statutes is akin to that of a secured creditor, but ranking ahead of all other secured creditors. The Crown does not hold a proprietary interest. Section 227(4.1) of the *ITA* does not elevate the Crown's claim to a proprietary interest. This is consistent with prior case law and the definitions of "secured creditor" and "security interest" in the Fiscal Statutes and the *CCAA*.

Prior Case Law

33 The Crown advances the same argument that was rejected by Romaine J in *Temple City*. The Crown's argument is also inconsistent with the Supreme Court of Canada's characterization of the Crown's deemed trust under the *ITA* as a "floating charge over all of the assets of the tax debtor in the amount of the default": *First Vancouver* at para 40.

34 Deemed trusts are not true trusts: *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.) at para 31, (1997), 143 D.L.R. (4th) 385 (S.C.C.); *First Vancouver* at para 37. They do not attach to particular assets: *First Vancouver* at para 40. While the trust is focussed on the tax debtor's property, it attaches to the proceeds from realization of the estate of the tax debtor: *First Vancouver* at para 41. It follows that their character will change over time: *First Vancouver* at para 41.

35 As noted by Iacobucci J, this interpretation gives effect to legislative intent. Parliament did not intend for the statutory deemed trusts to attach to particular assets thus freezing the debtor's assets and preventing the debtor

from carrying on business: *First Vancouver* at para 41. I agree with the chambers judge that "the fact that a floating charge permits alienation of secured property resonates in all *CCAA* restructurings": at para 86.

36 It follows that I do not adopt the conclusion of Moir J in *Rosedale Farms* who found the deemed trust to have priority over the security for debtor in possession financing.

Definitions

37 Further, the Crown's interest falls squarely within the definition of "secured interest" in both the *ITA* and the *CCAA*.

ITA

38 Section 224(1.3) of the *ITA* defines "secured creditor" as "a person who has a security interest in the property of another person." Where a "security interest" includes "any interest in ... property that secures payment ... and includes an interest ... created by or arising out of a ... deemed or actual trust ..." The *EIA* and the *CPP* cross-reference the *ITA* definitions.

39 The Crown concedes that s. 224(1.3) of the *ITA* provides that deemed or actual trusts are security interests, but argues that this definition does not apply when the Crown is asserting its deemed trust claim. I reject this argument for the same reason as the chambers judge: it is illogical to interpret the statutory deemed trust interests in a way contrary to their enabling statutes.

CCAA

40 The Crown's main argument relates to the definition of "secured creditor" in section 2(1) of the *CCAA*. The Crown proposes a reading of the section which it says supports a finding that the Crown is not a secured creditor. The definition reads as follows:

> **secured creditor** means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds.

41 The Crown argues that under the *CCAA* there are two "classes" of secured creditors: (i) holders of direct security, and (ii) holders of secured bonds. This interpretation requires that the definition be read as follows [indentation and emphasis added]:

> **secured creditor** means
>
> > a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company,
> >
> > **or a holder of any bond of a debtor company secured by**
> >
> > > a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or **a trust in respect of, all or any property of the debtor company,**

> whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds. [Emphasis added]

42 According to the Crown's interpretation, the reference to "a trust" is nested within the reference to bonds; the reference to "trust" is only in relation to an instrument securing *a bond* of a debtor company. If Parliament intended for "secured creditor" to include holders of trusts, the Crown argues there would be a third reference to "a holder of a trust" drafted in parallel to the first two classes. The Crown also points to the phrase "a trustee under any trust deed or other instrument *securing any of those bonds*" as evidence that this is the intended meaning.

43 Neither the chambers judge nor Romaine J in *Temple Housing* specifically addressed this argument. Although the Crown's analysis is initially attractive, it ignores two things: (1) the Crown's interest could be characterized as a "charge" so is covered by the opening words of the definition; and (2) if we read the statutes harmoniously, as we must, Parliament has defined "security interest" in the *Income Tax Act* as including a deemed trust.

2. Can the deemed trust be subordinated to the Priming Provisions under the CCAA?

44 The Crown argues that the language of the Fiscal Statutes is clear: Parliament intended that the Crown's interest in unremitted source deductions cannot be subordinated to any other secured interest, including court-ordered Priming Charges. It relies on the opening words of s. 227(4.1) of the *ITA*: "Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law ..." The Crown submits, and my colleague finds, that these words lead to one conclusion: the deemed trust supersedes all.

45 I disagree with this conclusion for a number of reasons. First, while a conflict may appear to exist at the level of the "black letter" wording of the Priming Provisions of the *CCAA* and the Fiscal Statutes, the presumption of statutory coherence requires that the provisions be read to work together to achieve the intended goal. The *CCAA* and the Fiscal Statutes are part of a larger statutory scheme that must be considered as a whole: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 (S.C.C.) at para 49. In my view, the chambers judge's harmonious interpretation is correct.

46 The crux of the chambers judge's reasoning is that the Crown failed to reconcile the objective of tax collection with Parliament's commitment to facilitate *CCAA* restructurings. The Crown's position ignores that *CCAA* restructurings facilitate the survival of companies, the production of goods and services, and ultimately jobs, all of which serve as fuel for the fiscal base.

47 In *Century Services*, the Supreme Court provided an extensive history of the *CCAA*, its function amidst the body of insolvency legislation, and the principles that have been recognized by the jurisprudence. The Supreme Court explained the remedial purpose of the *CCAA* at para 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.

48 This remedial purpose has been recognized time and again in the jurisprudence: *Century Services* at para 59. Not only does the Crown's position undermine the objective of the *CCAA*, it will also result in fewer restructurings which will necessarily result in reduced tax revenue. Undermining the remedial objective of the *CCAA* for the sake of tax collection disregards the obvious benefit for the government of successful corporate restructurings. In other words, the Crown is biting off the hand that feeds it. Indeed, in this case, the Priming Charges allowed the debtor to continue to operate its business and raise sufficient funds to satisfy both the Priming Charges and the Crown's claim. When the statutes are read harmoniously, as the chambers judge did, the objectives of both the Fiscal Statutes and the *CCAA* can be achieved.

49 Second, the harmonious interpretation avoids absurd consequences. The presumption that the legislature does not intend absurd consequences was explained in *Rizzo* at para 27:

> It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté [P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)], an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile ([R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994)], at p. 88).

50 If the Crown's position prevailed, absurd consequences could follow. Interim financing of *CCAA* restructurings would simply end. Interim financing is necessary to achieve the purposes of the *CCAA*, with approximately 75% of restructurings requiring the aid of interim lenders: Janis P Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013) at 199; *Indalex* at para 59. The chambers judge rightly recognized the important role played by the court-appointed monitors who cannot resign without leave of the court, and the directors of the debtor company who steer the sinking ship.

51 The chamber's judge's interpretation is also consistent with *Edmonton (City) v. Alvarez & Marsal Canada Inc*, 2019 ABCA 109 (Alta. C.A.) at para 17, leave to appeal to SCC requested where this court recognized the modern commercial reality that professional services and interim lending in *CCAA* proceedings are provided in reliance on super priorities. Moreover, since the value of unremitted source deductions is often unknown at the outset of *CCAA* proceedings, the Crown's position would inject an unacceptable level of uncertainty into the insolvency process. As noted in the Report of the Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: 2003) at p 6:

> [C]anadian insolvency laws must be drafted in a manner that ensures a high level of predictability for all stakeholders, domestic and international. Everyone should have a clear understanding of how the insolvency process operates and the options that are available; consistency should enable the likely outcomes to be predicted with a relatively high degree of accuracy. Predictability will enable stakeholders to make the best possible choices given their particular circumstances: debtors to decide between bankruptcy and a consumer proposal or commercial reorganization, suppliers and creditors to assess the likely outcome of debtor default as a contributing factor in their decision about whether to supply and extend credit and at what cost, domestic and foreign investors about whether to make an investment, and judges to determine the most appropriate orders to be made and actions to be taken in particular circumstances, among others.

52 The consequences of a proposed interpretation are properly considered as part of the interpretive exercises. Courts are not engaged in academic exercises; the application of legislation to facts affects the well-being of

society and the legislature is presumed to act to protect the public interest: Sullivan at para 10.4. The Crown's interpretation is incompatible with the intended goal of the *CCAA*.

53 Third, s. 6(3) of the *CCAA* prohibits the court from sanctioning a compromise or arrangement unless the plan of compromise or arrangement provides for payment in full to the Crown, within six months of the sanction of the plan, of all amounts that could be subject to a demand under the Fiscal Statutes. If the Crown's statutory deemed trusts had absolute priority, s. 6(3) would be unnecessary because the Crown would always be paid first. The legislature avoids tautology: every provision serves a purpose.

54 Fourth, this interpretation is supported by the court's authority to displace the Crown's claim in order to facilitate a restructuring. Section 11.09(1) of the *CCAA* grants courts the power to stay the Crown's garnishment right under s. 224(1.2) of the *ITA*, just as the court can stay the enforcement mechanisms of other secured creditors. This power is illustrative of Parliament's intent to authorize courts to exercise control over the Crown's interests while monitoring restructuring proceedings. An implication of the Crown's position is that a court ordered stay would not apply to the Crown's claim.

55 Fifth, even if there was a conflict, the implied exception rule (*generalia specialibus non derogant*) supports the chambers judge's interpretation. This principle is described by R Sullivan at para 11.58:

> When two provisions are in conflict and one of them deals specifically with the matter in question while the other has a more general application, the conflict may be resolved by applying the specific provision to the exclusion of the more general one. The specific prevails over the general; it does not matter which was enacted first.

56 See also *Schnarr v. Blue Mountain Resorts Limited*, 2018 ONCA 313 (Ont. C.A.) at paras 41-42, 52, 61-64, leave to appeal to SCC refused, (2019), [2018] S.C.C.A. No. 187 (S.C.C.).

57 The *CCAA* applies in special circumstances while the Fiscal Statutes are of general application. At the level of the provisions, the Priming Provisions in the *CCAA* are narrow, precise, limited to only those charges necessary for restructuring, and subject to ongoing judicial oversight. The court is typically balancing multiple interests as it moves the *CCAA* process forward. In contrast, the *ITA* deals generally with income tax collection, giving the Minister a mechanism to recover employee tax deductions that employers fail to remit to the Minister.

58 The intended effect of s. 227(1.4) of the *ITA* is not diminished by giving effect to the *CCAA*. The Crown's interest remains specially protected as against all other secured creditors save those charges that are necessary to implement restructurings. This interpretation recognizes that the *CCAA* carves out a discretion for the court to achieve the intended legislated purpose of the *CCAA*.

59 For these reasons, I dismiss the appeal and uphold the chambers judge's ruling that ss. 11.2, 11.51 and 11.52 of the *CCAA* give the court the ability to grant priority to charges necessary for restructuring ahead of the Crown's security interest arising out of the statutory deemed trusts under the Fiscal Statutes.

Costs

60 The respondents argue that since the appeal was brought by the Crown as a test case on a moot point, it is just and equitable for the Crown to pay the respondents' costs on a full indemnity basis. The respondent Monitor notes that the costs of the appeal will only serve to reduce the amounts available for distribution to creditors in the subject *CCAA* proceedings. The intervenors do not seek costs.

61 I am not persuaded that the respondents are entitled to enhanced costs. Although moot, the issue is significant to insolvency law. The default Rule (Rule 14.88) applies. The respondents are entitled to party and party costs. There will be no costs payable to the intervenors.

***Frederica Schutz J.A.*:**

I concur:

***Thomas W. Wakeling J.A.* (dissenting):**

I. Introduction

62 This is an important statutory interpretation case involving priorities created under s. 227 (4.1) of the *Income Tax Act*[2] and under ss. 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act*.[3]

63 The Crown, relying on s. 227(4.1) of the *Income Tax Act*, claims that it is the beneficial owner of an amount equal to the unremitted employment income tax withholdings[4] made by Canada North Group Inc. and the other applicants seeking relief under the *Companies' Creditors Arrangement Act*. It asserts that its claim to these funds is superior to that of the Business Development Bank Canada, the insolvency professionals and the directors of the Canada North companies. The respondents rely on the provisions of the *Companies' Creditors Arrangement Act*.

64 The Insolvency Institute of Canada predicts that validation of the Crown's position will "result in fewer restructurings [under the *Companies' Creditors Arrangement Act*], negating the primary purpose of ... [the *Act*] and, arguably, the tax collection purposes of the ... [*Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act*]."[5]

II. Questions Presented

65 Section 227(4.1) of the *Income Tax Act*[6] states that

> [n]otwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* ..., any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed ... to be held by a person in trust for Her Majesty is not paid to Her Majesty ... is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General *in priority to all such security interests*.

66 Section 227(4) of the *Income Tax Act* states that a person who makes source deductions holds the amount deducted in trust for Her Majesty.

67 The Crown relies on s. 227(4.1) and argues that its meaning is obvious.

68 The respondents rely generally on s. 11 and more specifically on ss. 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act*.[7]

69 Section 11 declares that "[d]espite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*[8] ... the court... may, subject to the restrictions set out in this *Act*... make any order that it considers appropriate in the circumstances". This is a broad but not unlimited grant of authority.

70 It is broad in the sense that it excludes limitations of a court's authority under s. 11 that may be incorporated in the *Bankruptcy and Insolvency Act*[9] or the *Winding-up and Restructuring Act*.[10]

71 It is limited in the sense that it does not exclude provisions in the *Income Tax Act* and other federal and provincial enactments or the other provisions of *Companies' Creditors Arrangement Act*.

72 Sections 11.2(1), 11.51(1) and 11.52(1) of the *Companies' Creditors Arrangement Act* bestow on a court the power to create a "security or charge" on the property of the company seeking to restructure or reorganize in favour of a number of specified persons who assist a company to restructure or reorganize under the *Companies' Creditors Arrangement Act*. The first set consists of interim lenders who agree to provide financial assistance to applicants seeking relief under the *Companies' Creditors Arrangement Act*. The second set captures the insolvency professionals and the fees and expenses they incur. The third set identifies directors of the applicant companies who assist with restructuring or reorganization.

73 Those who participate in insolvency proceedings call these "priming charges".

74 Sections 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act* are identical and provide that a court may order that these priming charges "rank in priority over the claim of any secured creditor of the company".

75 The initial order issued July 5, 2017 granted priming charges in favour of the Business Development Bank Canada, the interim lender, and the insolvency professionals and directors of the Canada North companies who assisted the applicants with their attempt to restructure or reorganize under the *Companies' Creditors Arrangement Act*.

76 Who has the best claim to the deemed trust funds created by s. 227(4) of the *Income Tax Act*?

77 Is it the Crown on account of the deemed trust under s. 227(4) and the priority created by s. 227(4.1) of the *Income Tax Act*?

78 Or is it the interim lender, the insolvency professionals and the directors by reason of the priming charges priority authorized by ss. 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act*?

79 If the consequence of giving s. 227(4.1) of the *Income Tax Act* its ordinary meaning might discourage insolvency professionals, interim lenders and directors of a relief-seeking corporation from participating in a restructuring or reorganization project under the *Companies' Creditors Arrangement Act*, does that justify a court ignoring the ordinary meaning of the statutory text?

III. Brief Answers

80 The text of s. 227(4.1) of the *Income Tax Act* [11] bears only one plausible meaning.

81 The Crown has a claim to the s. 227(4) deemed trust funds that supersedes any claim by those holding priming charges under ss. 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act*. [12]

82 Nothing in the *Companies' Creditors Arrangement Act* is inconsistent with this determination.

83 The fact that this interpretation of s. 227(4.1) of the *Income Tax Act* might reduce the efficacy of the *Companies' Creditors Arrangement Act* is a result of a policy choice made by Parliament. It is not the judiciary's role to rewrite the legislation under the guise of statutory interpretation. If Parliament concludes that its 1997 decision to accord first priority to the Crown [13] was unwise and must be reversed, it will have to act.

IV. Statement of Facts

A. Initial Order Under the Companies' Creditors Arrangement Act

84 On July 5, 2017, the return date of an originating application filed on June 28, 2017 [14] by Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., D.J. Catering Ltd., 816956 Alberta Ltd. and

1371047 Alberta Ltd. [15] under s. 9 of the *Companies' Creditors Arrangement Act*, [16] the Court of Queen's Bench of Alberta issued a "*Companies' Creditors Arrangement Act* Initial Order," [17] parts of which are as follows:

APPLICATION

2. The Applicants are companies to which the ... [*Companies' Creditors Arrangement Act*] applies. [18]

. . . . .

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

13. Until and including August 3, 2017, [19] or such later date as this Court may order ..., no proceeding or enforcement process in any court ... shall be commenced or continued against or in respect of the Applicants ... or the Monitor ... or affecting the Business or the Property, arising out of or in connection with any right, remedy or claim of any person against the Applicants in connection with any indebtedness, indemnity, liability or obligation of any kind whatsoever of the Applicants under contract, statute or otherwise ... except with leave of this Court, and any and all such Proceedings currently underway against or in respect of the Stay Parties or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

. . . . .

DIRECTORS' AND OFFICERS' INDEMINIFICATION AND CHARGE

21. The directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the 'Directors' Charge') on the Property, which charge shall not exceed an aggregate amount of $150,000, as *security* [20] for the indemnity provided in paragraph 21 of this Order. The Directors' Charge shall have the priority set out in paragraphs 44 and 46 herein.

. . . . .

APPOINTMENT OF MONITOR

30. The Monitor, counsel to the Monitor, the ... [Chief Restructuring Officer] and its counsel, if any, and the Applicants' counsel, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the 'Administration Charge') on the Property, which charge shall not exceed an aggregate amount of $500,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor and such counsel, both before and after the making of this order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 44 and 46 hereof.

INTERIM FINANCING

. . . . .

34. The Interim Lender shall be entitled to the benefits of and is hereby granted a charge (the 'Interim Lender's Charge') on the Property to *secure* [21] all obligations under the Definitive Documents incurred on or after the date of this Order which charge shall not exceed the aggregate amount advanced on or after the date of this Order under the Definitive Documents. The Interim Lenders' Charge shall have the priority set out in paragraphs 44 and 46 hereof.

. . . . .

VALIDITY AND PRIORITY OF CHARGES

42. The priorities of the Directors' Charge, the Administration Charge and the Interim Lender's Charge, as among them, shall be as follows:

First — Administration Charge (to the maximum amount of $500,000);

Second — Interim Lender's Charge (to the maximum amount of $1,000,000); and

Third — Directors' Charge (to the maximum amount of $150,000).

. . . . .

44. Each of the Directors' Charge, Administration Charge and the Interim Lender's Charge ... shall constitute a charge on the Property and subject always to section 34(11) of the ... [*Companies' Creditors Arrangement Act*] such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise ... in favour of any Person.

. . . . .

46. The Directors' Charge, Administration Charge ... and the Interim Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargee entitled to the benefits of the Charges ... shall not otherwise be limited or impaired in any way by:

. . . . .

(b) any application(s) for bankruptcy order(s) issued pursuant to ... [the *Bankruptcy and Insolvency Act*], or any bankruptcy order made pursuant to such applications;

. . . . .

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement ... which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

. . . . .

(iii) the payments made by the Applicants pursuant to this order, including the Letter of Offer ... and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

. . . . .

General

. . . . .

56. Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven ... days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

85 As a result of the initial order the total priming charges were $1,650,000 — directors' charge of $150,000, administration charge of $500,000 and the interim lender's charge of $1,000,000. [22]

86 On July 20, 2017 the Business Development Bank Canada advanced $900,000 to the applicants. [23]

B. The Crown's Variation Application

87 While the applicants served the Crown on June 28, 2017, the service package failed to make its way to the appropriate Canada Revenue Agency official until July 13, 2017. [24] As a result, the Crown did not appear at the July 5, 2017 hearing. [25]

88 As of July 5, 2017 Canada North Group Inc. and Campcorp Structures Ltd. owed the Canada Revenue Agency $685,542.93 for employee source deductions held in trust and not remitted to the Crown. [26]

89 On July 31, 2017 the Crown applied for an order varying paragraphs 44 and 46(d) of the initial order on the ground that

> [s]ubsections 227(4.1) of the *Income Tax Act*, 23(4) of the *Canada Pension Plan* and 86(2.1) of the *Employment Insurance Act* all provide that the Minister's claims for unremitted employee source deductions have priority over the claims of all other creditors of a debtor, notwithstanding any other federal statute, including the *Companies' Creditors Arrangement Act*.
>
> . . . . .
>
> Paragraphs 44 and 46(d) of the Initial Order are without force and effect vis-à-vis the Minister, as those paragraphs fail to recognize the Minister's legislative proprietary interest as described in the cited provisions.

90 The Crown sought the following variations of the initial order:

> 1. Paragraph 44 of the Initial Order in these [*Companies' Creditors Arrangement Act*] proceedings granted by the Honourable K.G. Nielsen on July 5, 2017 is amended by adding the following phrase before the opening words of paragraph 44:
>
> > Subject to subsections 23(3) and (4) of the *Canada Pension Plan*, subsections 86(2) and (2.1) of *Employment Insurance Act*, and subsections 227(4) and (4.1) of the *Income Tax Act*,
>
> 2. The reference in paragraph 46(d) of the Initial Order to the provisions of any federal statute does not apply to the provisions cited in paragraph 1 of this Order.
>
> 3. This Order is deemed effective *ab initio* to July 5, 2017 as if the cited amendments were made as part of the Initial Order.

C. The Court of Queen's Bench Dismissed the Crown's Variation Application

91 The chambers judge acknowledged that any funds held by Canada North Group Inc. and the other applicants covered by s. 227(4) of the *Income Tax Act*,[27] s. 23(3) of the *Canada Pension Plan*[28] and s. 86(2) of the *Employment Insurance Act*[29] were the subject of a deemed trust.[30]

92 The critical issue, according to the chambers judge, was "whether CRA's interest arising from the deemed trusts can be subordinated [to the priming charges.]"[31]

93 She concluded that "it is the Court's order [under the *Companies' Creditors Arrangement Act*] that sets the priority of the charges at issue."[32]

94 This interpretation, in her opinion, was the one most consistent with the general purpose of the *Companies' Creditors Arrangement Act* — to preserve the entrepreneurial heartbeat of a stricken enterprise so that it could return to financial health in the future.[33] She noted that corporate patients who leave the operating room as functioning entities continue to employ taxpayers[34] and contribute to the Crown treasury.

95 She foresaw a gloomy future for the *Companies' Creditors Arrangement Act* as the emergency physician if a court exercising its authority under the *Act* could not attach a super priority to the priming charges:[35]

> The interim financiers' charge provides both an incentive and guarantee to the lender that funds advanced in the course of the restructuring will be recovered. Without this charge such financing would simply end, and with that, so too would end the hope of positive *CCAA* outcomes. Here, I digress to note the increasing prevalence of interim financiers having no prior relationship to the debtor. It does not take a stretch of

imagination to forecast that this practice will diminish if not end altogether without the comfort of super-priority charges.

Similarly, the charge in favour of directors is important. The charge is intended to keep the captains aboard the sinking ship. Without the benefit of this charge, directors will be inclined to abandon the ship, and it would be remarkably difficult, if not impossible, to recruit replacements.

Likewise, the priority charge for administrative fees is critical to a successful restructuring. Indeed, it is the only protection the Monitor has to ensure that its bills are paid. While the debtor's counsel has the option of resigning if its accounts go unpaid, the Monitor does not have that luxury. As a Court officer, the Monitor's job is to see the proceeding through to completion or failure and would need Court approval to be relieved of that duty. Finally, insolvency practitioners well know that they typically do not have to look to the administrative charge for their initial work — where it has the most significance is at the end.

D. The Crown Secured Leave to Appeal

96 The Crown applied for leave to appeal [36] this question: [37] "Did the case management judge err in law in determining that the 'super-priority' charges made in favour of the interim financier, the directors of the debtor companies, and the Monitor and its counsel have priority over the claim of the Minister of National Revenue for unremitted source deductions?"

97 The chambers judge granted leave to appeal even though there were sufficient assets in the debtors' estates to satisfy both the Crown's claim and the priming charges. He was satisfied that the "applicant has identified a substantive issue justifying a further appeal". [38]

V. Applicable Statutory Provisions

A. Income Tax Act

98 The key parts of s. 227 of the *Income Tax Act* [39] are set out below:

227(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest

and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

99 "Secured creditor" and "security interest," important terms in s. 227(4) and (4.1) of the *Income Tax Act*, are defined in s. 224(1.3) of the *Income Tax Act*:

224(1.3) In subsection 224(1.2),

secured creditor means a person who has a security interest in the property of another person or who acts for or on behalf of that person with respect to the security interest and includes a trustee appointed under a trust deed relating to a security interest, a receiver or receiver-manager appointed by a secured creditor or by a court on the application of a secured creditor, a sequestrator or any other person performing a similar function; ...

security interest means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for ....

B. Canada Pension Plan

100 Sections 23(3) and (4) of the *Canada Pension Plan* [40] are in this form:

23(3) Where an employer has deducted an amount from the remuneration of an employee as or on account of any contribution required to be made by the employee but has not remitted the amount to the Receiver General, the employer is deemed, notwithstanding any security interest (as defined in subsection 224(1.3) of the *Income Tax Act*) in the amount so deducted, to hold the amount separate and apart from the property of the employer and from property held by any secured creditor (as defined in subsection 224(1.3) of the *Income Tax Act*) of that employer that but for the security interest would be property of the employer, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

23(4) Notwithstanding the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection (3) to be held by an employer in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the employer and property held by any secured creditor (as defined in subsection 224(1.3) of the *Income Tax Act*) of that employer that but for a security interest (as defined in subsection 224(1.3) of the *Income Tax Act*) would be property of the employer, equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted by the employer, separate and apart from the property of the employer, in trust for Her Majesty whether or not the property is subject to such a security interest, and

(b) to form no part of the estate or property of the employer from the time the amount was so deducted, whether or not the property has in fact been kept separate and apart from the estate or property of the employer and whether or not the property is subject to such a security interest

and is property beneficially owned by Her Majesty notwithstanding any security interest in such property or in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

C. Employment Insurance Act

101 Sections 86(2) and 86(2.1) of the *Employment Insurance Act*[41] are identical to ss. 23(3) and 23(4) of the *Canada Pension Plan*.

D. Companies' Creditors Arrangement Act

102 The important provisions of the *Companies' Creditors Arrangement Act*[42] are set out below:

> *2(1) In this Act*,
>
> . . . . .
>
> ***secured creditor*** means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds ....
>
> . . . . .
>
> 11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.
>
> . . . . .
>
> 11.2(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> . . . . .
>
> 11.51(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> . . . . .
>
> 11.52(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

. . . . .

37(1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* ....

VI. Analysis

A. A Court Cannot Give Statutory Text a Meaning It Cannot Support

103 A court tasked with applying statutory text to a fact pattern must read the statute and related statutes in their entirety. [43]

104 This review produces two significant benefits.

105 First, it may disclose the purpose or purposes [44] that the enactment pursues. [45] This is frequently helpful. [46] Sometimes it is not. [47]

106 Second, reading the statutory text [48] discloses its potential plausible meanings. [49]

107 Words have an ordinary meaning or meanings. [50] Legislators are presumed to know the ordinary meanings of words and to have intended readers of the text to give a statute an interpretation consistent with those ordinary meanings. [51] "Words must not be given meanings they cannot possibly bear." [52]

108 If text may bear only one plausible or permissible meaning, the inquiry is over. [53] A court must conclude that the text has this restricted meaning. [54]

109 The next example shows how this works.

110 Suppose that a municipality receives complaints that some residents are disrupting the peace and quiet of their neighbourhoods by mowing their lawns when school children are in bed. It amends its noise bylaw and prohibits the operation of a lawn mower in residential areas between the hours of 9 pm and 8 am. An overzealous bylaw enforcement officer charges a resident who is operating his old-fashioned reel push mower at 10 pm. The accused's mower made no or very little sound. Any noise it made would not disturb anyone. The resident has violated the noise bylaw. An old-fashioned reel push mower is a lawn mower. He operated it during prohibited hours. Any person asked whether this machine is a lawn mower would say yes. Webster's Third New International

Dictionary of the English Language Unabridged's [55] definition of "lawn mower" supports this assertion: "a hand-operated or power-operated machine for cutting grass or a lawn." The dictionary features a picture of a reel push mower to show what a lawn mower is. The conclusion that a reel push mower is a lawn mower ends the inquiry and eliminates the need to consider why the municipality amended its noise bylaw. In any event, giving the bylaw text its ordinary meaning did not thwart the attainment of the noise bylaw's purpose. It just meant that some lawn mowers that do not disrupt the peace and quiet of a neighbourhood may not be operated at night.

111 If the text discloses more than one plausible or permissible meaning, the court must select the one that best promotes the purpose that accounts for the statute or the contested part of the statute. [56]

112 Fidelity to statutory text is a fundamental feature of statutory interpretation. [57] Courts that ignore the text act as unauthorized legislators. [58] They disregard the primacy of parliament and the paramountcy of the rule of law in our legal system. [59]

113 Courts must be wary of the harm attributable to improper and undue emphasis of the purpose of the statute and the consequential perversion of the statutory text. [60] Purpose can never trump text. [61]

114 Here is an example of the misuse of purpose.

115 Suppose that a railway safety act declares that a railway must equip freight and passenger cars with automatic couplers. Automatic couplers relieve workers of the need to manually connect and disconnect rolling stock. [62] Manual connection is a very dangerous task and causes workers many serious injuries. A dispute arises as to whether a locomotive is a freight or passenger car. The railway unions argue that it is. They claim that a contrary interpretation would largely frustrate the ameliorative effects of the legislation because locomotives frequently participate in the coupling and uncoupling process. The railways oppose this interpretation. Automatic couplers are expensive. A court contemplates holding that a locomotive is a freight or passenger car. It is attracted to this interpretation because it will enhance workplace safety. But the court ultimately rejects this option, convinced a court cannot do this. A locomotive cannot possibly be characterized as a freight or passenger car. [63] This is not a permissible reading of the statute — a legislative compromise of the positions advanced by the railway unions and the railways. If the law is to be changed the legislature must do it. It can amend the railway safety act to state that a railway must equip locomotives and freight and passenger cars with automatic couplers.

B. The Absurdity Doctrine Has a Very Limited Function in the Interpretation of Legal Texts

116 In rare cases the generally accepted interpretation principles do not work.

117 This is not because these principles are in any way deficient. It is because there is good reason to believe that there is something wrong with the text.

118 The problem with the text may be attributable to an error on the part of the statutory printer. [64] Suppose the drafter of court rules had submitted text to the printer that stated a document may be served outside the jurisdiction "in accordance with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters". The legislative printer erroneously substituted "Havana" for "Hague". There is no Havana Convention on this subject. Litigators and judges know that the governing norm is the Hague Convention. Neither the drafter nor the legislators detected this error and approved the court rules with this mistake.

119 Sometimes the source of the error is the drafter. [65] Suppose that Parliament is convened on an emergency basis to order striking air traffic controllers back to work and declare that unresolved wage issues must be resolved by arbitration. The drafter submits a text to the printer providing that the "arbitration award is binding on the employees and the bargaining agent". The printer returns a bill as instructed. In the rush no one detected that no

mention is made of "the employer". The provision should have stated that the "arbitration award is binding on the employer, employees and the bargaining agent". This is a major problem. It gives the employer an opportunity to argue that an unfavourable arbitration award is not binding on it.

120 The doctrine of absurdity allows a court to make minor corrections of the flawed text. [66] No reasonable person would contend that the text the legislators approved was what they thought it was.

121 This proposition allows a court either to disregard the suspect text or modify the text slightly to correct what every reasonable person would recognizes as an obvious textual error. Justice Scalia and Professor Garner assert that "[a] provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve". [67]

122 Most of the time correcting the error is the desirable course.

123 The absurdity doctrine authorizes judicial rewriting of text only in these limited circumstances.

124 A court has no authority to ignore or revise clear and unambiguous text that bears only one meaning just because the court considers the substantive norm embodied in the text to be unwise or dangerous. [68]

125 Suppose a legislature triples the minimum hourly wage rate when it amends employment standard legislation. Employers — large and small — are up in arms. They loudly proclaim that they will not employ workers if they have to pay triple the previous minimum and that it will drive them out of business. Informed commentators agree that a minimum wage of this magnitude will be a job and business-killing initiative. A court charged with the responsibility of hearing complaints filed by employees against noncompliant employers must enforce the minimum hourly wage.

126 Needless to say, a court acts illegitimately if it substitutes its views for that of the legislators on the merits of a provision the text of which supports only one plausible meaning and gives the text a meaning it cannot support. [69] It is the role of legislature — not the courts — to evaluate the merits of an enactment and to amend imprudent enactments. [70]

C. The Plain Meaning of Section 227(4.1) of the Income Tax Act Accords Priority to the Crown Over the Holders of Priming Charges Created by the Companies' Creditors Arrangement Act

127 There is only one plausible meaning for s. 227(4.1) of the *Income Tax Act*. [71]

128 It makes two statements unequivocally. First, the Crown is the beneficial owner of amounts a corporation seeking relief under the *Companies' Creditors Arrangement Act* [72] withheld from the employment income of its employees and failed to remit to the Crown. Second, these amounts must be paid to the Crown notwithstanding the security interests of any other secured creditors including those who are the holders of a priming charge. [73]

129 I will now focus on the text of s. 227(4.1) of the *Income Tax Act*.

130 For ease of reference s. 227(4.1) of the *Income Tax Act* is set out below:

> 227(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security

> interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> > (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

131 Section 227(4.1) may be broken down into two parts.

132 The first part, a dependent phrase — identified by single underlining — declares that the norm embedded in the main clause of this subsection is not abridged by any other provision to the contrary in other parts of the *Income Tax Act*, provisions of the *Bankruptcy and Insolvency Act* [74] with the exception of ss. 81.1 and 81.2 [75] , any other enactment of Canada or any province or any other law — anything set out in the dependent phrase.

133 "Notwithstanding" [76] routinely appears in statutes [77] and contracts in a dependent phrase to identify specific provisions of a statute or contract that do not apply to the norm set out in the main clause as "a fail-safe way of ensuring that the clause it introduces will absolutely, positively prevail". [78]

134 The dependent clause in s. 227(4.1) establishes a remarkably comprehensive defensive bulwark. [79] No other statute or law that abridges the norm created by the main clause of s. 227(4.1) has any force. This is what drafters refer to as "blanket paramountcy". [80]

135 Because there is no comparable blanket paramountcy provision in ss. 11, 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act* there is no need to look beyond the four corners of s. 227(4.1) to determine the scope of the unassailable priority it creates. [81]

136 The second part is the main clause. It can be subdivided. One part — identified by no underlining — declares the norm: the Crown has the best claim to an amount representing the funds the employer-applicant withheld from the employment income of its employees but failed to remit to the Crown and is entitled to be paid an amount equal to the withheld funds. The holders of the priming charges have no claim to these funds that is superior to the Crown's claim. This is because the holders of the priming charges have a security interest under s. 224(1.3) of the *Income Tax Act* [82] and the last clause of s. 227(4.1) states that "the proceeds of such property shall be paid to the Receiver General in priority to all such security interests."

137 The other segment of the second part — identified by double underlining — explains why the Crown has this superior claim. The funds held by the corporate trustee and not properly remitted to the Crown "form no part of the estate or property" of the corporation that withheld them and failed to properly remit them to the Crown. [83] They are beneficially owned by the Crown.

138 Nothing in the *Companies' Creditors Arrangement Act* suggests a contrary conclusion.

139 As mentioned, there is no counterpart to the first part of s. 227(4.1) of the *Income Tax Act* — the formidable defensive bulwark — in ss. 11, 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act*.

140 Indeed, s. 37(2) of the *Companies' Creditors Arrangement Act* expressly recognizes the primacy of the rule fashioned by s. 227(4.1) of the *Income Tax Act* and the comparable provisions in the *Canada Pension Plan* [84] and the *Employment Insurance Act*. [85]

141 Section 37 of the *Companies' Creditors Arrangement Act* reads as follows:

> 37(1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* ....

142 Section 11 of the *Companies' Creditors Arrangement Act*, [86] the provision that authorizes the court to "make any order that it considers appropriate in the circumstances," does not function without regard to s. 227(4.1) of the *Income Tax Act* and the comparable provisions in the *Canada Pension Plan* [87] and the *Employment Insurance Act*. [88] It only trumps provisions in the *Bankruptcy and Insolvency Act* and the *Winding-up and Restructuring Act*. [89]

143 The sections of the *Companies' Creditors Arrangement Act* that authorize a court to create priming charges — ss. 11.2(1), 11.51(1) and 11.52(1) — declare that the order attach to "all or part of the company's property". Section 227(4.1) of the *Income Tax Act* unequivocally declares that unremitted employee income tax withholdings "form no part of the estate or property of the person from the time the amount was so deducted or withheld".

144 In addition, none of the provisions that authorize a court to make a priming charge state that a priming charge overrides the interest created by s. 227(4.1) of the *Income Tax Act*. As well, subsections 11.2(2), 11.51(2) and 11.52(2) state that a court may make a priming charge with a priority superior to other secured creditors. The Crown is not a secured creditor under the *Companies' Creditors Arrangement Act*. A "secured creditor", as defined in s. 2(1) of the *Companies' Creditors Arrangement Act*, includes "a holder of any bond of a debtor company secured by ... a trust in respect of, all or any property of the debtor company". The Crown is not the holder of a bond of Canada North Group Inc. or any of the other applicants seeking relief under the *Companies' Creditors Arrangement Act*. It does not include a beneficiary of any trust, such as the Crown. The plain and ordinary meaning of the text defining "secured creditor" compels this conclusion. [90] The structure of this s. 2(1) definition makes it easy to misread. The Crown is the beneficial owner of an amount equal to the withheld but unremitted employee income tax source deductions. [91]

145 The fact that s. 6(3) of the *Companies' Creditors Arrangement Act* prohibits a court from sanctioning a compromise or arrangement unless it results in the payment to the Crown of its entire claim protected by s. 227(4) of the *Income Tax Act* provides additional support for the view that the *Companies' Creditors Arrangement Act* complements s. 227(4.1) of the *Income Tax Act* — the Crown is the holder of the super priority. [92]

D. There Is a Perfect Correlation Between the Purpose of the Income Tax Amendments Act, 1997 and the Plain and Ordinary Meaning of Section 227(4.1) of the Income Tax Act

146 I acknowledge the importance of the priming charges to the ability of companies to restructure. [93] Lenders will not advance funds and restructuring professionals will not accept assignments if they reasonably fear that their loan is in jeopardy or their fees will be unpaid.

147 If the respondents and intervenors are correct and the efficacy of restructuring and reorganization under the *Companies' Creditors Arrangement Act* will be jeopardized by according the text of s. 227(4.1) of the *Income Tax Act* its plain and ordinary meaning, they will no doubt bring these concerns to the attention of Parliament. It is up to Parliament to assess the validity of these fears and decide whether the unassailable priority the *Income Tax Amendments Act, 1997* introduced was improvident and that its merits must be revisited. [94] Courts cannot ignore the plain and ordinary meaning of legislative text just because litigants present a compelling case that the consequences of the interpretation are problematic. [95]

148 While it is unnecessary to examine the objective Parliament pursued when it enacted the *Income Tax Amendment Acts, 1997* [96] and introduced the current text of ss. 227(4) and (4.1) of the *Income Tax Act*, a study of the legislative history [97] reveals a perfect correlation between the stated purpose and the plain and ordinary meaning the text supports.

149 The starting point of the legislative history is the February 27, 1997 decision of the Supreme Court of Canada in *Royal Bank v. Sparrow Electric Corp.* [98] At issue was whether the Crown's ownership claim to $625,990.86 of unremitted income tax withholdings from Sparrow Electric's employees under s. 227(4) of the *Income Tax Act* superseded the Royal Bank's claim to the sale proceeds of Sparrow Electric's inventory asserted under both a general security agreement and an inventory assignment under s. 427 of the *Bank Act*. [99] The issue arose because the proceeds of an inventory sale conducted by the receiver appointed by court order at the instigation of the Royal Bank were not sufficient to discharge the debtor's obligation to both the Crown and the Royal Bank. [100]

150 The Court concluded that the Royal Bank was entitled to the inventory sale proceeds on account of its general security agreement that "gave it a fixed and specific charge against the debtor's inventory ...." [101]

151 But the Court also told Parliament how to proceed if it wished a contrary result: [102]

> Finally, I wish to emphasize that it is open to Parliament to step in and assign absolute priority to the deemed trust. A clear illustration of how this might be done is afforded by s. 224(1.2) [of the *Income Tax Act*], which vests certain moneys in the Crown 'notwithstanding any security interest in those moneys' and provides that they 'shall be paid to the Receiver General in priority to any such security interest'. All that is needed to effect the desired result is clear language of that kind. In the absence of such clear language, judicial innovation is undesirable, both because the issue is policy charged and because a legislative mandate is apt to be clearer than a rule whose precise bounds will become fixed only as a result of expensive and lengthy litigation.

152 On April 7, 1997 the Finance Minister announced the government's intention to propose amendments to the *Income Tax Act*, the *Canada Pension Plan*, the *Employment Insurance Act* and the *Excise Tax Act* [103] that would reverse the effect of *Royal Bank v. Sparrow Electric Corp.*. [104]

153 An accompanying press release explained why these amendments were desirable: [105]

> [I]t is important to assert the absolute priority of the Crown's claim as unremitted source deductions are part of the gross wages of employees and are held in trust for remittance to the Receiver General. Further, source deductions are automatically credited to these employees on account of taxes paid for the year and they are paid over to those provinces that are parties to the Federal/Provincial Tax Collection Agreements, on account of the employee's provincial taxes payable. ... Thus, the amendment will ensure that tax revenue losses are minimized and that delinquent taxpayers and their secured creditors do not benefit from failures to remit source deductions and GST at the expense of the Crown.

154 Parliament passed the *Income Tax Amendments Act, 1997*. [106] It came into force on June 18, 1998. Provisions that introduced the current s. 227(4) and (4.1) were given retroactive effect as of June 15, 1994. [107]

155 The Supreme Court of Canada commented on the new ss. 227(4) and (4.1) of the *Income Tax Act* in a 2002 opinion, *First Vancouver Finance v. Minister of National Revenue*: [108]

> It is apparent from these changes that the intent of Parliament when drafting ss. 227(4) and 227(4.1) was to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect. This is clear from the use of the words 'notwithstanding any security interest' in both ss. 227(4) and 227(4.1). In other words, Parliament has reacted to the interpretation of the deemed trust provisions in *Sparrow Electric*, and has amended the provisions to grant priority to the deemed trust in situations where the Minister and secured creditors of a tax debtor both claim an interest in the tax debtor's property.
>
> ... It is evident from these changes that Parliament has made a concerted effort to broaden and strengthen the deemed trust in order to facilitate the collection efforts of the Minister.

E. The Absurdity Doctrine Does Not Assist the Holders of the Priming Charges

156 The absurdity doctrine does not apply.

157 There is no basis to assert that s. 227(4.1) of the *Income Tax Act* contains flawed text. It obviously does not.

158 Section 227(4.1) of the *Income Tax Act* bears only one plausible meaning. The Crown is the beneficial owner of an amount equal to the unremitted employment income tax withholdings made by the employer and is entitled to these funds in priority to those who are beneficiaries of the priming charges.

159 A court cannot ignore the plain meaning of statutory text just because it concludes the consequences are mischievous. [109]

160 Justice Rowbotham concludes that the interpretation I advance will undermine the general objective of the *Companies' Creditors Arrangement Act* — "[r]eorganization 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" [110] and thwart the restructuring process. She may be correct. She may not be.

161 But this is irrelevant.

162 If Parliament shares her concerns, it can amend the governing legislation. [111]

163 I am not aware of any case in the common law world in which a court has declared that it is entitled to rewrite statutory text that bears only one plausible meaning and is indisputably in accord with the declared objective of the legislature. [112]

VII. Conclusion

164 I would allow the appeal and amend the initial order as requested by the Crown.

165 I acknowledge the high quality of counsel's facta and oral arguments.

Appeal dismissed.

Footnotes

1 Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., and 1919209 Alberta Ltd.

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

3 R.S.C. 1985, c. C-36.

4 *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, s. 227(4).

5 Factum, ¶ 15. See also ¶ 1 ("The net result of the Crown's position, if successful, will be more liquidations and *less* recoverable tax revenue") (emphasis in original) & ¶ 4 ("Priority Charges provide the basis for the participation of insolvency professionals, interim lenders and others in ... [*Companies' Creditors Arrangement Act*] proceedings and, without certainty that such parties will be compensated or repaid, the restructuring practice will suffer from a shortage of experience and capital"). See also Hanlon, Tickle & Csiszar, "Conflicting Case Law, Competing Statutes and the Confounding Priority Battle of the Interim Financing Charge and the Crown's Deemed Trust for Source Deductions", in Annual Review of Insolvency Law 2018, at 939 (J. Sarra et al eds. 2019) ("Until the Alberta Court of Appeal renders its decision, the lower court's ruling that the priority of the ... [*Income Tax Act*] deemed trust may be subordinated to a court-ordered interim financing lender charge is encouraging to interim lenders").

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

7 R.S.C. 1985, c. C-36.

8 R. Wood, Bankruptcy and Insolvency Law 16 (2d ed. 2015) ("The *Winding-up and Restructuring Act* ... is the only insolvency regime that can be used in connection with the insolvency of banks, insurance companies, trust companies, and loan companies. Proceeding under [it]... are characterized by a higher degree of court involvement; the court appoints a liquidator and supervises the liquidation of the debtor's assets").

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

10 R.S.C. 1985, c. W-11.

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

12 R.S.C. 1985, c. C-36.

13 *Income Tax Amendments Act, 1997*, S.C. 1997, c. 19, s. 226.

14 *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550 (Alta. Q.B.), ¶ 2.

15 An order pronounced July 27, 2017 added 1919209 Alberta Ltd. as an applicant.

16 R.S.C. 1985, c. C-36.

17 *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550 (Alta. Q.B.), ¶ 9.

18 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 3(1) ("This Act applies in respect of a debtor company or affiliated debtor companies if the total of the claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed").

19 Id. s. 11.02(1) ("A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days").

20 Emphasis added.

21 Emphasis added.

22 Subsequent orders increased the administration charge to $950,000 and the interim lender's charge to $3,500,000 and extended the stay-of-proceedings end date beyond August 3, 2017. 2017 ABQB 508 (Alta. Q.B.), ¶ 15.

23 *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550 (Alta. Q.B.), ¶ 13.

24 Id. ¶¶ 10 & 12.

25 Id. ¶ 9.

26 Factum of the Appellant ¶¶ 10 & 38.

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

28 R.S.C. 1985, c. C-8.

29 S.C. 1996, c. 23.

30 2017 ABQB 550 (Alta. Q.B.), ¶ 79.

31 Id.

32 Id. ¶ 112.

33 Id. ¶¶ 108 & 113.

34 Id. ¶ 109.

35 Id. ¶¶ 102-04.

36 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 13 ("Except in Yukon, any person dissatisfied with an order or decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs").

37 2017 ABCA 363 (Alta. C.A.), ¶ 5.

38 Id.

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

40 R.S.C. 1985, c. C-8.

41 S.C. 1996, c. 23.

42 R.S.C. 1985, c. C-36.

43 *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), 41 (the Court approved this statement: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament") & *Purba v. Ryan*, 2006 ABCA 229 (Alta. C.A.),

¶ 13; (2006), 397 A.R. 251 (Alta. C.A.), 254 ("one must consider the combined effect of all relevant legislation as a whole and in its appropriate context").

44 Most enactments incorporate more than one purpose. This is certainly the case for the *Criminal Code*. R.S.C. 1985, c. C-46. At the most abstract level the *Criminal Code* provides an exhaustive statement of crimes. Section 9 of the *Criminal Code* states that "[n]otwithstanding anything in this Act or any other Act, no person shall be convicted ... of an offence at common law". This promotes certainty. A law that clearly defines criminal conduct allows persons who have free will to factor in the lawfulness of possible courses of conduct when deciding how to act. See also *Canadian Charter of Rights and Freedoms*, s. 11(g) ("Any person charged with an offence has the right ... not be found guilty on account of an act or omission unless, at the time of the act or omission, it constitutes an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations". *Canada Act 1982*, c. 11, sch. B (U.K.). The *Criminal Code* is a comprehensive enactment that contains discrete parts each of which pursues distinct objectives. For example, Part XXIII deals with sentencing. Section 718 declares that "[t]he fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives: (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct; (b) to deter the offender and other persons from committing offences; (c) to separate offenders from society, where necessary; (d) to assist in rehabilitating offenders; (e) to provide reparations for harm done to victims or to the community; and (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims or to the community". Part XXI/Mental Disorder also promotes a distinct purpose. In *Winko v. Forensic Psychiatric Institute*, [1999] 2 S.C.R. 625 (S.C.C.), 658 Justice McLachlin opined that "the purpose of Part XX.1 is to replace the common law regime for the treatment of those who offend while mentally ill with a new approach emphasizing individualized assessment and the provision of opportunities for appropriate treatment. ... Throughout the process the offender is to be treated with dignity and accorded the maximum liberty compatible with Part XX.1's goals of public protection and fairness to the NCR accused". All this means that one must be mindful that many purposes may be at play and that they may advance completely difference interests in a way that may be complementary or discordant.

45 *Frank v. Canada (Attorney General)*, 2019 SCC 1 (S.C.C.), ¶ 130 ("the best way of discerning a legislature's purpose will usually be to look to the legislation itself"); *Alberta (Minister of Justice) v. Cardinal*, 2013 ABQB 407 (Alta. Q.B.), ¶52; (2013), 565 A.R. 271 (Alta. Q.B.), 286 ("The best source of the goal the legislature pursues is the text itself. A part of the legislation devoted to a statement of the legislative purpose is usually an indisputable marker of the true intention of the legislature") & H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1200 (tentative ed. Harvard University 1958) ("In interpreting a statute a court should ... [d]ecide what purpose ought to be attributed to the statute").

46 E.g., *Election Amendment Act, 1998*, S.A. 1998, c. 34 ("Whereas the Legislative Assembly of Alberta believes that, with a few exceptions, denying the right to vote to those whose disrespect for the law has caused them to be imprisoned at the time of an election preserved the integrity of those principles and their recognition among Albertans").

47 Knowledge of an enactment's purpose may be of minimal assistance. This is usually so if it is stated abstractly. *McMorran v. McMorran*, 2014 ABCA 387 (Alta. C.A.), ¶ 70; (2014), 378 D.L.R. (4th) 103 (Alta. C.A.), 143 per Wakeling, J.A. ("For example, the determination that a labour relations statute exists to promote collective bargaining by government employees does not assist much in determining whether a worker is employed by government or is an independent contractor"); *Alberta (Minister of Justice) v. Cardinal*, 2013 ABQB 407 (Alta. Q.B.), ¶ 54; (2013), 565 A.R. 271 (Alta. Q.B.), 287 ("On occasion, the legislative purpose is stated in terms too abstract to be helpful. A legislative purpose which is precise is of more assistance to the court than one that is not") & *Alberta Union of Provincial Employees v. Alberta Research Council*, [1992] C.L.L.R. 14390 at 14392 (Alta. P.S.E.R.B.) ("an abstract statement of purpose will as a rule be less helpful ... than one that is specific").

48 *Spencer v. Commonwealth*, [2010] H.C.A. 28 (Australia H.C.), ¶ 50; (2010), 241 C.L.R. 118 (Australia H.C.), 138 per Hayne, Crennan, Kiefel & Bell, JJ. ("Consideration of the operation and application ... [of the summary judgment rule] must begin from consideration of its text").

49 *Humphreys v. Trebilcock*, 2017 ABCA 116 (Alta. C.A.), ¶ 109 ("[a court] must identify the potential permissible meanings [of the text]"). A permissible meaning is one that a reasonable reader could have given the text when it was produced. *Unifor, Local 707A v. SMS Equipment Inc.*, 2017 ABCA 81 (Alta. C.A.), ¶ 81; (2017), 47 Alta. L.R. (6th) 28 (Alta. C.A.), 56 per Wakeling, J.A. An implausible meaning is not a permissible meaning. *Lenz v. Sculptoreanu*, 2016 ABCA 111 (Alta. C.A.), ¶ 4; (2016), 399 D.L.R. (4th) 1 (Alta. C.A.), 6 ("A contrary meaning would give the text an implausible meaning. A court may never do this") & *Valard Construction Ltd. v. Bird Construction Co.*, 2016 ABCA 249 (Alta. C.A.), ¶ 184; (2016), 57 C.L.R. (4th) 171 (Alta. C.A.), 236 per Wakeling, J.A. in dissent ("The text of the bond does not support the interpretation the trial judge gave it"), rev'd 2018 SCC 8, [2018] 1 S.C.R. 224 (S.C.C.).

50 Dictionaries record the ordinary meanings those who use the language correctly understand their use to represent. See *Humphreys v. Trebilcock*, 2017 ABCA 116 (Alta. C.A.), ¶ 113; [2017] 7 W.W.R. 343 (Alta. C.A.), 375 ("Reference to authoritative dictionaries is helpful. Those sources record a range of potential meanings from which the court must select the most suitable for the context") & H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1220 (tentative ed. Harvard University 1958) ("A dictionary... never says what meaning a word *must* bear in a particular context. ...An unabridged dictionary is simply an historical record, not necessarily all-inclusive, of the meanings which words in fact *have* borne, in the judgment of the editors, in the writings of reputable authors. ... A good dictionary always gives examples of the use of the word *in context* in each of the meanings ascribed to it") (emphasis in original).

51 *R. v. I. (D.)*, 2012 SCC 5 (S.C.C.), ¶ 26; [2012] 1 S.C.R. 149 (S.C.C.), 166 ("The first and cardinal principle of statutory interpretation is that one must look to the plain words of the provision"); *Thomson v. Canada (Department of Agriculture)*, [1992] 1 S.C.R. 385 (S.C.C.), 399-400 (unless an enactment indicates a contrary intention a word should be given its ordinary or usual meaning); *Humphreys v. Trebilcock*, 2017 ABCA 116 (Alta. C.A.), ¶ 109; [2017] 7 W.W.R. 343 (Alta. C.A.), 375 ("To do so one must identify the potential permissible meanings of these terms, taking into account their ordinary meanings"); *Caminetti v. United States*, 242 U.S. 470 (U.S. Sup. Ct. 1917), 485-86 ("Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them"); R. Sullivan, Sullivan on the Construction of Statutes 28 (6th ed. 2014) ("It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature") & A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 69 (2012) ("Words are to be understood in their ordinary, everyday meanings — unless the context indicates that they bear a technical sense").

52 *Zuk v. Alberta Dental Association and College*, 2018 ABCA 270 (Alta. C.A.), ¶ 159; (2018), 426 D.L.R. (4th) 496 (Alta. C.A.), 539. See also *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49 (S.C.C.), ¶ 43; [2002] 2 S.C.R. 720 (S.C.C.), 739 ("Although it would be open to Parliament to extend the trust to property alienated by the tax debtor, such an interpretation is simply not supported by the language of the ... [*Income Tax Act*]"); *Bourne v. Norwich Crematorium Ltd.*, [1967] 2 All E.R. 576 (Eng. Ch. Div.), 578 ("[a court] must not ... distort ... [the *Income Tax Act, 1952*] and give it a meaning which in the context ... it can [not] possibly bear"); A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 31 (2012) ("A fundamental rule of textual interpretation is that neither a word nor a sentence may be given a meaning that it cannot bear") & H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1200 (tentative ed. Harvard University 1958) ("In interpreting a statute a court should... [i]nterpret the words of the statute... so as to carry out the purpose [of the statute] as best it can, making sure, however, that it does not give the words... a meaning they will not bear").

53 *R. v. Rodgers*, 2006 SCC 15 (S.C.C.), ¶ 20; [2006] 1 S.C.R. 554 (S.C.C.), 573 ("The clear language of s. 487.055(1) [of the *Criminal Code*] indicates that Parliament intended to authorize *ex parte* applications under this section. There is no room to interpret the provision as presumptively requiring that applications be brought on notice"); *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54 (S.C.C.), ¶ 10; [2005] 2 S.C.R. 601 (S.C.C.), 610 ("When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process"); *R. v. McIntosh*, [1995] 1 S.C.R. 686 (S.C.C.), 704 ("where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be"); *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.), 581 ("when Parliamentary intent is clear, courts ... are not empowered to do anything else but to apply the law") *Unifor, Local 707A v. SMS Equipment Inc.*, 2017 ABCA 81 (Alta. C.A.), ¶ 82; (2017), 47 Alta. L.R. (6th) 28 (Alta. C.A.), 56 per

Wakeling, J.A. ("If this endeavor produces only one ... [plausible] meaning the interpretation process comes to an end"); *Vacher & Sons v. London Society of Compositors* (1912), [1913] A.C. 107 (U.K. H.L.), 121-22 per Lord Atkinson ("If the language of a statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results .... [Y]our Lordships' House sitting judicially is not concerned with the question whether the policy it embodies is wise or unwise, or whether it leads to consequences just or unjust, beneficial or mischievous"); *Sussex Peerage Case* (1844), 8 E.R. 1034 (U.K. H.L.), 1057 per Tindal C.J. ("If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense"); *Hamilton v. Rathbone*, 175 U.S. 414 (U.S. Sup. Ct. 1899), 419 ("where a statute is ... susceptible upon its face of two constructions, the court may look into... the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it"); *Temple v. Petersburg (City)*, 182 Va. 418 (U.S. Va. S.C. 1944), 423; 29 S.E.2d 357 (U.S. Va. S.C. 1944), 358 ("If the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it regardless of what courts think of its wisdom or policy") & de Sloovère, "Contextual Interpretation of Statutes", 5 Fordham L. Rev. 219, 219 (1936) ("Very often the obvious meaning is the correct one, but until one can say that it is the only sensible meaning, the statute has not been fully interpreted. At this point in the process the context must be studied so as to be sure there is no other equally justifiable meaning that the text will bear by fair use of language").

54 *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), 484 ("the consequences of my colleague's approach might be more dire than even Professor Wood supposes. ... I agree that if Parliament mandated this outcome, the courts must perforce accept it. However, judges should not rush to embrace such a weighty consequence unless the statutory language requiring them to do so is unequivocal").

55 Webster's Third New International Dictionary of the English Language Unabridged 1280 (2002).

56 *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10 ("An enactment ... shall be given the fair, large and liberal construction and interpretation that best assures the attainment of its objects"); *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1 (S.C.C.), ¶ 21; [2011] 1 S.C.R. 3 (S.C.C.), 13 ("The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute"); *McBratney v. McBratney* (1919), 59 S.C.R. 550 (S.C.C.), 561 ("where you have rival constructions of which the language of the statute is capable you must resort to the object ... of the statute ... [and adopt] the construction which best gives effect to the governing intention"); *Humphreys v. Trebilcock*, 2017 ABCA 116 (Alta. C.A.), ¶ 109; [2017] 7 W.W.R. 343 (Alta. C.A.), 375-76 ("If there is more than one potential meaning, the court must select the option that best advances the purpose that accounts for the text"); *McMorran v. McMorran*, 2014 ABCA 387 (Alta. C.A.), ¶ 69; (2014), 378 D.L.R. (4th) 103 (Alta. C.A.), 142 per Wakeling, J.A. ("[a] failure to be mindful of the purpose may cause a court to select from several permissible meanings one that does not best promote the attainment of the text's object"); *Rainy Sky S.A. v. Kookmin Bank*, [2011] UKSC 50 (U.K. S.C.), ¶ 21; [2011] 1 W.L.R. 2900 (U.K. S.C.), 2908 ("If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other"); *R. v. London (City) Court Judge* (1891), [1892] 1 Q.B. 273 (Eng. C.A.), 290 per Lord Esher, M.R. ("If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. ... [I]f the words...admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity, and the other does not, the Court will conclude that the legislature did not intend to lead to an absurdity, and will adopt the other interpretation"); *National Tax Credit Partners, L.P. v. Havlik*, 20 F.3d 705 (U.S. C.A. 7th Cir. 1994), 707 per Easterbrook, J. ("Knowing the purpose behind a rule may help a court decode an ambiguous text, ... but first there must be some ambiguity"); A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 63 (2012) ("A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored") & H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1156 (tentative ed. Harvard University 1958)("Every statute must be conclusively presumed to be a purposive act. The idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible").

57 *Alternative granite & marbre inc., Re*, 2009 SCC 49 (S.C.C.), ¶ 29; [2009] 3 S.C.R. 286 (S.C.C.), 304 ("Canadian tax authorities are bound by the choice of legislative policy now expressed in the ... [*Bankruptcy and Insolvency Act*]. ...

The appellants' arguments conflict with both the words of the statutory provisions in question and their underlying legislative intent and cannot be accepted").

58 *Purba v. Ryan*, 2006 ABCA 229 (Alta. C.A.), ¶ 56; (2006), 397 A.R. 251 (Alta. C.A.), 262 ("The legislation fixes the boundary between large cases (with a right to a civil jury) and small cases (with no right) at $75,000. How can a court say that the legislators were wrong, and the boundary should be lower? ... It is improper, because it is amendment, not interpretation"); *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252 (F.C.A.), ¶ 50; (2017), 417 D.L.R. (4th) 173 (F.C.A.), 189 ("judges — like everyone else — are bound by legislation. They must take it as it is. They must not insert into it the meaning they want. They must discern and apply its authentic meaning, nothing else"); *Temple v. Petersburg (City)*, 182 Va. 418 (U.S. Va. S.C. 1944), 424; 29 S.E.2d 357 (U.S. Va. S.C. 1944), 359 ("Just why the Legislature in its wisdom saw fit to prohibit the establishment of cemeteries in cities and towns and did not see fit to prohibit enlargements or additions, is no concern of ours. Certain it is that language could not be plainer than that it employed to express the legislative will. From it we can see with certainty that while a cemetery may not be established in a city or town, it may be added to or enlarged") & *Saville v. Virginia Railway & Power Co.*, 114 Va. 444 (U.S. Va. S.C. 1913), 452-53; 76 S.E. 954 (U.S. Va. S.C. 1913), 957 ("We hear a great deal about the spirit of the law, but the duty of this court is not to make the law, but to construe it .... It is our duty to take the words which the legislature has seen fit to employ and give them their usual and ordinary signification, and thus having ascertained the legislative intent, to give effect to it, unless it transcends the legislative power as limited by the Constitution").

59 *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (U.S. Wash. S.C. 1937), 404 per Sutherland, J. in dissent ("The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase 'supreme law of the land' stands for and to convert what was intended as inescapable and enduring mandates into mere moral reflections").

60 Frankfurter, "Some Reflections on the Reading of Statutes", 47 Colum. L. Rev. 527, 543 (1947) ("Violence must not be done to the words chosen by the legislature").

61 *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 (S.C.C.), ¶ 202 per Brown, J. ("The Tribunal is no more constitutionally empowered than this Court to aim for a result consistent with its own policy preferences by holding fast to the bits of statutory text that it likes while ignoring the bits that it does not"); *R. v. Zundel*, [1992] 2 S.C.R. 731 (S.C.C.), 771 (the Court held that a statute cannot be given a meaning it cannot bear in order to promote equality and multiculturalism); *Jodrey Estate v. Nova Scotia (Minister of Finance)*, [1980] 2 S.C.R. 774 (S.C.C.), 807 per Dickson, J. ("Although a court is entitled ... to look to the purpose of the Act ... it must still respect the actual words which express the legislative intention"); *Ursa Ventures Ltd. v. Edmonton (City)*, 2016 ABCA 135 (Alta. C.A.), ¶ 85; (2016), 91 C.P.C. (7th) 73 (Alta. C.A.), 106 per Wakeling, J.A. ("Overzealous pursuit of an undeniable legislative purpose must not cause one to overlook the limited scope of the words the legislators used") & *Alberta v. McGeady*, 2014 ABQB 104 (Alta. Q.B.), ¶ 23; [2014] 7 W.W.R. 559 (Alta. Q.B.), 571 ("No statutory decision maker can ignore substantive statutory provisions because it believes [they produce] ... unfair results").

62 See *Johnson v. Southern Pacific Co.*, 196 U.S. 1 (U.S. Sup. Ct. 1904), 14-15 (the Court refused to interpret "car" in railway safety legislation narrowly — "any car ... not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars" — and exclude locomotives in order to promote the safety of railway employees responsible for coupling and uncoupling activities).

63 Webster's Third New International Dictionary of the English Language Unabridged 908 (2002) ("freight car ... a railroad car for the transportation of freight") & 1650 ("a passenger car ... railroad car (as a coach, parlor car, dining car, or sleeping car) for carrying passengers").

64 E.g., *An Act Respecting the Solemnization of Marriage*, R.S.M. 1970, c. M50, s. 8(2)(b) ("Where a marriage is to be solemnized under the authority of publication of banns, the intention to marry shall be proclaimed openly, at least once ... during divine service ... (b) where the parties are in the habit of attending whorship [read worship] at different churches ... in each of those churches").

65 E.g., 3 Geo. 4, c. 39, s. 2 (U.K.) ("or unless judgment shall have been signed or [read 'and'] execution issued [read 'levied'] on such warrant of attorney") & *Green v. Wood* (1845), 115 E.R. 455 (Eng. Q.B.), 458 per Lord Denman, C.J. ("We have here words which, as they stand, are useless .... But, to give an effectual meaning, we must alter, not only 'or' into 'and', but 'issued' into 'levied'. It is extremely probable that this would express what the Legislature meant. But we cannot supply it") & per Williams, J. ("It is much safer to say that the words really have no meaning"). See R. Sullivan, Sullivan on the Construction of Statutes 318 (6th ed. 2014) ("Absurd results can sometimes be avoided by correcting a clear drafting mistake").

66 A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 234 (2012) ("If an easy correction is not possible, the absurdity stands").

67 Id.

68 *R. v. Conway*, 2010 SCC 22 (S.C.C.), ¶ 97; [2010] 1 S.C.R. 765 (S.C.C.), 810 ("barring a constitutional challenge to the legislation, no judicial fiat can overrule Parliament's clear expression of intent"); *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), 484 ("the consequences of my colleague's approach might be more dire than even Professor Woods supposes. ... I agree that if Parliament mandated this outcome, the courts must perforce accept it"); *R. v. McIntosh*, [1995] 1 S.C.R. 686 (S.C.C.), 704 ("where, by use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be"); *Zeitel v. Ellscheid*, [1994] 2 S.C.R. 142 (S.C.C.), 152 ("Recognition of the proper roles of the legislature and the judiciary requires that the courts give effect to the plain meaning of the words of a duly enacted statute. It is beyond the power of a court to interfere in a carefully crafted legislative scheme merely because it does not approve of the result produced by a statute in a particular case"); *Bedwell v. McGill*, 2008 BCCA 526 (B.C. C.A.), ¶ 31; (2008), 305 D.L.R. (4th) 751 (B.C. C.A.), 765 ("I know of no judicial authority that would support our disregarding the clear terms of an enactment on the basis of absurdity"); *R. v. Huggins*, 2010 ONCA 746 (Ont. C.A.), ¶ 17 ("the clear wording of a statute must be given effect even if it may lead to an absurdity"); *Beattie v. National Frontier Insurance Co.* (2003), 68 O.R. (3d) 60 (Ont. C.A.), 67 ("if the words of an Act are clear, they must be followed even though they lead to a manifest absurdity"); *Vacher & Sons v. London Society of Compositors* (1912), [1913] A.C. 107 (U.K. H.L.), 121 per Lord Atkinson ("If the language of a statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results"); *Victoria (City) v. Bishop of Vancouver Island*, [1921] 2 A.C. 384 (Jud. Com. of Privy Coun.), 388 (the Privy Council cited with approval Lord Esher's speech in *R. v. London (City) Court Judge*); *Cooke v. Charles A. Vogeler Co.*, [1901] A.C. 102 (U.K. H.L.), 107 per Earl of Halsbury, L.C. ("a court of law has nothing to do with the reasonableness of unreasonableness of a provision"); *Warburton v. Loveland* (1832), 6 E.R. 806 (Ireland H.L.), 809 per Tindal, C.J. ("Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences"); *Abley v. Dale* (1851), 138 E.R. 519 (Eng. C.P.), 525 per Jervis, C.J. ("If the precise words used are plain and unambiguous, we are bound to construe them in their ordinary sense, even though it does lead to an absurdity or manifest injustice"); *R. v. London (City) Court Judge* (1891), [1892] 1 Q.B. 273 (Eng. C.A.), 290 & 301-02 per Lord Esher, M.R. ("If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the legislature has committed an absurdity") & per Lopes, L.J. ("if the words of an Act are unambiguous and clear, you must obey those words, however absurd the result may appear .... If any other rule were followed, the result would be that the Court would be legislating instead of the properly constituted authority of the country, namely, the legislature"); *The Queen v. Skeen*, 8 Cox. Cr. C. 143, 158 (Cr. App. 1859) per Lord Campbell, C.J. ("Where by the use of clear and unequivocal language, capable of only one construction, anything is enacted by the legislature, we must enforce it, although in our opinion, it may be absurd or mischievous"); *Electrical, Electronic, Telecommunication and Plumbing Union v. Times Newspapers Ltd.* (1979), [1980] Q.B. 585 (Eng. Q.B.), 599 ("It is my task to construe the words and if I find them to be absolutely clear, then even though the results produced may be one which strikes me as being absurd, I must give effect to them") & *Temple v. Petersburg (City)*, 182 Va. 418 (U.S. Va. S.C. 1944), 423; 29 S.E.2d 357 (U.S. Va. S.C. 1944), 358 ("If the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it regardless of what courts think of its wisdom or policy").

69 A court may properly decline to accord text that supports two plausible interpretations, only one of which is absurd, an absurd interpretation. *R. v. London (City) Court Judge* (1891), [1892] 1 Q.B. 273 (Eng. C.A.), 290 per Lord Esher, M.R. ("if the words of an Act admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity, and the other does not, the Court will conclude that the legislature did not intend to lead to an absurdity, and will adopt the other interpretation"); *Holmes v. Bradfield Rural District Council*, [1949] 2 K.B. 1 (Eng. K.B.), 7 ("the mere fact that the results of applying a statute may be unjust or even absurd does not entitle this court to refuse to put it into operation. ... but if there are two reasonable interpretations ... of the words in an Act, the courts [will] adopt that which is just, reasonable and sensible rather than one which [is] ... none of those things"); *Auckland City Corp. v. Dawson* , [1929] N.Z.L.R. 614, 619 (Sup. Ct.) ("Where the meaning of the words of a section is not clear, and such unreasonable consequences result from a particular interpretation of the section, the Court should not adopt such interpretation if the language is susceptible of a more reasonable construction"); R. Sullivan, Sullivan on the Construction of Statutes 313 (6th ed. 2014) ("If the text is judged to be ambiguous, everyone agrees that avoiding absurdity is a good reason to prefer one interpretation over another") & Manning, "The Absurdity Doctrine", 116 Harv. L. Rev. 2387, 2463 (2005) ("if a given phrase has several relevant social connotations, then an interpreter may use purpose or policy considerations to choose among them").

70 *R. v. McIntosh*, [1995] 1 S.C.R. 686 (S.C.C.), 706 ("Parliament ... has the right to legislate illogically (assuming that this does not raise constitutional concerns). And if Parliament is not satisfied with the judicial application of its illogical enactments, then Parliament may amend them accordingly"); *Chung Fook v. White*, 264 U.S. 443 (U.S. Sup. Ct. 1924), 446 per Sutherland, J. ("The words of the statute being clear, if it unjustly discriminates against the native-born citizen or is cruel and inhuman in its results ... the remedy lies with Congress and not with the courts. Their duty is simply to enforce the law as it is written, unless clearly unconstitutional"); *Stock v. Frank Jones (Tipton) Ltd.*, [1978] 1 W.L.R. 231 (U.K. H.L.), 234 per Viscount Dilhorne ("it is not open to the court to remedy the defect. That must be left to the Legislature"); *Hill v. East & West India Dock Co.* (1884), (1883-84) L.R. 9 App. Cas. 448 (U.K. H.L.), 465 per Lord Bramwell ("it is infinitely better, although an absurdity or an injustice or other objectionable result may be evolved as the consequence of your construction, to adhere to the words of an Act of Parliament and leave the legislature to set it right than to alter these words according to one's notion of an absurdity") & *Pocock v. Pickering* (1852), 118 E.R. 298 (Eng. Q.B.), 301 per Coleridge, J. ("In constructing an Act of Parliament, our first business, I conceive, is to examine the words themselves which are used; and, if in these there be no ambiguity, it is seldom desirable to go further ....; and ... when ... you have arrived at the meaning, I think nothing is more dangerous than to flinch from that conclusion because we think the enactment is less wise or efficacious than it might have been made, or even wholly fail of its object. Perhaps the most efficacious mode of procuring good laws, certainly the only one allowable to a Court of Justice, is to act fully up to the spirit and language of bad ones, and to let their inconvenience be fully felt, by giving them their full effect").

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

72 R.S.C. 1985, c. C-36.

73 *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), ¶¶ 29 & 45; [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter Century Services], 400 & 406 ("The Crown retained priority for source deductions of income tax, Employment Insurance ... and Canada Pension Plan ... premiums, but ranks as an ordinary unsecured creditor for most other claims ... [T]here is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the ... [*Companies' Creditors Arrangement Act*] or the ... [*Bankruptcy and Insolvency Act*]. Unlike source deductions [under the *Income Tax Act*, *Canada Pension Plan* and *Employment Insurance Act*] which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST").

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

75 These sections are not applicable here.

76 Black's Law Dictionary 1231 (10th ed. 2014 B. Garner ed.) ("1. Despite; in spite of notwithstanding the conditions listed above, the landlord can terminate the lease if the tenant defaults "); Webster's Third New International Dictionary of the English Language Unabridged 1545 (2002) ("without prevention or obstruction from or by: in spite of ? its wide

distribution, it is an animal seldom encountered") & B. Garner, Garner's Modern English Usage 635 (4th ed. 2016) ("notwithstanding is a formal word used in the sense 'despite', 'in spite of', or 'although'").

77 E.g., *Rainville c. Québec (Sous-ministre du Revenu)* (1979), [1980] 1 S.C.R. 35 (S.C.C.), 44 (1979) ("Paragraph (j) [of s. 107(1) of the *Bankruptcy Act*] ends with the following words ... '*notwithstanding any statutory preference to the contrary*'. The purpose of this part of the provision is obvious. Parliament intended to put all debts to a government on a "equal footing: it therefore cannot have intended to allow provincial statutes to confer any higher priority"); *Tennant v. Union Bank of Canada* (1893), [1894] A.C. 31 (Jud. Com. of Privy Coun.), 45 ("sect. 91 [of the *British North America Act*] expressly declares that, 'notwithstanding anything in this Act', the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority"); *Engineered Buildings Ltd. v. Calgary (City)* (1966), 57 D.L.R. (2d) 322 (Alta. C.A.), 325 ("the words 'notwithstanding anything in this Act' in s.s. (9) mean that where the facts come within that subsection no other part of the Act applies, and this includes s.s. (10) which is another party of the Act") & *Green v. Commonwealth*, 28 Va. App. 567 (U.S. Va. Ct. App. 1998), 569-70; 507 S.E.2d 627 (U.S. Va. Ct. App. 1998), 628-29 (Virginia punished carjacking with a mandatory three-year prison term and denied the sentencer the option of suspending the sentence of juveniles, an option generally available for juveniles, by the use of the prepositional phrase "notwithstanding any other provision of law").

78 A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 127 (2012). See P. Salembier, Legal and Legislative Drafting 382-83 (2d ed. 2018) ("if Rule A is stated to be *notwithstanding* Rule B, then where Rules A and B conflict, Rule A is to be given paramountcy and hence will govern. In such a case, Rule A is introduced with *Notwithstanding Rule B*") (emphasis in original).

79 See *Rosedale Farms Limited, Hassett Holdings Inc., Resurgam Resources (Re)*, 2017 NSSC 160 (N.S. S.C.), ¶ 35 ("the opening words of s. 227(4.1) ... expressly override s. 50.6 of the *Bankruptcy and Insolvency Act*, the authority for ordering ... [debtor in possession] financing and security for priority. To hold that the court can grant priority to ... [debtor in possession financing] security over the s. 227(4.1) deemed trust is to ignore these words"). *Cf. Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), ¶ 34; [2010] 3 S.C.R. 379 (S.C.C.), 402 ("The amended text of s. 227(4.1) of the ... [*Income Tax Act*] and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the ... [*Bankruptcy and Insolvency Act*]. The ... [*Excise Tax Act*] deemed trust at issue in this case is similarly worded, but it excepts the ... [*Bankruptcy and Insolvency Act*] in its entirety").

80 P. Salembier, Legal and Legislative Drafting 385 (2d ed. 2018).

81 See P. Salembier, Legal and Legislative Drafting 387 (2d ed. 2018) ("When readers (or the courts) are confronted with two conflicting statutory provisions, each of which states that it is to operate *Notwithstanding any other Act of Parliament*, which one governs?").

82 A priming charge is an interest in property that secures payment of an obligation. R.S.C. 1985 (5th Supp.), c.1, s. 224 (1.3) ("*security interest* means any interest in ... property that secures payment or performance of an obligation and includes an interest ... created by or arising out of a ... charge ... of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for").

83 This is so even though the statutory trust applies to unidentifiable property and not specific assets that can be separated from the debtor's estate. See *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 37(2) & *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), 449 ("Thus while s. 227(5) [a deemed trust provision] can be seen as a provision enacted to solve the conceptual dilemma precipitated by an intermingling of unremitted payroll deductions with a tax debtor's general assets, it is a legal vehicle not without its own conceptual limitations").

84 R.S.C. 1985, c. C-8.

85 S.C. 1996, c. 23.

86 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 11 ("Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances").

87 R.S.C. 1985, c. C-8.

88 S.C. 1996, c. 23.

89 R.S.C. 1985, c. W-11.

90 *Contra*, *Kerr Interior Systems Ltd., Re*, 2009 ABCA 240 (Alta. C.A.), ¶ 7; (2009), 457 A.R. 274 (Alta. C.A.), 279 (per incuriam) & *Temple City Housing Inc., Re*, 2007 ABQB 786 (Alta. Q.B.), ¶¶ 13 & 14; (2007), 42 C.B.R. (5th) 274 (Alta. Q.B.), 278-79.

91 See also *Rosedale Farms Limited, Hassett Holdings Inc., Resurgam Resources (Re)*, 2017 NSSC 160 (N.S. S.C.), ¶ 34 ("The correct contextual interpretation is that the inclusion of the [*Income Tax Act*] definition is to give the deemed trust for unremitted withholdings priority over all security interests including other federal and provincial statutory deemed trusts").

92 See also *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 6(4) (the Court may not sanction a compromise or arrangement if post initial order the company fails to remit employment income withholding on post initial order employment income) & 11.09(2)(a) & (b) (if a company defaults on its post initial order withholding and remittance obligations, the Crown may take collection measures in spite of the stay of proceedings).

93 *Edmonton (City) v. Alvarez & Marsal Canada Inc*, 2019 ABCA 109 (Alta. C.A.), ¶ 17 ("without security for their fees and disbursements ... [receivers] would be understandably concerned about taking on receiverships").

94 *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), ¶¶ 15 & 18; [2010] 3 S.C.R. 379 (S.C.C.), 394 & 395 ("the purpose of the ... [*Companies' Creditors Arrangement Act*] ... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. ... 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"). See also *Alternative granite & marbre inc., Re*, 2009 SCC 49 (S.C.C.), ¶12; [2009] 3 S.C.R. 286 (S.C.C.), 296 ("In 1992 ... Parliament ... made extensive changes to the ... [*Bankruptcy and Insolvency Act*] .... Some of these changes related to the Crown's priority in bankruptcy situations. The federal government seemed at the time to want to respond to criticisms that the system establishing the priority of the Crown's claims often left nothing for a bankrupt's ordinary creditors").

95 See *Vacher & Sons v. London Society of Compositors* (1912), [1913] A.C. 107 (U.K. H.L.), 121-22 per Lord Atkinson ("your Lordships' House sitting judicially is not concerned with the question whether the policy it embodies is wise or unwise, or whether it leads to consequences just or unjust, beneficial or mischievous") & *Callidus Capital Corp. v. Canada*, 2018 SCC 47 (S.C.C.), ¶ 1 (the Court adopted Justice Pelletier's reasons) & 2017 FCA 162 (F.C.A.), ¶ 64; (2017), 414 D.L.R. (4th) 132 (F.C.A.), 160 per Pelletier, J.A. ("Had Parliament meant to make the subsection (3) trust a function of the continued existence of unremitted amounts, it could have said so easily enough").

96 S.C. 1998, c. 19, s. 226.

97 See *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252 (F.C.A.), ¶ 51; (2017), 417 D.L.R. (4th) 173 (F.C.A.), 189 per Stratas, J.A. ("in certain circumstances and with appropriate caution — [a court may consider] extraneous, contemporaneous materials (e.g., regulatory impact or official explanatory statements), legislative debates, and legislative history").

98 [1997] 1 S.C.R. 411 (S.C.C.).

99 Id. 424.

100 Id. 427.

101 Id. 485.

102 Id.

103 R.S.C. 1985, c. E-15.

104 Department of Finance, "Unremitted Source Deductions and Unpaid GST" (Ottawa, April 7, 1997, 1997-030).

105 Id.

106 S.C. 1998, c. 19.

107 S.C. 1998, c. 19, s. 226(4).

108 2002 SCC 49 (S.C.C.), ¶¶ 28 & 29; [2002] 2 S.C.R. 720 (S.C.C.), 732-33. *First Vancouver Finance v. Minister of National Revenue*, as the Supreme Court expressly acknowledged, does not apply to "the question of the priority of secured creditors". Id at ¶ 39; [2002] 2 S.C.R. at 737. First Vancouver Finance was not a secured creditor of Great West Transport Ltd. It was a third party purchaser of book debts. Id.

109 *Supra* note 68.

110 *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), ¶ 18; [2010] 3 S.C.R. 379 (S.C.C.), 395.

111 *Supra* note 70.

112 See O. Jones, Bennion on Statutory Interpretation 433 (6th ed. 2013) ("If the court thinks that what it considers to be absurd was really and truly contemplated by Parliament, and was deliberately intended, then the court must defer to that").

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Tab 7

2012 ONSC 2899
Ontario Superior Court of Justice [Commercial List]

Milan, Re

2012 CarswellOnt 6906, 2012 ONSC 2899, 218 A.C.W.S. (3d) 14, 92 C.B.R. (5th) 262

In the Matter of the Proposal of Arnold Milan, of the City of Vaughan, in the Regional Municipality of York, in the Province of Ontario

L.A. Pattillo J.

Heard: May 15, 2012
Judgment: June 5, 2012
Docket: 31-1580085

Counsel: A. Kauffman for BDO Canada Limited, Proposal Trustee
Harry Fogul for Arnold Milan
G. Benchetrit for Deposit Insurance Corporation of Ontario in its capacity as Liquidator for Croatian (Toronto) Credit Union Limited
Fred Tayar for B. Pfeiffer
Barbara Frederiksa for Bank of Nova Scotia
Jeffrey Spiegelman for 784753 Ontario Ltd., Paulo Holdings, Rogi Holdings and Bany Goldlist
B. Salsberg for 1245094 Ontario Inc.

Subject: Insolvency; Estates and Trusts; Torts
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.1 General principles
Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.a General principles
Headnote
Bankruptcy and insolvency --- Proposal — Approval by court — General principles
September 2008 financial statement showed total assets for debtor of over $67 million and net worth of approximately $55 million — In January 2012, debtor filed proposal under Bankruptcy and Insolvency Act (BIA) — In statement of affairs debtor swore that he had incurred debts of over $21 million and that his net assets were approximately $50,000 — Debtor did not provide any books, records or relevant documents to trustee — Proposal provided for payment of 15 cents on dollar to unsecured creditors — Proposal also provided that Fraudulent Conveyances Act and Assignments and Preferences Act as well as preference provisions of BIA would not apply if proposal were accepted — Debtor brought motion for approval of proposal — Motion dismissed — In absence of production by debtor of books, records and relevant documentation to enable trustee to do independent review of his affairs there was no basis for court or creditors to determine that amount being offered as settlement was reasonable — It was possible that improper preferences and/or transfers of property formed significant part of debtor's recoverable assets and creditors might be giving up significant rights to such recovery — Integrity of bankruptcy proposal process requires full and complete disclosure to enable creditors and court to determine whether proposal is reasonable and in best interests of all parties — Debtor was attempting to use proposal process

to compromise all claims against him including claims for fraud and breach of trust without properly accounting for his assets.

Bankruptcy and insolvency --- Proposal — General principles

Integrity of bankruptcy proposal process requires full and complete disclosure of books, records and other relevant financial documentation to enable creditors and court to determine whether proposal is reasonable and in best interests of all parties.

Table of Authorities

Cases considered by *L.A. Pattillo J.*:

Mernick, Re (1994), 24 C.B.R. (3d) 8, 1994 CarswellOnt 257 (Ont. Gen. Div. [Commercial List]) — referred to

Mister C's Ltd., Re (1995), 1995 CarswellOnt 372, 32 C.B.R. (3d) 242 (Ont. Bktcy.) — followed

Statutes considered:

Assignments and Preferences Act, R.S.O. 1990, c. A.33

Generally — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 38 — considered

s. 50 — considered

s. 50(10)(b) — considered

s. 58 — pursuant to

s. 58(b) — considered

s. 59(2) — considered

s. 59(3) — considered

ss. 95-101 — referred to

s. 173 — considered

s. 187(9) — considered

ss. 198-200 — referred to

Fraudulent Conveyances Act, R.S.O. 1990, c. F.29

Generally — referred to

MOTION by debtor for approval of proposal under *Bankruptcy and Insolvency Act*.

***L.A. Pattillo J.*:**

1 This is a motion by Arnold Milan ("Milan") pursuant to s. 58 of the *Bankruptcy and Insolvency Act*, R S. C. 1985, c. B-3, as amended (the "Act") for the approval of a proposal made by him under the Act.

Background

2 On October 5, 2011, the Crotian (Toronto) Credit Union Limited ("CCU"), by its liquidator, the Deposit Insurance Corporation of Ontario ("DICO") commenced an application for a bankruptcy order against Milan. Milan disputed the application and a hearing date was set for January 25, 2012.

3 On January 12, 2012, Milan filed a proposal under the Act dated January 11, 2012 naming BDO Canada Limited as Trustee (the "Proposal"). The Proposal provides, among other things, that Milan will pay to the Trustee sufficient monies to pay 15 cents on the dollar to unsecured creditors who have filed valid proofs of claim. The monies will be provided by a third party and are to be paid as follows: $1 million 60 days after approval of the Proposal by the court; $1 million every 6 months after the initial payment for a period of 18 months; 24 months after the initial payment, an amount sufficient to pay all proven claims 15 cents on the dollar taking into account all previous payments; and a subsequent payment or payments to pay 15 cents on the dollar to any claims finalized as proven claims after the 24 month period within 60 days of being finalized.

4 The Proposal provides in paragraph nine that the provisions of s. 38 and ss. 95 to 101 of the Act and the provisions of the *Fraudulent Conveyances Act* and the *Assignments and Preferences Act* shall not apply if the Proposal is accepted.

5 The Proposal was approved at a meeting of creditors on January 23, 2012 by 19 of 20 creditors eligible to vote representing 90.5% by value.

6 The Trustee has filed its First Report dated March 2, 2012 setting out the background leading up to the Proposal and its recommendations concerning it. The Trustee notes that it met with Milan and his counsel prior to the Proposal being finalized and obtained information concerning his affairs but was not provided with any records relating to such matters including bank account records, lists of payments to creditors and documents relating to his involvement in many companies. Milan advised the Trustee that some documents were lost in a number of physical moves and he has been denied access to others.

7 As a result of not receiving any documentation, the Trustee was unable to express an opinion as to the reasonableness of the exclusions contained in paragraph nine of the Proposal relating to any preferential payments or the improper transfer of assets.

8 Notwithstanding various reservations including the lack of any documentation to enable an independent review of Milan's affairs, the Trustee concluded having regard primarily to the expense and challenge of unraveling the "complex web" of Milan's affairs in a bankruptcy compared with the potential payment of a substantial amount of money over a reasonably short period of time that the terms of the Proposal were more beneficial to the creditors than a bankruptcy.

9 In reaching its recommendation, the Trustee noted that it had received "some comfort" from Milan with respect to the source and financial ability of the third party funder.

10 The approval motion is supported by William Pfeiffer who is the largest creditor by far. Mr. Pfeiffer, who resides in Florida, acquired his claim of $15,238,798 against Milan (approximately 80% of the total unsecured claims accepted for voting) for $375,000.

11 The approval motion is opposed by the DICO in its capacity as Liquidator for CCU which obtained a judgment against Milan on May 19, 2011 for $1,654,228.64 plus interest and costs of $67,207. DICO is also the Liquidator for the Portuguese Canadian Credit Union which has a pending action against Milan and others for fraud.

12 It is also opposed by the Bank of Nova Scotia which obtained a judgment against Milan on September 15, 2011 in the amounts of approximately $772,732 (plus interest) and US $124,515 (plus interest) and by 784753 Ontario Ltd., Paulo Holdings, Rogi Holdings and Barry Goldlist and 1245094 Ontario Inc.

13 The principal grounds of opposition by the opposing creditors are that the Proposal is an abuse of the Act and does not meet the minimum mandatory requirements of the Act.

Preliminary Matter

14 When DICO's original application came before the court on January 25, 2012, because the Proposal had been filed and approved by creditors, a timetable was set for the filing of material in support of the approval motion including the Trustee's Report. On March 6, 2012, the approval motion was set for May 15, 2012.

15 As a result of the way in which the approval motion came about, the Proposal Trustee inadvertently failed to serve notice of the date for the approval motion on all creditors with proven claims as required by s. 58(b) of the Act. Although there are a number of creditors who are represented by counsel and who participated in the court scheduling process, there are a number who did not. When the error was discovered, the Trustee sent notice of the May 15th date by email or fax on May 14, 2012.

16 At the outset of the approval motion, the Trustee requested an order, pursuant to s. 187(9) of the Act validating the late service. That section provides that no proceeding in bankruptcy shall be invalidated by any formal defect or irregularity unless the court is of the opinion that "substantial injustice" has been caused by the defect or irregularity which cannot be remedied by any order of the court. The Trustee submitted that in the circumstances, no substantial injustice had been caused by the late notice.

17 The creditors who received the late notice of the approval motion all voted in favour of the Proposal at the creditors' meeting. All except one were subsequently examined by counsel for DICO in respect of the approval motion pursuant to an order of the court. It is fair to say those creditors were aware the approval motion was going to take place but not the date. The creditors at the approval motion who are represented by counsel represent the great majority of creditors dollar wise. While that does not excuse the late notice, it reduces the prejudice in my view to those who received the late notice as the positions both for and against approval of the Proposal were well represented on the motion. Any issue that may have been raised by them, whether for or against approval, was amply covered by counsel. Finally, none of the parties appearing before me raised any concern with the Trustee's request or took any issue with it.

18 As a result, it was my view that the defect in service was not such that the approval motion should be delayed. In the circumstances, I was of the opinion that the late notice did not cause a substantial injustice to the creditors who received it. Accordingly, I indicted I would issue an order pursuant to s. 187(9) of the Act validating the late service of the approval motion on the individuals identified by the Trustee.

Background

19 Milan is described by the Trustee in its Report as "a businessman who had investments in a complex web of businesses, including businesses involved in gaming in the United States." Milan is identified as the chair and CEO of the Milan Group on its website which is still active. The Milan Group is described as focusing on three strategic business sectors: financial and technology; commodities & development; and gaming, sports and entertainment. Milan is described as: "a self-built entrepreneur and dynamic leader with an unparalleled reputation and track record of success. He is considered a foremost expert on merchant banking, electronic transactions and electronic cash management. A well versed financier and broker in both national and international business projects and currently doing business through over thirty companies in North America, Central America, Europe, Africa and Asia."

20 A Statement of Personal Net Worth prepared by Milan's accountant as of September 2008 showed total assets valued at over $67 million and net worth valued at approximately $55 million.

21 In his Statement of Affairs dated January 11, 2012, Milan swore under oath that he had incurred debts totaling over $21 million and that his net assets were approximately $50,000. He valued at $1.00 "shares in various private companies which are either dormant, insolvent or not operating." The Trustee has provided a list of 48 corporations which are intended to be the "various private companies" referred to in the Statement of Affairs.

22 The Trustee states in its Report that it was not provided with any records relating to the affairs of Milan such as bank account records or lists of payments. It was further advised by Milan and his counsel that the businesses which Milan was involved in were insolvent and he did not have access to the books and records of the businesses.

23 The proofs of claim filed with the Trustee indicate that various parties were issued promissory notes by Milan at a time when he was insolvent, including several parties who were issued notes within 12 months prior to the "initial bankruptcy event" pertaining to Milan and some who were issued promissory notes after DICO's bankruptcy application.

24 Prior to the return of the approval motion, all that had been disclosed by Milan to the creditors about the source of the approximately $8 million required to enable him to meet the Proposal were two letters from an alleged bank in Mexico with the name of the bank redacted. The first letter dated January 18, 2012 indicated that the bank was loaning the money to Milan and the second dated January 31, 2012, after the approval meeting, indicated that the money was being provided by a "bank client" from the proceeds of a "lawsuit settlement". When asked about the source of funds on his examination under oath, Milan refused to provide the name of the financial institution or information as to the source of the funds other than to say that they were coming from a lawsuit.

25 In a supplementary affidavit sworn by Milan on May 14, 2012, and presented at the approval motion, Milan attached the two bank letters, unredacted. In the affidavit, Milan provided the name of the individual who will be supplying the money, stated he has known him for over 10 years and provided some information concerning the litigation and the settlement.

The Test for Approval of a Proposal

26 The test for approval of a proposal is set out in s. 59(2) of the Act. If the court is of the opinion the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse approval. The court may refuse to approve when it is established that the debtor has committed any of the offences mentioned in ss. 198 to 200 of the Act.

27 In *Mister C's Ltd., Re*, [1995] O.J. No. 1390 (Ont. Bktcy.) at para. 5, MacPherson J. (as he then was) set out the three interests that the court should take into account in approving a proposal: the interests of the debtor in making settlement with creditors; the interests of the creditors in procuring a settlement which is reasonable and which does not prejudice their rights; and the interests of the public in the fashioning of a settlement which preserves the integrity of the bankruptcy process and complies with the requirements of commercial morality. See too: *Mernick, Re* (1994), 24 C.B.R. (3d) 8 (Ont. Gen. Div. [Commercial List]).

28 At first blush, the payment of 15 cents on the dollar may appear reasonable to creditors and in their best interests, particularly given Milan's listed assets at the time of the Proposal. In my view, however, in the absence of the production by Milan of any books and records and other relevant documentation to enable the Trustee to do an independent review of his affairs, there is no basis to permit the court or the creditors to determine that the amount being offered as a settlement is reasonable.

29 This is particularly so in the circumstances of this matter given the substantial nature of Milan's assets as at September 2008 including his interest in many businesses and companies around the world when compared with his stated assets at the time of the Proposal.

30 I am also of the view that the Proposal is not reasonable because of the proposed exclusion in paragraph nine of the application of s. 38 and ss. 95 to 101 of the Act and the provisions of the *Fraudulent Conveyances Act* and the *Assignments and Preferences Act* is not reasonable.

31 Section 50(10)(b) of the Act requires the Proposal Trustee to provide its opinion as to the reasonableness of the exclusion of ss. 95 to 101 in a proposal. Milan advised the Trustee that the exclusion was not done to cover any specific transaction but to avoid continued litigation and legal costs. In its Report, the Trustee states at paragraph 38:

> As indicated in this report, the Trustee has not been provided with any records relating to the affairs of the Proponent such as bank account records or lists of payments to creditors. Consequently, the Trustee has been unable to independently review or consider payments made by the Proponent or transfers of assets made by the Proponent in the relevant time periods. Accordingly, the Trustee is unable to express an opinion as to the reasonableness of the exclusions contained in paragraph nine of the Proposal.

32 The requirement in s. 50(10)(b) of the Act that the Trustee give its opinion as to the reasonableness of the exclusions of the claims recognized in ss. 95 to 101 of the Act emphasizes the importance of ensuring such exclusion is reasonable. In my view, the absence of such an opinion in circumstances such as here where Milan has provided no records or independent means of verification by itself results in exclusion provision in paragraph nine of the Proposal being unreasonable. Improper preferences and/or transfers of property may form a significant part of Milan's recoverable assets. The creditors may be giving up significant rights to such recovery which they are unaware of. In the absence of any independent information from Milan to enable the Trustee to conclude that the exclusion of such rights is reasonable and does not prejudice creditors' rights, I am unable to conclude that paragraph nine of the Proposal is reasonable.

33 The opposing creditors further submit, having regard to the evidence in this case, that s. 59(3) of the Act requiring security for the payment applies and the court must refuse approval of the Proposal because Milan has failed to provide any security in the Proposal. In response, Milan submits that sufficient security has been provided and, in the alternative, if the court determines that is not the case, requests that the amount of the security required by s. 59(3) be reduced to match the security provided.

34 Section 59(3) of the Act provides that the court shall refuse to approve the proposal where any of the facts mentioned in s. 173 are proved against the debtor unless it provides reasonable security for the payment of not less that 50 cents on the dollar on all the unsecured claims or such other percentage as the court may direct.

35 Based on the evidence, I find the following facts mentioned under s. 173 of the Act have been proved:

> a) Milan's assets are not equal to a value of fifty cents on the dollar on the amount of his unsecured liabilities and Milan has not established that he should not be held responsible for such failure;
>
> b) Milan has either omitted to keep proper books of account for his projects and businesses or has chosen not to provide them to the Trustee as required by s. 50 of the Act;
>
> c) Milan continued to incur liabilities when he was insolvent. Milan through his lawyer indicated to the Trustee that he was insolvent dating back to the 2008/2009 period. Subsequent to that period, Milan issued personal promissory notes which have not been repaid; and
>
> d) Milan has failed to account satisfactorily for the loss of his assets or for any deficiency of assets to meet his liabilities.

36 As a result, s. 59(3) of the Act applies and Milan is required to provide security for the payments under the Proposal of not less than 50 cents on the dollar on all unsecured claims, unless the court orders otherwise.

37 The Proposal itself does not provide for any security for the proposed payments. When the opposing creditors raised the issue of lack of security, Milan responded by stating in his supplementary affidavit sworn May 14, 2012, that the person who is putting up the money has agreed to make a loan advance of US $4 million within 60 days

of court approval of the Proposal. It is submitted on Milan's behalf that because the proposed payment is 50% of the total of the estimated $8 million to be paid under the Proposal, sufficient security has been provided.

38 In my view, the $4 million amount offered does not amount to the security required by s. 59(3) of the Act. The Proposal calls for an initial payment of $1 million 60 days from approval. As a result, assuming payment of the $4 million as indicated, the security which will be in place (after the first $1 million payment) to secure the remaining payments of $7 million is really $3 million which is less than 50% of the remaining monies to be paid.

39 In the absence of the security being sufficient, Milan requests that I exercise the discretion provided for in s. 59(3) and reduce the amount of security required to accommodate the monies to be paid on Milan's behalf. In the circumstances, I am not prepared to do that. I say this for a number of reasons. First is my general concern arising from Milan's failure to produce any books and records relating to his affairs. I am unable to accept that Milan has no records or access to records in respect of his personal affairs and of his many and varied businesses. I am also concerned with the secrecy surrounding the details of where the monies are coming from to fund the Proposal. The initial information that was provided is both contradictory and lacking in detail. It was only at the argument that the name of the bank and the third party were provided. While the Trustee may have received "some comfort" concerning the source of the funds and the financial ability of the funder, I have not. At the very least, I would have expected information about the agreement between the third party and Milan concerning the provision of the funds. Finally, the proposal for "security" has only come forward at the last minute and suffers, in my view, from the same concerns as the funding proposal itself.

40 The integrity of the bankruptcy proposal process requires full and complete disclosure by the proponent to enable the creditors and the court to determine whether the proposal is reasonable and in the best interests of all interested parties. That has not happened here. Milan has failed to provide any books and records to enable the Trustee to confirm his statements to the Trustee about his affairs or the reasonableness of the Proposal. He has also been very guarded about the source of the money to enable him to fund the Proposal and how he is able to obtain such money.

41 In my view, by proceeding as he has, Milan is attempting to use the proposal process to compromise all claims against him, including claims for fraud and breach of trust, without properly accounting for his assets and any transactions that may constitute a preference or an improper transfer of property. Given the substantial nature of his assets as at September 2008 including his interest in many companies, his Statement of Affairs raises many questions as to what happened and what, if anything remains. It is important for the creditors and the bankruptcy process generally that a proper review of Milan's assets take place. The circumstances of this case cry out for such a review.

42 For the above reasons, therefore, it is my view that the terms of the Proposal are not reasonable having regard to both the interests of the creditors and the interests of the public in maintaining the integrity of the bankruptcy proposal process. I am also of the view that Milan has not provided reasonable security for the proposed payments under the Proposal as required pursuant to s. 59(3) of the Act.

43 As a result, Milan's approval motion is dismissed.

Motion dismissed.

End of Document

Tab 8

Court File No.: CV-18-608313-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF FORME DEVELOPMENT GROUP INC. AND THE OTHER COMPANIES LISTED ON SCHEDULE "A" HERETO

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

Sean Zweig / Aiden Nelms for Moving Party (KSV as Monitor)
D.J. Miller / Alex Soutter for Moving Party (Ferina)
Adam Slavens for Tarion Warranty Corporation
Dom Michaud for –various mortgagees in claims process
Chris Besant for Non-Applicant companies
Bobby Sachdeva / Stephanie DiCarie for Grant Thornton, Trustee in Bankruptcy
Jeffrey Larry for First Source Mortgage
George Benchetrit for Home Trust Company
John N. Birch for Cassels Brock
Mario Forte for CCAA entities

ENDORSEMENT OF MR. JUSTICE HAINEY
DATED FEBRUARY 20, 2020

1. The Monitor brings a motion for relief to be reviewed below. The motion is supported by all stakeholders represented by counsel recorded on the Counsel Slip except the Non Applicant companies represented by Mr. Besant who opposes the motion.

2. At the outset of the motion the Monitor's counsel, at my direction, suggested to Mr. Besant that the order could be granted without prejudice to his client's position. Mr. Besant declined to proceed in this fashion and insisted that the motion proceed.

3. Despite Mr. Besant's submissions, I granted the order for the following reasons:

   (i) The Kennedy approval and vesting order and the distribution order were not opposed and I am satisfied the sale and proposed distribution are in the best interest of the stakeholders;

(ii) The ancillary order is appropriate and the time for service of the motion record is abridged. No one is prejudiced by this order as the motion record was served 8 days before the motion was heard.

(iii) I am satisfied that the stay period should be extended to May 31, 2020. The *Applicants have acted in good faith and circumstances exist that make the order appropriate because it will permit the Monitor to maximize stakeholder recovery for the reasons set out at paragraph 53 of the Monitor's Factum.

(iv) The confidential appendices of the Monitor's Twelfth Report contain sensitive commercial information that should be sealed in accordance with the test in *Sierra Club*. That aspect of the Order is not opposed.

(v) The undertaking dated March 11, 2019 should be amended by order of the Court to substitute Bennett Jones LLP, the Monitor's legal counsel, to hold the surplus funds currently held in Cassels Brock & Blackwell LLP's ("**CBB**") trust account and any further realizations from the Non-Applicants unsold real property. CBB is therefore ordered to transfer these funds to Bennett Jones LLP forthwith on the terms set out in the order.

(vi) I am satisfied that I should make an order pursuant to section 181(1) of the BIA annulling the assignments into bankruptcy made on January 28, 2020 by the Non-Applicant companies without any notice to the Monitor for the following two reasons;

(a) the Non-Applicant companies were not demonstrably insolvent persons. Each company has sold its real property generating sufficient proceeds to repay its mortgage debt in full and to fund the surplus funds currently held in CBB's trust account in the amount of approximately $11 million. The only evidence before the Court is that the value of the Non-Applicant's assets exceeds their liabilities. This is not a "clear cut situation" of insolvency that is "clearly established by sound and convincing evidence"; and

(b) in my view the assignments into bankruptcy are all entirely duplicative and serve no valid purpose. The Non-Applicant's creditor relationships are already being managed in these CCAA proceedings and the Court supervised claims process, all of which was consented to by Mr. Wang, the controlling mind of the Non-Applicants. If these assignments are not annulled, they will stay the Court approved claims process at the expense of creditors and the Court and will not accomplish anything already achieved by these unique and heavily negotiated CCAA proceedings. The claims process is one of several integral "building blocks" in the CCAA proceedings and, in my view, must be respected. The assignments must not be permitted to undermine this important building block [see Chief Justice Morawetz's Reasons at paragraph 81 in *Target Canada Co.*, 2015 ONSC 303].

(vii) I am satisfied that this CCAA claims process should continue and that proven Wang claims will be admitted as proven claims in the proceedings related to the Wang NOI.

(viii) Finally, without further order of the Court the surplus funds to be transferred from CBB to the Monitor's counsel shall not be used to pay any parties' legal fees.

(ix) In my view, this is an appropriate case to make an order as to costs. I have requested counsel provide me with short written cost submissions.

(x) I thank all counsel for their helpful submissions.

- References to "Applicants" acting in good faith in this context refers to the Monitor, as it is a super-Monitor in these CCAA proceedings.

Hainey, J.
February 20, 2020

Tab 9

2015 ONSC 124
Ontario Superior Court of Justice [Commercial List]

4519922 Canada Inc., Re

2015 CarswellOnt 178, 2015 ONSC 124, 22 C.B.R. (6th) 44, 249 A.C.W.S. (3d) 508

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

In the Matter of a Plan of Compromise or Arrangement of 4519922 Canada Inc.

Newbould J.

Heard: December 8, 2014; January 6, 2015
Judgment: January 12, 2015
Docket: CV-1410791-00CL

Counsel: Robert I. Thornton, John T. Porter, Lee M. Nicholson, Asim Iqbal for Applicant
Harry M. Fogul for 22, former CLCA partners
Orestes Pasparakis, Evan Cobb for Insurers
Avram Fishman, Mark Meland for German and Canadian Bank Groups, Widdrington Estate and Trustee of Castor Holdings Limited
James H. Grout for 22, former CLCA partners
Chris Reed for 8, former CLCA partners
Andrew Kent for 5, former CLCA partners
Richard B. Jones for one, former CLCA partne
John MacDonald for Pricewaterhouse Coopers LLP
James A. Woods, Sylvain Vauclair, Bogdan Catanu, Neil Peden for Chrysler Canada Inc. and CIBC Mellon Trust Company
Jay A. Swartz for proposed Monitor Ernst & Young Inc.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.vii Extension of order
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.viii Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.h Miscellaneous

2015 ONSC 124, 2015 CarswellOnt 178, 22 C.B.R. (6th) 44, 249 A.C.W.S. (3d) 508

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Extension of order

Applicant was corporation and was partner in accounting firm — In 1993, 96 plaintiffs commenced negligence actions against accounting firm and 311 of its individual partners claiming approximately $1 billion in damages — Test case in this litigation resulted in judgment of $4,978,897.51, and leave to appeal this judgment was dismissed by Supreme Court of Canada in January 2014 — Applicant engaged in negotiations with remaining plaintiffs in negligence actions — These negotiations culminated with execution of term sheet outlining plan of arrangement under Companies' Creditors Arrangement Act (CCAA) that could achieve global resolution to outstanding litigation — In December 2014, applicant obtained initial order granting it and accounting firm protection under CCAA — C Inc., which had very large claim against accounting firm, had not been given notice of CCAA application — C Inc. brought motion to set aside initial order and to dismiss CCAA application — Motion dismissed — CCAA proceeding would permit applicant and its stakeholders means of attempting to arrive at global settlement of all claims — There was no issue as to good faith of applicant in CCAA proceeding — Initial order should not be set aside and CCAA application dismissed on basis of defence tactics in test case — Term sheet was supported by overwhelming number of creditors — C Inc. was seeking to impose its will on all other creditors by attempting to prevent them from voting on proposed plan — Court's primary concern under CCAA had to be for debtor and all of its creditors — There was no prejudice to C Inc. given that its contingent claim was not scheduled to be tried until 2017 at earliest — Issues raised by C Inc. with respect to term sheet were premature and could be dealt with later in proceedings as required.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous

Creditors' committee — Applicant was corporation and was partner in accounting firm — In 1993, 96 plaintiffs commenced negligence actions against accounting firm and 311 of its individual partners claiming approximately $1 billion in damages — Test case in this litigation resulted in judgment of $4,978,897.51, and leave to appeal this judgment was dismissed by Supreme Court of Canada in January 2014 — Applicant engaged in negotiations with remaining plaintiffs in negligence actions — These negotiations culminated with execution of term sheet outlining plan of arrangement under Companies' Creditors Arrangement Act (CCAA) that could achieve global resolution to outstanding litigation — In December 2014, applicant obtained initial order granting it and accounting firm protection under CCAA — Initial order provided for creditors' committee (committee), and it also provided that accounting firm should be entitled to pay reasonable fees and disbursements of legal counsel to committee — C Inc., which had very large claim against accounting firm, had not been given notice of CCAA application — C Inc. brought motion to vary initial order to delete appointment of committee and provision for payment of committee's legal fees and expenses — Motion dismissed — Committee was result of intensely negotiated term sheet that formed foundation of plan — Altering term sheet removing committee could frustrate applicant's ability to develop viable plan and could jeopardize existing support from majority of claimants — Other creditors had no objection if C Inc. wanted to join committee — C Inc.'s complaints about claim process proposed in term sheet was not reason to deny existence of committee, but rather would be matter for discussion when claims process came before court for approval — Costs of paying committee in relation to amounts at stake would be relatively minimal.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Miscellaneous

Extending stay to include insurers of insolvent accounting firm.

Table of Authorities

Cases considered by *Newbould J.*:

Alberta Treasury Branches v. Tallgrass Energy Corp (2013), 8 C.B.R. (6th) 161, 2013 ABQB 432, 2013 CarswellAlta 1496 (Alta. Q.B.) — considered

Alexis Paragon Limited Partnership, Re (2014), 2014 ABQB 65, 2014 CarswellAlta 165, 9 C.B.R. (6th) 43 (Alta. Q.B.) — considered

Calpine Canada Energy Ltd., Re (2006), 19 C.B.R. (5th) 187, 2006 ABQB 153, 2006 CarswellAlta 446 (Alta. Q.B.) — followed

Calpine Canada Energy Ltd., Re (2007), 35 C.B.R. (5th) 27, 410 W.A.C. 25, 417 A.R. 25, 2007 ABCA 266, 2007 CarswellAlta 1097, 80 Alta. L.R. (4th) 60, 33 B.L.R. (4th) 94 (Alta. C.A. [In Chambers]) — referred to
Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115, 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) — followed
Crystallex International Corp., Re (2011), 2011 ONSC 7701, 2011 CarswellOnt 15034, 89 C.B.R. (5th) 313 (Ont. S.C.J. [Commercial List]) — considered
First Leaside Wealth Management Inc., Re (2012), 2012 CarswellOnt 2559, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) — referred to
Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, *(*sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — considered
Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — followed
Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re (2013), 2013 CarswellQue 8420, 2013 QCCS 3777 (Que. Bktcy.) — considered
Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — considered
Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 57, 2006 CarswellOnt 720 (Ont. S.C.J. [Commercial List]) — considered
Priszm Income Fund, Re (2011), 2011 ONSC 2061, 2011 CarswellOnt 2258, 75 C.B.R. (5th) 213 (Ont. S.C.J.) — referred to
Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, [2004] O.T.C. 284, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — considered
Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 2 "insolvent person" — considered
Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 2(1) "debtor company" (a) — considered

s. 3(1) — considered

s. 11 — considered
Partnerships Act, R.S.O. 1990, c. P.5
Generally — referred to

MOTION by creditor of insolvent accounting firm to set aside or vary initial order issued under *Companies' Creditors Arrangement Act*; MOTION by partner of accounting firm to extend stay contained in initial order to include insurers of accounting firm.

***Newboald J.*:**

1 On December 8, 2014 the applicant 4519922 Canada Inc. ("451"), applied for an Initial Order granting it protection under the *Companies' Creditors Arrangement Act* ("CCAA"), extending the protection of the Initial Order to the partnership Coopers & Lybrand Chartered Accounts ("CLCA"), of which it is a partner and to CLCA's insurers, and to stay the outstanding litigation in the Quebec Superior Court relating to Castor Holdings Limited ("Castor") during the pendency of these proceedings. The relief was supported by the Canadian and German bank

groups who are plaintiffs in the Quebec litigation, by the Widdrington Estate that has a final judgment against CLCA, by the insurers of CLCA and by 22 former CLCA partners who appeared on the application.

2 The material in the application included a term sheet which the applicant wishes to use as a basis of a plan and which provides for an injection of approximately $220 million in return for a release from any further litigation. The term sheet was supported by all parties who appeared.

3 I granted the order with a stay to January 7, 2015 for reasons to follow, but in light of the fact that Chrysler Canada Inc., with a very large claim against CLCA in the litigation, had not been given notice of the application, ordered that Chrysler be given notice to make any submissions regarding the Initial Order if it wished to do so.

4 Chrysler has now moved to set aside the Initial Order, or in the alternative to vary it to delete the appointment of a creditors' committee and the provision for payment of the committee's legal fees and expenses. On the return of Chrysler's motion, a number of other former CLCA partners and PricewaterhouseCoopers appeared in support of the granting of the Initial Order.

Structure of Coopers & Lybrand Chartered Accounts

5 The applicant 451 is a corporation continued pursuant to the provisions of the *Canada Business Corporations Act*, and its registered head office is in Toronto, Ontario. It and 4519931 Canada Inc. ("4519931") are the only partners of CLCA.

6 CLCA is a partnership governed by the *Partnerships Act (Ontario*) with its registered head office located in Toronto, Ontario. It was originally established in 1980 under the name of "Coopers & Lybrand" and was engaged in the accountancy profession. On September 2, 1985, the name "Coopers & Lybrand" was changed to "Coopers & Lybrand Chartered Accountants" and the partnership continued in the accountancy profession operating under the new name. Until 1998, CLCA was a national firm of chartered accountants that provided audit and accounting services from offices located across Canada and was a member of a global network of professional firms.

7 In order to comply with the requirements of the various provincial Institutes of Chartered Accountants across Canada, many of which restricted chartered accountants providing audit services from being partners with persons who were not chartered accountants, Coopers & Lybrand Consulting Group ("CLCG") was established under the *Partnerships Act (Ontario)* in September 1985 to provide management consulting services. Concurrent with the formation of CLCG, Coopers & Lybrand ("OpCo") was established as a partnership of CLCA, CLCG and two other parties to develop and manage the CLCA audit and CLCG management consulting practices that had to remain separate. Until 1998, OpCo owned most of the operating assets of CLCA and CLCG. OpCo is governed by the Partnerships Act (Ontario) and its registered head office is in Toronto.

8 In 1998, the member firms of the global networks of each of Coopers & Lybrand and Price Waterhouse agreed upon a business combination of the two franchises. To effect the transaction in Canada, substantially all of CLCA's and CLCG's business assets were sold to PricewaterhouseCoopers LLP ("PwC"), which entity combined the operations of the Coopers & Lybrand entities and Price Waterhouse entities, and the partners of CLCA and CLCG at that time became partners of PwC. Subsequent to the closing of the PwC transaction, CLCA continued for the purpose of winding up its obligations and CLCA and CLCG retained their partnership interests in OpCo. By 2006, all individual CLCA partners had resigned and been replaced by two corporate partners to ensure CLCA's continued existence to deal with the continuing claims and obligations.

9 Since 1998, OpCo has administered the wind up of CLCA and CLCG's affairs, in addition to its own affairs, including satisfying outstanding legacy obligations, liquidating assets and administering CLCA's defence in the Castor litigation. In conjunction with OpCo, 451 and 4519931 have overseen the continued wind up of CLCA's affairs. The sole shareholders of 451 and 4519931 are two former CLCA partners. 451 and 4519931 have no assets or interests aside from their partnership interests in CLCA.

Castor Holdings litigation

10 Commencing in 1993, 96 plaintiffs commenced negligence actions against CLCA and 311 of its individual partners claiming approximately $1 billion in damages. The claims arose from financial statements prepared by Castor and audited by CLCA, as well as certain share valuation letters and certificates for "legal for life" opinions. The claims are for losses relating to investments in or loans made to Castor in the period 1988 to 1991. A critical issue in the Castor litigation was whether CLCA was negligent in doing its work during the period 1988-1991.

11 Fifty-six claims have either been settled or discontinued. Currently, with interest, the plaintiffs in the Castor litigation collectively claim in excess of $1.5 billion.

12 Due to the commonality of the negligence issues raised in the actions, it was decided that a single case, brought by Peter Widdrington claiming damages in the amount of $2,672,960, would proceed to trial and all other actions in the Castor litigation would be suspended pending the outcome of the Widdrington trial. All plaintiffs in the Castor litigation were given status in the Widdrington trial on the issues common to the various claims and the determination regarding common issues, including the issues of negligence and applicable law, was to be binding in all other cases.

13 The first trial in the Widdrington action commenced in September 1998, but ultimately was aborted in 2006 due to the presiding judge's illness and subsequent retirement. The new trial commenced in January 2008 before Madam Justice St. Pierre. A decision was rendered in April 2011 in which she held that Castor's audited consolidated financial statements for the period of 1988-1990 were materially misstated and misleading and that CLCA was negligent in performing its services as auditor to Castor during that period. She noted that that the overwhelming majority of CLCA's partners did not have any involvement with Castor or the auditing of the financial statements prepared by Castor.

14 The decision in the Widdrington action was appealed to the Quebec Court of Appeal which on the common issues largely upheld the lower court's judgment. The only common issue that was overturned was the nature of the defendant partners' liability. The Quebec Court of Appeal held that under Quebec law, the defendant partners were severally liable. As such, each individual defendant partner is potentially and contingently responsible for his or her several share of the damages suffered by each plaintiff in each action in the Castor litigation for the period that he or she was a partner in the years of the negligence.

15 On January 9, 2014, the defendants' application for leave to appeal the Widdrington decision to the Supreme Court of Canada was dismissed.

16 The Widdrington action has resulted in a judgment in the amount of $4,978,897.51, inclusive of interest, a cost award in the amount of $15,896,297.26 plus interest, a special fee cost award in the amount of $2.5 million plus interest, and a determination of the common issue that CLCA was negligent in performing its services as auditor to Castor during the relevant period.

17 There remain 26 separate actions representing 40 claims that have not yet been tried. Including interest, the remaining plaintiffs now claim more than $1.5 billion in damages. Issues of causation, reliance, contributory negligence and damages are involved in them.

18 The Castor Litigation has given rise to additional related litigation:

> (a) Castor's trustee in bankruptcy has challenged the transfer in 1998 of substantially all of the assets used in CLCA's business to PwC under the provisions of Quebec's bulk sales legislation. As part of the PwC transaction, CLCA, OpCo and CLCG agreed to indemnify PwC from any losses that it may suffer arising from any failure on the part of CLCA, OpCo or CLCG to comply with the requirements of any

bulk sales legislation applicable to the PwC transaction. In the event that PwC suffers any loss arising from the bulk sales action, it has the right to assert an indemnity claim against CLCA, OpCo and CLCG.

(b) Certain of the plaintiffs have brought an action against 51 insurers of CLCA. They seek a declaration that the policies issued by the insurers are subject to Quebec law. The action would determine whether the insurance coverage is costs-inclusive (i.e. defence costs and other expenses are counted towards the total insurance coverage) or costs-in-addition (i.e. amounts paid for the defence of claims do not erode the policy limits). The insurers assert that any insurance coverage is costs-inclusive and has been exhausted. If the insurers succeed, there will be no more insurance to cover claims. If the insurers do not succeed and the insurance policies are deemed to be costs-in-addition, the insurers may assert claims against CLCA for further premiums resulting from the more extensive coverage.

(c) The claim against the insurers was set to proceed to trial in mid-January 2015 for approximately six months. CLCA is participating in the litigation as a mis-en-cause and it has all the rights of a defendant to contest the action and is bound by the result. As a result of the stay in the Initial Order, the trial has been put off.

(d) There have been eight actions brought in the Quebec Superior Court challenging transactions undertaken by certain partners and parties related to them (typically a spouse) (the "Paulian Actions").

(e) There is a pending appeal to the Quebec Court of Appeal involving an order authorizing the examination after judgment in the Widdrington action of Mr. David W. Smith.

19 The next trial to proceed against CLCA and the individual partners will be in respect of claims made by three German banks. It is not expected to start until at the least the fall of 2015 and a final determination is unlikely until 2017 at the earliest, with any appeals taking longer. It is anticipated that the next trial after the three German banks trial will be in respect of Chrysler's claim. Mr. Woods, who acts for Chrysler, anticipates that it will not start until 2017 with a trial decision perhaps being given in 2019 or 2020, with any appeals taking longer. The remaining claims will not proceed until after the Chrysler trial.

20 The fees incurred by OpCo and CLCA in the defence of the Widdrington action are already in excess of $70 million. The total spent by all parties already amounts to at least $150 million. There is evidence before me of various judges in Quebec being critical of the way in which the defence of the Widdrington action has been conducted in a "scorched earth" manner.

Individual partner defendants

21 Of the original 311 defendant partners, twenty-seven are now deceased. Over one hundred and fifty are over sixty-five years of age, and sixty-five more will reach sixty-five years of age within five years. There is a dispute about the number of defendant partners who were partners of CLCA at the material time. CLCA believes that twenty-six were wrongly named in the Castor litigation (and most have now been removed), a further three were named in actions that were subsequently discontinued, some were partners for only a portion of the 1988-1991 period and some were named in certain actions but not others. Six of the defendant partners have already made assignments in bankruptcy.

Analysis

(i) Applicability of the CCAA

22 Section 3(1) of the CCAA provides that it applies to a debtor company where the total claims against the debtor company exceed $5 million. By virtue of section 2(1)(a), a debtor company includes a company that is insolvent. Chrysler contends that the applicant has not established that it is insolvent.

23 The insolvency of a debtor is assessed at the time of the filing of the CCAA application. While the CCAA does not define "insolvent", the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* is commonly referred to for guidance although the BIA definition is given an expanded meaning under the CCAA. See Holden, Morawetz & Sarra, *the 2013-2014 Annotated Bankruptcy and Insolvency Act* (Carswell) at N§12 and *Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]) (per Farley J.); leave to appeal to the C of A refused 2004 CarswellOnt 2936 (Ont. C.A.).

24 The BIA defines "insolvent person" as follows:

> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

25 The applicant submits that it is insolvent under all of these tests.

26 The applicant 451 is a debtor company. It is a partner of CLCA and is liable as a principal for the partnership's debts incurred while it is a partner.

27 At present, CLCA's outstanding obligations for which the applicant 451 is liable include: (i) various post-retirement obligations owed to former CLCA partners, the present value of which is approximately $6.25 million (the "Pre-71 Entitlements"); (ii) $16,026,189 payable to OpCo on account of a loan advanced by OpCo on October 17, 2011 to allow CLCA to pay certain defence costs relating to the Castor litigation; (iii) the Widdrington costs award in the amount of $18,783,761.66, inclusive of interest as at December 1, 2014, which became due and payable to the plaintiff's counsel on November 27, 2014; (iv) the special fee in the amount of $2,675,000, inclusive of interest as at December 1, 2014, awarded to the plaintiff's counsel in the Widdrington action; and (v) contingent liabilities relating to or arising from the Castor litigation, the claims of which with interest that have not yet been decided being approximately $1.5 billion.

28 The only asset of the applicant 451 on its balance sheet is its investment of $100 in CLCA. The applicant is a partner in CLCA which in turn is a partner in OpCo. At the time of the granting of the Initial Order, Ernst & Young Inc., the proposed Monitor, stated in its report that the applicant was insolvent based on its review of the financial affairs of the applicant, CLCA and OpCo.

29 Mr. Peden in argument on behalf of Chrysler analyzed the balance sheets of CLCA and OpCo and concluded that there were some $39 million in realizable assets against liabilities of some $21 million, leaving some $18 million in what he said were liquid assets. Therefore he concluded that these assets of $18 million are available to take care of the liabilities of 451.

30 I cannot accept this analysis. It was unsupported by any expert accounting evidence and involved assumptions regarding netting out amounts, one of some $6.5 million owing to pre-1971 retired partners, and one of some $16 million owing by CLCA to OpCo for defence costs funded by OpCo. He did not consider the contingent claims against the $6.5 million under the indemnity provided to PWC, nor did he consider that the $16 million was unlikely to be collectible by OpCo as explained in the notes to the financial statements of 451.

31 This analysis also ignored the contingent $1.5 billion liabilities of CLCA in the remaining Castor litigation and the effect that would have on the defence costs and for which the applicant 451 will have liability and a contingent liability for cost awards rendered in that litigation against CLCA. These contingent liabilities must be taken into account in an insolvency analysis under the subsection (c) definition of an insolvent person in the BIA which refers to obligations due and accruing due. In *Stelco Inc., Re*, *supra*, Farley J. stated that all liabilities, contingent or unliquidated, have to be taken into account. See also *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. [Commercial List]) (per Farley J.).

32 It is obvious in this case that if the litigation continues, the defence costs for which the applicant 451 will have liability alone will continue and will more than eat up whatever cash OpCo may have. As well, the contingent liabilities of CLCA in the remaining $1.5 billion in claims cannot be ignored just because CLCA has entered defences in all of them. The negligence of CLCA has been established for all of these remaining cases in the Widdrington test case. The term sheet provides that the claims of the German and Canadian banks, approximately $720 million in total, and the claim of the Trustee of CLCA of approximately $108 million, will be accepted for voting and distribution purposes in a plan of arrangement. While there is no evidence before me at this stage what has led to the decision of CLCA and its former partners to now accept these claims, I can only conclude that in the circumstances it was considered by these defendants that there was exceptional risk in the actions succeeding. I hesitate to say a great deal about this as the agreement in the term sheet to accept these claims for voting and distribution purposes will no doubt be the subject of further debate in these proceedings at the appropriate time.

33 As stated, the balance sheet of the applicant 451 lists as its sole asset its investment of $100 in CLCA. The notes to the financial statements state that CLCA was indebted to OpCo at the time, being June 30, 2014, for approximately $16 million and that its only asset available to satisfy that liability was its investment in OpCo on which it was highly likely that there would be no recovery. As a result 451 would not have assets to support its liabilities to OpCo.

34 For this reason, as well as the contingent risks of liability of CLCA in the remaining claims of $1.5 billion, it is highly likely that the $100 investment of the applicant 451 in CLCA is worthless and unable to fund the current and future obligations of the applicant caused by the CLCA litigation.

35 I accept the conclusion of Ernst & Young Inc. that the applicant 451 is insolvent. I find that the applicant has established its insolvency at the time of the commencement of this CCAA proceeding.

(ii) Should an Initial Order be made and if so should it extend to CLCA?

36 The applicant moved for a stay in its favour and moved as well to extend the stay to CLCA and all of the outstanding Castor litigation. I granted that relief in the Initial Order. Chrysler contends that there should be no stay of any kind. It has not expressly argued that if a stay is granted against the applicant it should not be extended to CLCA, but the tenor of its arguments would encompass that.

37 I am satisfied that if the stay against the applicant contained in the Initial Order is maintained, it should extend to CLCA and the outstanding Castor litigation. A CCAA court may exercise its jurisdiction to extend protection by way of the stay of proceedings to a partnership related to an applicant where it is just and reasonable or just and convenient to do so. The courts have held that this relief is appropriate where the operations of a debtor company are so intertwined with those of a partner or limited partnership in question that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor company. See *Priszm Income Fund, Re* (2011), 75 C.B.R. (5th) 213 (Ont. S.C.J.) per Morawetz J. The stay is not granted under section 11 of the CCAA but rather under the court's inherent jurisdiction. It has its genesis in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) and has been followed in several cases, including *Canwest Publishing Inc./Publications Canwest Inc., Re* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) per

Pepall J. (as she then was) and *Calpine Canada Energy Ltd., Re* (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.) per Romaine J.

38 The applicant 451's sole asset is its partnership interest in the CLCA partnership and its liabilities are derived solely from that interest. The affairs of the applicant and CLCA are clearly intertwined. Not extending the stay to CLCA and the Castor litigation would significantly impair the effectiveness of the stay in respect of 451. It would in fact denude it of any force at all as the litigation costs would mount and it would in all likelihood destroy any ability to achieve a global settlement of the litigation. CLCA is a necessary party to achieve a resolution of the outstanding litigation, and significant contributions from its interest in OpCo and from its former partners are anticipated under the term sheet in exchange for releases to be provided to them.

39 Chrysler relies on the principle that if the technical requirements for a CCAA application are met, there is discretion in a court to deny the application, and contends that for several reasons the equities in this case require the application to be met. It says that there is no business being carried on by the applicant or by CLCA and that there is no need for a CCAA proceeding to effect a sale of any assets as a going concern. It says there will be no restructuring of a business.

40 Cases under the CCAA have progressed since the earlier cases such as *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) which expressed the purpose of the CCAA to be to permit insolvent companies to emerge and continue in business. The CCAA is not restricted to companies that are to be kept in business. See *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) at para. 33 (per Brown J. as he then was). There are numerous cases in which CCAA proceedings were permitted without any business being conducted.

41 To cite a few, in *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. [Commercial List]) the applicants sought relief under the CCAA principally as a means of achieving a global resolution of a large number of product liability and other lawsuits. The applicants had sold all of its operating assets prior to the CCAA application and had no remaining operating business. In *Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re*, 2013 QCCS 3777 (Que. Bktcy.) arising out of the Lac-Mégant train disaster, it was acknowledged that the debtor would be sold or dismantled in the course of the CCAA proceedings. The CCAA proceedings were brought to deal with litigation claims against it and others. In *Crystallex International Corp., Re*, 2011 ONSC 7701 (Ont. S.C.J. [Commercial List]) the CCAA is currently being utilized by a company with no operating business, the only asset of which is an arbitration claim.

42 Chrysler contends, as stated in its factum, that the pith and substance of this case is not about the rescue of a business; it is to shield the former partners of CLCA from their liabilities in a manner that should not be approved by this court. Chrysler refers to several statements by judges beginning in 2006 in the Castor litigation who have been critical of the way in which the Widdrington test case has been defended, using such phrases as "a procedural war of attrition" and "scorched earth" strategies. Chrysler contends that now that the insurance proceeds have run out and the former partners face the prospect of bearing the cost of litigation which that plaintiffs have had to bear throughout the 22-year war of attrition, the former partners have convinced the German and Canadian banks to agree to the compromise set out in the term sheet. To grant them relief now would, it is contended, reward their improper conduct.

43 Chrysler refers to a recent decision in Alberta, *Alexis Paragon Limited Partnership, Re*, 2014 ABQB 65 (Alta. Q.B.) in which a CCAA application was denied and a receiver appointed at the request of its first secured creditor. In that case Justice Thomas referred to a statement of Justice Romaine in *Alberta Treasury Branches v. Tallgrass Energy Corp*, 2013 ABQB 432 (Alta. Q.B.) in which she stated that an applicant had to establish that it has acted and is acting in good faith and with due diligence. Justice Thomas referred to past failures of the applicant to act with due diligence in resolving its financial issues and on that ground denied the CCAA application. Chrysler likens that to the manner in which the Widdrington test case was defended by CLCA.

44 I am not entirely sure what Justice Romaine precisely had in mind in referring to the need for an applicant to establish that "it has acted and is acting with good faith and with due diligence" but I would think it surprising that a CCAA application should be defeated on the failure of an applicant to have dealt with its affairs in a diligent manner in the past. That could probably said to have been the situation in a majority of cases, or at least arguably so, and in my view the purpose of CCAA protection is to attempt to make the best of a bad situation without great debate whether the business in the past was properly carried out. Did the MM&A railway in Lac-Mégantic act with due diligence in its safety practices? It may well not have, but that could not have been a factor considered in the decision to give it CCAA protection.

45 I do understand that need for an applicant to act in the CCAA process with due diligence and good faith, but I would be reluctant to lay down any fixed rule as to how an applicant's actions prior to the CCAA application should be considered. I agree with the statement of Farley J. in *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]) that it is the good faith of an applicant in the CCAA proceedings that is the issue:

> Allegations ... of bad faith as to past activities have been made against the CCAA applicants and the Gardiner interests. However, the question of good faith is with respect to how these parties are conducting themselves in these CCAA proceedings.

46 There is no issue as to the good faith of the applicant in this CCAA proceeding. I would not set aside the Initial Order and dismiss the application on the basis of the defence tactics in the Widdrington test case.

47 The Castor litigation has embroiled CLCA and the individual partners for over 20 years. If the litigation is not settled, it will take many more years. Chrysler concedes that it likely will take at least until 2020 for the trial process on its claim to play out and then several more years for the appellate process to take its course. Other claims will follow the Chrysler claim. The costs have been enormous and will continue to escalate.

48 OpCo has dedicated all of its resources to the defence of the Castor litigation and it will continue to do so. OpCo has ceased distributions to its partners, including CLCA, in order to preserve funds for the purpose of funding the defence of the litigation. If the Castor litigation continues, further legal and other costs will be incurred by OpCo and judgments may be rendered against CLCA and its partners. If so, those costs and judgments will have to be paid by OpCo through advances from OpCo to CLCA. Since CLCA has no sources of revenue or cash inflow other than OpCo, the liabilities of CLCA, and therefore the applicant, will only increase.

49 If the litigation is not settled, CLCA's only option will be to continue in its defence of the various actions until either it has completely depleted its current assets (thereby exposing the defendant partners to future capital calls), or a satisfactory settlement or judicial determination has been reached. If no such settlement or final determination is achieved, the cost of the defence of the actions could fall to the defendant partners in their personal capacities. If a resolution cannot be reached, the amount that will be available for settlement will continue to decrease due to ongoing legal costs and other factors while at the same time, the damages claimed by the plaintiffs will continue to increase due to accruing interest. With the commencement of further trials, the rate of decrease of assets by funding legal costs will accelerate.

50 After a final determination had been reached on the merits in the Widdrington action, CLCA's board of directors created a committee comprised of certain of its members to consider the next steps in dealing with CLCA's affairs given that, with the passage of time, the defendant partners may ultimately be liable in respect of negligence arising from the Castor audits without a settlement.

51 Over the course of several months, the committee and the defendant partners evaluated many possible settlement structures and alternatives and after conferring with counsel for various plaintiffs in the Castor litigation, the parties agreed to participate in a further mediation. Multiple attempts had earlier been made to mediate a

settlement. Most recently, over the course of four weeks in September and October 2014, the parties attended mediation sessions, both plenary and individually. Chrysler participated in the mediation.

52 Although a settlement could not be reached, the applicant and others supporting the applicant believe that significant progress was achieved in the mediation. In light of this momentum, the applicant and CLCA continued settlement discussions with certain plaintiffs willing to engage in negotiations. These discussions culminated with the execution of a term sheet outlining a plan of arrangement under the CCAA that could achieve a global resolution to the outstanding litigation.

53 A CCAA proceeding will permit the applicant and its stakeholders a means of attempting to arrive at a global settlement of all claims. If there is no settlement, the future looks bleak for everyone but the lawyers fighting the litigation.

54 The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It is also intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Without a stay, such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan would succeed. See *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) per Farley J.

55 In this case it would be unfair to one plaintiff who is far down the line on a trial list to have to watch another plaintiff with an earlier trial date win and collect on a judgment from persons who may not have the funds to pay a later judgment. That would be chaos that should be avoided. A recent example of a stay being made to avoid such a possibility is the case of *Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re* which stayed litigation arising out of the Lac-Mégant train disaster. See also *Muscletech Research & Development Inc., Re*.

56 In this case, the term sheet that the applicant anticipates will form the basis of a proposed Plan includes, among other elements:

> (a) the monetization of all assets of CLCA and its partnership OpCo to maximize the net proceeds available to fund the plan, including all applicable insurance entitlements that are payable or may become payable, which proceeds will be available to satisfy the determined or agreed claims of valid creditors;
>
> (b) contributions from a significant majority of the defendant partners;
>
> (c) contributions from non-defendant partners of CLCA and CLCG exposed under the PwC indemnity;
>
> (d) contributions from CLCA's insurers and other defendants in the outstanding litigation;
>
> (e) the appointment of Ernst & Young Inc. as Monitor to oversee the implementation of the plan, including to assist with the realization and monetization of assets and to oversee (i) the capital calls to be made upon the defendant partners, (ii) a claims process, and (iii) the distribution of the aggregate proceeds in accordance with the plan; and
>
> (f) provision to all parties who contribute amounts under the plan, of a court-approved full and final release from and bar order against any and all claims, both present and future, of any kind or nature arising from or in any way related to Castor.

57 This term sheet is supported by the overwhelming number of creditors, including 13 German banks, 8 Canadian banks, over 100 creditors of Castor represented by the Trustee in bankruptcy of Castor and the Widdrington estate. It is also supported by the insurers. The plaintiffs other than Chrysler, representing approximately 71.2% of the face value of contingent claims asserted in the outstanding litigation against CLCA, either support, do not oppose or take no position in respect of the granting of the Initial Order. Chrysler represents approximately 28.8% of the face value of the claims.

58 Counsel for the German and Canadian banks points out that it has been counsel to them in the Castor claims and was counsel for the Widdrington estate in its successful action. The German and Canadian banks in their factum agree that during the course of the outstanding litigation over the past 20 years, they have been subjected to a "scorched earth", "war of attrition" litigation strategy adopted by CLCA and its former legal counsel. Where they seriously part company with Chrysler is that they vigorously disagree that such historical misconduct should prevent the CLCA group from using the CCAA to try to achieve the proposed global settlement with their creditors in order to finally put an end to this war of attrition and to enable all valid creditors to finally receive some measure of recovery for their losses.

59 It is argued by the banks and others that if Chrysler is successful in defeating the CCAA proceedings, the consequence would be to punish all remaining Castor plaintiffs and to deprive them of the opportunity of arriving at a global settlement, thus exacerbating the prejudice which they have already suffered. Chrysler, as only one creditor of the CLCA group, is seeking to impose its will on all other creditors by attempting to prevent them from voting on the proposed Plan; essentially, the tyranny of the minority over the majority. I think the banks have a point. The court's primary concern under the CCAA must be for the debtor and all of its creditors. While it is understandable that an individual creditor may seek to obtain as much leverage as possible to enhance its negotiating position, the objectives and purposes of a CCAA should not be frustrated by the self-interest of a single creditor. See *Calpine Canada Energy Ltd., Re*, 2007 ABCA 266 (Alta. C.A. [In Chambers]), at para 38, per O'Brien J.A.

60 The German and Canadian banks deny that their resolve has finally been broken by the CLCA in its defence of the Castor litigation. On the contrary, they state a belief that due to litigation successes achieved to date, the time is now ripe to seek to resolve the outstanding litigation and to prevent any further dissipation of the assets of those stakeholders funding the global settlement. Their counsel expressed their believe that if the litigation continues as suggested by Chrysler, the former partners will likely end up bankrupt and unable to put in to the plan what is now proposed by them. They see a change in the attitude of CLCA by the appointment of a new committee of partners to oversee this application and the appointment of new CCAA counsel in whom they perceive an attitude to come to a resolution. They see CLCA as now acting in good faith.

61 Whether the banks are correct in their judgments and whether they will succeed in this attempt remains to be seen, but they should not be prevented from trying. I see no prejudice to Chrysler. Chrysler's contingent claim is not scheduled to be tried until 2017 at the earliest, and it will likely still proceed to trial as scheduled if a global resolution cannot be achieved in the course of this CCAA proceeding. Further, since Chrysler has not obtained a judgment or settlement in respect of its contingent claim, the Initial Order has not stayed any immediate right available to Chrysler. The parties next scheduled to proceed to trial in the outstanding litigation who have appeared, the insurers and then the three German banks, which are arguably the most affected by the issuance of a stay of proceedings, have indicated their support for this CCAA proceeding and Initial Order, including the stay of proceedings.

62 What exactly Chrysler seeks in preventing this CCAA application from proceeding is not clear. It is hard to think that it wants another 10 years of hard fought litigation before its claim is finally dealt with. During argument, Mr. Vauclair did say that Chrysler participated in the unsuccessful mediation and that it has been willing to negotiate. That remains to be seen, but this CCAA process will give it that opportunity.

63 Chrysler raises issues with the term sheet, including the provision that the claims of the German and Canadian banks and the Trustee of Castor will be accepted but that the Chrysler claim will be determined in a claims process. Chrysler raises issues regarding the proposed claims process and whether the individual CLCA former partners should be required to disclose all of their assets. These issues are premature and can be dealt with later in the proceedings as required.

64 Mr. Kent, who represents a number of former CLCA partners, said in argument that the situation cries out for settlement and that there are many victims other than the creditors, namely the vast majority of the former CLCA partners throughout Canada who had nothing to do with the actions of the few who were engaged in the Castor audit. The trial judge noted that the main CLCA partner who was complicit in the Castor Ponzi scheme hid from his partners his relationships with the perpetrators of the scheme.

65 Mr. Kent's statement that the situation cries out for settlement has support in the language of the trial judge in the Widdrington test case. Madame Justice St. Pierre said in her opening paragraph on her lengthy decision:

> **1** Time has come to put an end to the longest running judicial saga in the legal history of Quebec and Canada.

66 At the conclusion of her decision, she stated:

> **3637** Defendants say litigation is far from being finished since debates will continue on individual issues (reliance and damages), on a case by case basis, in the other files. They might be right. They might be wrong. They have to remember that litigating all the other files is only one of multiple options. Now that the litigants have on hand answers to all common issues, resolving the remaining conflicts otherwise is clearly an option (for example, resorting to alternative modes of conflict resolution).

67 In my view the CCAA is well able to provide the parties with a structure to attempt to resolve the outstanding Castor litigation. The Chrysler motion to set aside the Initial Order and to dismiss the CCAA application is dismissed.

(iii) Should the stay be extended to the insurers?

68 The applicant 451 moves as well to extend the stay to the insurers of CLCA. This is supported by the insurers. The trial against the insurers was scheduled to commence on January 12, 2015 but after the Initial Order was made, it was adjourned pending the outcome of the motion by Chrysler to set aside the Initial Order. Chrysler has made no argument that if the Initial Order is permitted to stand that it should be amended to remove the stay of the action against the insurers.

69 Under the term sheet intended to form the basis of a plan to be proposed by the applicant, the insurers have agreed to contribute a substantial amount towards a global settlement. It could not be expected that they would be prepared to do so if the litigation were permitted to proceed against them with all of the costs and risks associated with that litigation. Moreover, it could well have an effect on the other stakeholders who are prepared to contribute towards a settlement.

70 A stay is in the inherent jurisdiction of a court if it is in the interests of justice to do so. While many third party stays have been in favour of partners to applicant corporations, the principle is not limited to that situation. It could not be as the interests of justice will vary depending on the particulars of any case.

71 In *Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re*, Castonguay, J.C.S. stayed litigation against the insurers of the railway. In doing so, he referred to the exceptional circumstances and the multiplicity of proceedings already instituted and concluded it was in the interests of sound administration of justice to stay the proceedings, stating:

> En raison des circonstances exceptionnelles de la présente affaire et devant la multiplicité des recours déjà intentés et de ceux qui le seront sous peu, il est dans l'intérêt d'une saine administration de la justice d'accorder cette demande de MMA et d'étendre la suspension des recours à XL.

72 In my view, it is in the interests of justice that the stay of proceedings extend to the action against the insurers.

(iv) Should a creditors' committee be ordered and its fees paid by CLCA?

73 The Initial Order provides for a creditors' committee comprised of one representative of the German bank group, one representative of the Canadian bank group, and the Trustee in bankruptcy of Castor. It also provides that CLCA shall be entitled to pay the reasonable fees and disbursements of legal counsel to the creditors' committee. Chrysler opposes these provisions.

74 The essential argument of Chrysler is that a creditors' committee is not necessary as the same law firm represents all of the banks and the Trustee of Castor. Counsel for the banks and the Trustee state that the German bank group consists of 13 distinct financial institutions and the Canadian bank group consists of 8 distinct financial institutions and that there is no evidence in the record to the effect that their interests do not diverge on material issues. As for the Castor Trustee, it represents the interests of more than 100 creditors of Castor, including Chrysler, the German and Canadian bank groups, and various other creditors. They says that a creditors' committee brings order and allows for effective communication with all creditors.

75 CCAA courts routinely recognize and accept *ad hoc* creditors' committees. It is common for critical groups of critical creditors to form an *ad hoc* creditors' committee and confer with the debtor prior to a CCAA filing as part of out-of-court restructuring efforts and to continue to function as an *ad hoc* committee during the CCAA proceedings. See Robert J. Chadwick & Derek R. Bulas, *"Ad Hoc Creditors' Committees in CCAA Proceedings: The Result of a Changing and Expanding Restructuring World"*, in Janis P. Sarra, ed, Annual Review of Insolvency Law 2011 (Toronto:Thomson Carswell) 119 at pp 120-121.

76 Chrysler refers to the fact that it is not to be a member of the creditors' committee. It does not ask to be one. Mr. Meland, counsel for the two bank groups and for the Trustee of Castor said during argument that they have no objection if Chrysler wants to join the committee. If Chrysler wished to join the committee, however, it would need to be considered as to whether antagonism, if any, with other members would rob the committee of any benefit.

77 Chrysler also takes exception to what it says is a faulty claims process proposed in the term sheet involving the creditors' committee. Whether Chrysler is right or not in its concern, that would not be a reason to deny the existence of the committee but rather would be a matter for discussion when a proposed claims process came before the court for approval.

78 The creditors' committee in this case is the result of an intensely negotiated term sheet that forms the foundation of a plan. The creditors' committee was involved in negotiating the term sheet. Altering the terms of the term sheet by removing the creditors' committee could frustrate the applicant's ability to develop a viable plan and could jeopardize the existing support from the majority of claimants. I would not accede to Chrysler's request to remove the Creditors' committee.

79 So far as the costs of the committee are concerned, I see this as mainly a final cri de couer from Chrysler. The costs in relation to the amounts at stake will no doubt be relatively minimal. Chrysler says it is galling to see it having to pay 28% (the size of its claim relative to the other claims) to a committee that it thinks will work against its interests. Whether the committee will work against its interests is unknown. I would note that it is not yet Chrysler's money, but CLCA's. If there is no successful outcome to the CCAA process, the costs of the committee will have been borne by CLCA. If the plan is successful on its present terms, there will be $220 million available

to pay claims, none of which will have come from Chrysler. I would not change the Initial Order an deny the right of CLCA to pay the costs of the creditors' committee.

80 Finally, Chrysler asks that if the costs are permitted to be paid by CLCA, a special detailed budget should be made and provided to Chrysler along with the amounts actually paid. I see no need for any particular order. The budget for these fees is and will be continued to be contained in the cash flow forecast provided by the Monitor and comparisons of actual to budget will be provided by the Monitor in the future in the normal course.

Conclusion

81 The motion of Chrysler is dismissed. The terms of the Initial Order are continued.

Order accordingly.

End of Document

Tab 10

Most Negative Treatment: Distinguished
Most Recent Distinguished: Economopoulos, Re | 2000 CarswellOnt 3778, 20 C.B.R. (4th) 71 | (Ont. Bktcy., Aug 4, 2000)

1994 CarswellOnt 268
Ontario Court of Justice (General Division), In Bankruptcy

Mayer, Re

1994 CarswellOnt 268, 25 C.B.R. (3d) 113

Re proposal of JOSEPH MOISE MAYER

Registrar Ferron

Judgment: March 3, 1994
Docket: Doc. 31-279696

Counsel: *Kenneth H. Page*, for insolvent.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.b Conditions
VI.4.b.iii Interests of creditors
Headnote
Bankruptcy --- Proposal — Approval by Court — General
Proposals — Approval by court — Proposal being wholly inadequate because of lack of vital financial information — In circumstances bankruptcy being more advantageous to creditors than proposal — Proposal rejected.
An insolvent person applied for approval of his proposal.
Held:
The proposal was rejected.
The proposal was inadequate. The insolvent person did not make full disclosure in his application. The proposal required the acceptance by creditors in full payment of their claims of the insolvent person's equity in his "family home" or "principal residence". Neither the proposal, the trustee's report to creditors, nor the report to the court disclosed that the property: (1) was held by the insolvent person's spouse, (2) was encumbered by two mortgages, a charge in favour of Revenue Canada and a charge for a line of credit, and (3) was subject to $24,000 in municipal tax arrears.
No appraisal of the property was made available to the creditors. The appraisal requested by the court was a two-line letter suggesting that the property was worth about $750,000; no creditor had seen that appraisal. Further, the property had been on the market for some time without success. Therefore, the property might never sell and might not sell for $750,000. The proposal did not give details as to the value of the insolvent person's assets. Therefore, the creditors could not evaluate the value of the proposal.
A bankruptcy would be significantly more advantageous to the creditors than the proposal.
Table of Authorities
Cases considered:
Allen Theatres Ltd., Re (1992) 3 C.B.R. 147, 23 O.W.N. 74 (S.C.) — *referred to*

Rideau Carleton Raceway Holdings Ltd. (1971), 15 C.B.R. (N.S.) 72 (Ont. S.C.) — *referred to*

Application for approval of proposal.

Registrar *Ferron*:

1 The application for the approval of the proposal of Joseph Moise Mayer came before the Court on February, 1994 and has been adjourned on two occasions for further information.

2 In order to affirm a proposal, the Court must be satisfied that the proposal is:

3 1. reasonable;

4 2. calculated to benefit the general body of creditors; and

5 3. made in good faith.

6 The first two provisions are statutory, while the third is implied. The Bankruptcy Court is a court of equity. An insolvent person asking for the Court's approval of a plan must do so in good faith requires full disclosure. There has not been full disclosure by the insolvent person in this application.

7 The central provision of the proposal requires the acceptance by creditors in full payment of claims of the insolvent person's equity in "the premises in which the debtor resides".

8 Nowhere, not in the proposal, not in the Trustee's report to creditors (where the property is called "family home" and "principal residence"), and not in the report to the Court is it disclosed that:

> 1. the premises which is to fund the proposal is held with the insolvent person's spouse; (the statement of affairs does make reference to a half interest in three properties including the property referred to in the proposal; that is ambiguous and might not be appreciated by the creditors); or
>
> 2. the property is encumbered by two mortgages, a charge in favour of Revenue Canada, and a charge for a line of credit; or
>
> 3. that municipal taxes of $24,000 for arrears are owing.

9 Moreover, there was no appraisal for the property available to creditors or, initially, to the Court, so that the Creditors can have no idea of what equity might be available, assuming there is an equity available to creditors.

10 When this matter came on before the Court initially, I directed counsel's attention to the omission of the appraisal, and I now have before me what is called an "appraisal". That appraisal consists of a two-line letter signed by sales representatives of a real estate company. The letter is addressed "To whom it may concern" and suggests that the property has a value of "about $750,000 in today's marketplace". The property, I am advised, has been on the market for some considerable time without result and one can only speculate that the property is overpriced. In any event, I repeat, no creditor has seen that appraisal.

11 Even if the property were to sell for $750,000, the funds available for purposes of the proposal would be only $73,000 and when one deducts the selling commission, the additional interest accruing on the encumbrances, legal costs both of the proposal and of the sale of the property and the Trustee's fees, the amount available to creditors would be minimal.

12 Moreover, the property has been on the market for some considerable time without results. The property may never sell for its so called appraised value. The proposal provides for no cut off date so that creditors may

never be paid. In addition, if the property is sold for less than $750,000 the dividend to creditors would be reduced even more.

13 The statutory report of the Trustee to the Court on the application for the approval of the proposal is deficient. Statutory Form Number 42, "Report of Trustee on Proposal", paragraph 9, provides by way of direction to the Trustee: "Set out assets in detail, giving the value as carried on the books of the Debtor and the Trustee's estimate in each case of the realizable value thereof."

14 Neither the Creditors nor the Court has been given the information required by the statute with which to gauge the value of the insolvent person's plan. That information which is available reveals the proposal not calculated to benefit the general body of creditors.

15 Accordingly, the statement in the Trustee's Report to Creditors (Section 51(1)), viz under the heading "Recommendations and Summary", viz, "Based on a review of the condensed statement of assets and liabilities, it is estimated that there would be less of a distribution to Creditors in a bankruptcy scenario. Accordingly, the proposal produces a higher realization for Creditors", is incorrect and misleading. Since there is no appraisal there can be no estimate, and the statement in the report is of no value. It is skewed unfairly in favour of the insolvent person and cannot be supported.

16 Nor is the Trustee entitled to make the statement under the heading, "Financial Position and Evaluation of Assets" simply because he cannot know what the assets will realize on bankruptcy for the same reason that he cannot know what will be available to Creditors in the proposal.

17 Moreover, the Creditors have not been advised that they would be able to get at least as much and probably more in a bankruptcy of the Debtor as opposed to the proposal.

18 In bankruptcy, the exact same asset, that is the principal residence, would be available to them, and the encumbrance to Revenue Canada for arrears of taxes would presumably abate, so that on that basis alone, the bankruptcy is more advantageous to Creditors than a proposal.

19 In addition, on bankruptcy creditors would obtain the following assets which are not available on the proposal:

1. After acquired assets, that is contributions from the Debtor's income; and

2. The mortgage receivable and automobile referred to in the statement of affairs; and

3. The Debtor's accounts receivable, that is, the OHIP payments owing to the doctor at the date of bankruptcy; and

4. Assets not encumbered or the equity therein.

20 The admitted combined net income of the insolvent person, a doctor, and his spouse, is $7,690 per month, from which a payment order would probably be obtainable in a bankruptcy. In particular, the insolvent person's statement of earnings carries an item of disbursements entitled "Mortgage and Loans" — $6,547 per month. In bankruptcy, the "Loan" portion of that payment would probably be available to Creditors. The Trustee's report to the Court states, "The Debtor's main assets are mostly encumbered" which indicates that there are other than "main assets" and these are not encumbered. Such assets would be available to creditors. The above information was not given or made available to Creditors.

21 It is clear that a plan to be approved by the Court must be more advantageous to Creditors than would be the case in a bankruptcy. See *Re Allen Theatres Ltd.* (1922), 3 C.B.R. 147 (Ont. S.C.) and *Re Rideau Carleton Raceway Holdings Ltd.* (1971), 15 C.B.R. (N.S.) 72 (Ont. S.C.) at 75. The proposal submitted does not meet that test.

22 Finally, I note that of the thirteen Creditors with declared liabilities of $277,000, only one attended the Creditors' meeting. The proposal was approved by that Creditor and by one proxy which the Trustee voted in favour of the proposal. This is hardly an overwhelming or representative showing of creditors. How much of this rather dismal showing can be attributed to the paucity of information made available to Creditors is conjecture, but the Court must, notwithstanding, protect Creditors from themselves. See Honsberger, "Debt Restructuring", page 8-64.

23 The proposal cannot be approved and is accordingly rejected.

Approval denied.

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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 YUAN HUA (MIKE) WANG

Court File No. / Estate No.: 31-2610052

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF FORME DEVELOPMENT GROUP INC., et al

Court File No. CV-18-608313-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceedings commenced at Toronto, Ontario

BOOK OF AUTHORITIES OF FERINA CONSTRUCTION LIMITED
(Motions returnable March 31, 2020)

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